Original

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

No. 28193

IN RE INTERROGATORIES OF THE GOVERNOR REGARDING THE SWEEPSTAKES RACES ACT	)))	INTERROGATORIES

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND THE COLORADO PARKS AND RECREATION SOCIETY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES (continued) Page

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTEREST OF THE COLORADO MUNICIPAL LEAGUE AND THE COLORADO PARKS AND RECREATION SOCIETY

The Colorado Municipal League is a non-profit association of 225 cities and towns located throughout the state of Colorado. The Colorado Parks and Recreation Society is a non-profit Colorado corporation representing approximately 800 professional parks and recreation personnel, special recreation districts, counties, and municipalities located throughout Colorado.

This Court's response to the interrogatories submitted by the Governor on the constitutionality of implementing the sweepstakes races act is of particular interest and importance to the Colorado Municipal League, the Colorado Parks and Recreation Society, and their membership, for the following reasons:

House Bill 1080 was enacted by the General Assembly in 1975, and was referred to the electors of Colorado pursuant to the referendum provisions of Article V, Section 1 of the Colorado Constitution, and article 40, title 1, Colorado Revised Statutes 1973, for their approval or rejection at the general statewide election held in November, 1976. In that election, the majority of the electors voting answered "yes" to the following question submitted pursuant to H.B. 1080: "Shall the conduct of sweepstakes races be authorized?".

Of particular interest to the League, the Society, and their membership, is the provision in H.B. 1080 [now C.R.S. 1973, 12-60.1-106(3), as amended] that the net proceeds of sweepstakes races go to the state conservation trust fund. The state conservation trust fund currently consists of money appropriated annually by the General Assembly and distributed on a population basis to municipalities and counties eligible to receive the money. C.R.S. 1973, 29-21-101, as amended. (The Division

of Local Government in the state Department of Local Affairs reports that in 1977, state conservation trust fund money was distributed to 196 municipalities and 59 counties in Colorado.)

Conservation trust fund monies may be used by municipalities and counties for capital improvements for recreation purposes and to acquire, develop, and maintain "new conservation sites", broadly defined in C.R.S. 1973, 29-21-101, as amended, to include:

> "...interests in land and water, acquired after establishment of a conservation trust fund...for park or recreation purposes, for all types of open space, including but not limited to flood plains, greenbelts, agricultural lands or scenic areas, or for any scientific, historic, scenic, recreational, aesthetic, or similar purposes."

Since 1974 when the state conservation trust fund program was created, the Colorado General Assembly has appropriated to the fund $725,000 annually for distribution to eligible counties and municipalities. While the state appropriation aids in the attempt to meet increasing demands of the state's citizens for public parks, recreational facilities and open space, shares from the fund received by many municipalities are small--particularly in relation to ever-increasing land acquisition and capital construction costs. Estimates as to the amount which might become available for conservation trust fund purposes as a result of sweepstakes implementation vary considerably depending upon the type of sweepstakes implemented, but some estimates of the net proceeds substantially exceed the current annual $725,000 state appropriation.

The Colorado Municipal League and the Colorado Parks and Recreation Society consistently have supported and encouraged implementation of the sweepstakes. In 1976, both the League and the Society supported voter authorization of sweepstakes races at the November general election in the hope that the sweepstakes proceeds would result in a more permanent and substantial source of funding for park, recreation, and open space

projects. Since 1976 the League and the Society have encouraged implementation of the voter-authorized sweepstakes by the Executive Branch, and have supported efforts by the Colorado General Assembly to secure implementation of the sweepstakes through adoption in 1977 of H.B. 1596 (which basically transferred the responsibility for implementation of the sweepstakes from the Division of Racing to the Department of Regulatory Agencies) and through adoption in 1978 of H.B. 1196 (which appropriated necessary monies to the Department of Regulatory Agencies to pay start-up costs for the sweepstakes). A response by this Supreme Court upholding the constitutionality of the sweepstakes races act would enhance the likelihood that the will of the majority of the state's electors voting in the 1976 election will be implemented, and help ensure that a potentially major, more permanent source of funding for Colorado park, recreation, and open space projects will not be lost.

It is the position of the Colorado Municipal League and the Colorado Parks and Recreation Society that Article XVIII, Section 2 of the Colorado Constitution does not prohibit the people of Colorado, through the exercise of their Article V, Section 1 referendum power, from authorizing lotteries nor the Department of Regulatory Agencies from implementing lotteries so authorized by the people; but, if the Court decides that the Constitution does prohibit the Department from implementing a lottery authorized by the people through their referendum power, the League and Society believe that two of the games proposed to be implemented by the Department are not lotteries within the meaning of the Constitution.

STATEMENT OF THE ISSUES AND OF THE CASE

The statement of the issues and of the case are as they appear in the Governor's interrogatories, filed with the Colorado Supreme Court on June 2, 1978.

SUMMARY OF THE ARGUMENT

1. ARTICLE XVIII, SECTION 2 OF THE COLORADO CONSTITUTION, WHICH PROVIDES IN PART THAT THE "GENERAL ASSEMBLY SHALL HAVE NO POWER TO AUTHORIZE LOTTERIES FOR ANY PURPOSE", DOES NOT PROHIBIT THE DEPARTMENT OF REGULATORY AGENCIES FROM CONDUCTING A LOTTERY PURSUANT TO THE SWEEPSTAKES RACES ACT WHEN H.B. 1080 WAS APPROVED BY THE PEOPLE AS A REFERRED LAW AND H.B. 1080 LATER WAS REPEALED AND REENACTED WITH SOME AMENDMENTS IN A NEW TITLE BY H.B. 1596.

   A. Introduction

   B. Article XVIII, Section 2 of the Colorado Constitution Does Not Prohibit the People of Colorado From Authorizing a Lottery Through the Exercise of Their Referendum Power Reserved in Article V, Section 1.

   C. Assuming That Any of the Sweepstakes Races Proposed to be Implemented by the Department of Regulatory Agencies Are Lotteries, Those Lotteries Were Authorized by the People Through the Exercise of Their Referendum Power, Notwithstanding H.B. 1596's Repeal and Reenactment With Some Amendments of H.B. 1080.

2. IF ARTICLE XVIII, SECTION 2 OF THE COLORADO CONSTITUTION PROHIBITS THE PEOPLE OF THE STATE OF COLORADO FROM AUTHORIZING LOTTERIES THROUGH THE EXERCISE OF THEIR REFERENDUM POWER, GAMES A AND B AS DESCRIBED IN THE GOVERNOR'S INTERROGATORIES ARE NOT LOTTERIES; BUT, GAME C IS A LOTTERY.

ARGUMENT

1. ARTICLE XVIII, SECTION 2 OF THE COLORADO CONSTITUTION, WHICH PROVIDES IN PART THAT THE "GENERAL ASSEMBLY SHALL HAVE NO POWER TO AUTHORIZE LOTTERIES FOR ANY PURPOSE", DOES NOT PROHIBIT THE DEPARTMENT OF REGULATORY AGENCIES FROM CONDUCTING A LOTTERY PURSUANT TO THE SWEEPSTAKES RACES ACT WHEN H.B. 1080 WAS APPROVED BY THE PEOPLE AS A REFERRED LAW AND H.B. 1080 LATER WAS REPEALED AND REENACTED WITH SOME AMENDMENTS IN A NEW TITLE BY H.B. 1596.

A. Introduction

It is important to note initially that the interrogatories propounded by the Governor regarding the "Sweepstakes Races Act" raise issues of primarily constitutional - not statutory - interpretation. Specifically at issue are the scope of the referendum powers reserved to the people of Colorado by Article V, Section 1 of the Colorado Constitution; the relationship between those reserved powers and the restrictions placed upon the General Assembly by Article XVIII, Section 2 of the Colorado Constitution; the effect of a repeal and reenactment upon a referred law; and the scope of the meaning of the word "lottery" as used in Article XVIII, Section 2. Not raised by the interrogatories are such questions of statutory interpretation as whether Games A, B or C, proposed to be implemented by the Department of Regulatory Agencies, are permitted or authorized by the statute itself. It is assumed, for the purposes of the interrogatories, that the sweepstakes games (A, B and C) described in the second question propounded by the Governor are each sweepstakes races properly authorized by statute.

B. Article XVIII, Section 2 of the Colorado Constitution Does Not Prohibit the People of Colorado From Authorizing a Lottery Through the Exercise of Their Referendum Power Reserved in Article V, Section 1.

Assuming that each of the sweepstakes games described in the

second question of the Governor's interrogatories are authorized by statute and that one or more of the games are "lotteries", it is the position of the League and the Society that nothing in the Colorado Constitution prohibits the people of Colorado from authorizing a lottery. And, nothing in the Colorado Constitution prohibits the Department of Regulatory Agencies (Department) from conducting a lottery authorized by the people.

Article XVIII, Section 2 was enacted in 1876 as part of the original Colorado Constitution, then reading as follows:

> "The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."

In 1958, Article XVIII, Section 2 was amended in part to authorize limited types of organizations to conduct certain games of chance, and to delete the requirement that the General Assembly pass laws to prohibit the sale of lottery or gift enterprise tickets in the state. However, the main prohibition of Article XVIII, Section 2 remained the same: "The general assembly shall have no power to authorize lotteries for any purpose...."

The express language of Article XVIII, Section 2 does not limit the power of the people of Colorado to authorize lotteries. Rather, the express language of the constitutional prohibition applies only to the General Assembly. And, it seems beyond refute that Article XVIII, Section 2 could not have been intended to limit the direct power of the people since the people had no direct initiative or referendum powers until they were reserved in 1910 by an amendment to Article V, Section 1 of the Constitution--34 years after the adoption of Article XVIII, Section 2.

Without an express limitation or clear intent to limit the power of the people to authorize lotteries in Article XVIII, Section 2, the people are not constitutionally prohibited from directly authorizing

lotteries unless such a restriction can be found in Article V, Section 1 of the Constitution.

Article V, Section 1, however, also contains no express limitation on the power of the people to authorize lotteries through the exercise of their referendum powers. Moreover, the constitutional language and its consistent interpretation by numerous court decisions present formidable obstacles to any argument that such a limitation should be implied or inferred by the courts. The express language of Article V, Section 1 broadly provides, in part, that:

> "...the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, items, section or part of any act of the general assembly.
>
> * * *
>
> "The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions, against any act, section or part of any act of the general assembly...and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than 30 days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the right to enact any measure." (Emphasis added.)

Only two express limitations to the exercise of the referendum power exist in Article V, Section 1: 1) laws necessary for the immediate preservation of the public peace, health or safety; and, 2) appropriations to support and maintain state institutions. In the years since the people reserved initiative and referendum powers to themselves, the Colorado Supreme Court consistently has resisted efforts to readily expand those express exceptions. The Court has recognized that the referendum is a fundamental right of the people of Colorado. City of Fort Collins v.

Dooney, 178 Colo. 25, 496 P.2d 316 (1972). And it has stated that limitations on the right should be strictly construed and not extended by either implication or inference:

> "The unquestioned purpose of the referendum is to expeditiously permit the total and free exercise of the legislative power by the people except in rare instances. Such a reservation of power in the people must be liberally construed in favor of the right of the people to exercise it. Conversely, limitations on the power of referendum must be strictly construed and should not be extended by either implication or inference." Brooks v. Zabka, 168 Colo. 265, 268, 450 P.2d 653 (1969). (Emphasis added.)

See also, Burks v. City of Lafayette, 142 Colo. 61, 349 P.2d 692 (1960); Brownlow v. Wunsch, 103 Colo. 120, 83 P.2d 775 (1938); Colorado Project-Common Cause v. Anderson, 178 Colo. 1, 495 P.2d 220 (1972); Billings v. Buchanan, Colo., 555 P.2d 176 (1976); Bernzen v. City of Boulder, 186 Colo. 81, 525 P.2d 416 (1974); and, DiManna v. Election Commission of the City and County of Denver, 187 Colo. 270, 530 P.2d 955 (1975).

Two Colorado cases illustrate, in particular, the rule set forth in Brooks v. Zabka, supra, that powers reserved to the people, such as the initiative and referendum, are to be liberally construed in favor of the people's right to exercise them, and that limitations on the powers should be strictly construed and not extended by implication or inference. In People v. Prevost, 55 Colo. 199, 134 P. 129 (1913), the Colorado Supreme Court ruled that Article V, Section 1 initiative power of the people was not restricted by the specific language of Article XIX, Section 2 of the Constitution which states, in relevant part:

> "...the general assembly shall have no power to propose amendments to more than six articles of this constitution at the same session."

The plaintiff in Prevost had argued that an initiated amendment to Article XX, Section 6 of the Colorado Constitution violated this prohibition since it

constituted the seventh article to be amended. (The General Assembly allegedly proposed amendments to six articles prior to the time the initiated amendment to Article XX, Section 6 was filed.) The Colorado Supreme Court rejected plaintiff's argument saying:

> "...the plain language of section 1 of article 5 is against the contention of plaintiff in error no matter what the true meaning of section 2 of article 19 may be, and [the Court] places the determination of this case solely on that language." People v. Prevost, supra, 134 P. at 132.

The Court reviewed the language of the initiative provisions in Article V, Section 1 and found no limitation therein on the number of articles which could be proposed to be amended by the initiative. The Court went on to say that to read Article XIX, Section 2 as a limit upon the power of the people (as opposed to the power of the General Assembly) would be to amend the Constitution by construction. The method of analysis conducted by the Court in People v. Prevost, supra, is particularly appropriate in the instant case.

In a second case, the Court was even more protective of the reserved initiative and referendum powers of the people. In Armstrong v. Mitten, 95 Colo. 425, 37 P.2d 757 (1934) the Court addressed the question of whether Article V, Section 45 of the Colorado Constitution limited the power of the people to act directly through the initiative. In 1934, Article V, Section 45 provided in part that:

> "The general assembly...shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration according to ratios to be fixed by law."

The Supreme Court ruled that regardless of the language of Article V, Section 45--which seemed to give exclusive power to the General Assembly--the people, through the initiative power, could reapportion:

> "We do not agree with the contention that the people have no power to adopt an initiated reapportionment bill. In section 1 of article 2 of the state Constitution the people declare: 'That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their

> will only, and is instituted solely for the good of the whole.'
>
> "The people are sovereign. The General Assembly was created by them and is merely their agent. For reasons satisfactory to them, the people, in 1910, deemed it unwise to permit their agent, the General Assembly, to continue longer to exercise exclusive legislative power. They therefore amended section 1 of article 5 of the Constitution...by reserving to themselves the power to make laws directly and independently of the General Assembly, and also the power to approve or reject acts passed by the General Assembly. In our opinion, the reservation of power is sufficiently broad to include the power to adopt a reapportionment act." Armstrong v. Mitten, 37 P.2d at 759.

The Court's decision in Armstrong v. Mitten, supra, is consistent with its decision in People v. Prevost, supra, and the rules of construction stated in Brooks v. Zabka, supra. In Prevost (a limitation of power case), the Court refused to limit the people's Article V, Section 1 powers by reading the words "general assembly" to mean "general assembly and the people". Thus, the Court gave full effect to Article V, Section 1. In Armstrong, (a grant of powers case), the Court read "general assembly" to mean "general assembly and the people" since to do so would, in that case, give the fullest effect to Article V, Section 1 and the broadest power to the people.

In this case, the Court again is faced with the question of whether a limitation specifically addressed to the power of the General Assembly should also be placed upon the Article V, Section 1 referendum powers of the people. No apparent reason exists, however, for extending that limitation to the power of the people and no express language extends the limitation. All of the previously stated cases and rules of constitutional construction must lead naturally to the conclusion that the limitation does not and should not extend to the people's referendum powers.

Many other rules of constitutional construction support and lead to the same conclusion:

1. There is a presumption that the language and structure of

a provision in the Constitution are adopted by choice and that discrimination was exercised in the language and structure used. White v. Anderson, 155 Colo. 291, 394 P.2d 333 (1964). As applied to the present case, it would be presumed that Article XVIII, Section 2, which expressly limits only the power of the General Assembly, was intended to limit only that power; and, Article V, Section 1, which does not expressly limit the power of the people to authorize lotteries, was not intended to so limit that power.

2. Where the language used in the Constitution is plain, its meaning clear, and no absurdity is involved, then the Constitution must be declared and enforced as written. People v. Hinderlider, 98 Colo. 505, 57 P.2d 894 (1936). Or stated otherwise: "What the words declare is the meaning, and courts have no right to add to or take from that meaning." People v. Prevost, supra, 134 P. at 132; and see People v. May, 9 Colo. 80, 10 P. 641 (1885). What the words declare in the present case is that the General Assembly may not authorize lotteries, but the people's referendum power has only two express exceptions--neither of which exceptions extend to the authorization of lotteries.

3. Every presumption in favor of the validity of questioned legislation is indulged in by the courts in testing its constitutionality. In re Interrogatories Propounded by the Senate Concerning House Bill 1078, Colo., 536 P.2d 308 (1975); and Allardice v. Adams County, 173 Colo. 133, 476 P.2d 982 (1970). And one who challenges legislation bears an extremely heavy burden to establish its unconstitutionality beyond a reasonable doubt. Lloyd A. Fry Roofing Co. v. State of Colorado Department of Health, 179 Colo. 223, 499 P.2d 1176 (1972).

4. Where an amendment to the Constitution (such as Article V, Section 1) conflicts or is inconsistent with a prior provision of the Constitution (such as Article XVIII, Section 2), the later enacted amend-

ment must be considered as controlling, at least where the language is explicit. See In re Interrogatories by the General Assembly Concerning House Joint Resolution No. 1008, Second Regular Session, Forty-Seventh General Assembly, 171 Colo. 200, 467 P.2d 56 (1970); City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); and Post Printing and Publishing Company v. Shafroth, 53 Colo. 129, 124 P.2d 176 (1912).

The League and the Society urge the Court to apply established principles to this issue, continue its strong judicial policy of protecting to the greatest extent possible the important initiative and referendum powers of the people, and rule that the people's Article V, Section 1 referendum powers are not limited by Article XVIII, Section 2.

C. Assuming That Any of the Sweepstakes Races Proposed to be Implemented by the Department of Regulatory Agencies Are Lotteries, Those Lotteries Were Authorized by the People Through the Exercise of Their Referendum Power, Notwithstanding H.B. 1596's Repeal and Reenactment With Some Amendments of H.B. 1080.

As stated in the Governor's interrogatories, H.B. 1080, providing for the conduct of sweepstakes races, was submitted to a vote of the qualified electors of the state of Colorado at the general election held on November 2, 1976, under the referendum power as provided in Article V, Section 1 of the Colorado Constitution and article 40 of title 1, Colorado Revised Statutes 1973. The question presented by H.B. 1080 to the electors voting at the 1976 general election was "Shall the conduct of sweepstakes races be authorized?" A majority of the electors voting at said election voted in favor of that question.

Along with the question submitted to and approved by the electors, 12-60-116 and 117 in Section 1 of H.B. 1080 specifically

authorized the conduct of sweepstakes races. The bill placed the responsibility for implementing the sweepstakes races in the Colorado Racing Commission. When problems with implementation by the Racing Commission became apparent, the Colorado General Assembly enacted H.B. 1596 during its 1977 legislative session. H.B. 1596 repealed the provisions of H.B. 1080, but reenacted those provisions with some amendment as a new article 60.1 to title 12 of the Colorado Revised Statutes. A comparison of the provisions of H.B. 1080 and H.B. 1596 indicate that the major change made by the adoption of H.B. 1596 was to transfer the responsibility for implementing sweepstakes races authorized by the people from the state Racing Commission to the state Department of Regulatory Agencies. In order to indicate the changes made to the provisions of H.B. 1080 by H.B. 1596, the following was prepared. It shows where the substantive language of H.B. 1596 differs from the language of H.B. 1080. Capital letters indicate new language added to the language of H.B. 1080 by H.B. 1596; and words in brackets indicate language from H.B. 1080 which was deleted by H.B. 1596:

> "12-60.1-101. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE 'SWEEPSTAKES RACES ACT'.
>
> "12-60.1-102. DEFINITION. AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:
>
> "(1) 'DEPARTMENT' MEANS THE DEPARTMENT OF REGULATORY AGENCIES.
>
> "12-60.1-103. Authority for sweepstakes races. The DEPARTMENT [commission] may contract with any person, firm, corporation, or association licensed to hold a race meet in this state to conduct, within the enclosure of any race track of such licensee where there is held a [race or] race meet licensed by the COLORADO RACING commission, but not elsewhere, sweepstakes races. Tickets for such sweepstakes shall be sold by the DEPARTMENT [commission], AND such sales shall be made only within such enclosure and in such other locations AS ARE specified by the DEPARTMENT [commission].

"12-60.1-104. DIRECTOR OF SWEEPSTAKES. SUBJECT TO THE PROVISIONS OF SECTION 13 OF ARTICLE XII OF THE STATE CONSTITUTION, THE EXECUTIVE DIRECTOR OF THE DEPARTMENT MAY APPOINT A DIRECTOR OF SWEEPSTAKES, WHO SHALL ADMINISTER THE PROVISIONS OF THIS ARTICLE. THE DIRECTOR OF SWEEPSTAKES SHALL BE UNDER THE CONTROL AND SUPERVISION OF THE DEPARTMENT, AND HIS SALARY AND EXPENSES SHALL BE PAID OUT OF MONEYS IN THE SWEEPSTAKES RACES FUND.

"12-60.1-105. Rules and regulations. The DEPARTMENT [commission] shall make rules and regulations for the holding and conducting of such sweepstakes races and the sales of tickets thereon and shall employ such technical assistants to organize such sweepstakes and other employees to carry out the provisions of THIS ARTICLE [sections 12-60-116 to 12-60-118]. The DEPARTMENT [commission] shall establish and fix the purses to be awarded in said sweepstakes races and shall establish the price, not to exceed three dollars each, for which tickets upon said sweepstakes shall be sold. The DEPARTMENT [commission] shall also establish the method whereby tickets sold upon said sweepstakes races shall be determined to be winning tickets and shall establish the money or prizes to be awarded holders of winning tickets.

"12-60.1-106. Disposition of proceeds. (1) The DEPARTMENT [commission] shall deposit the proceeds of ticket sales in the state treasury in the sweepstakes races fund, which FUND is hereby created, from which the expenses incident to the administration of THIS ARTICLE [sections 12-60-116 to 12-60-118] shall be paid. SUCH [which] expenses shall include but not be limited to the expenses incurred in the printing, distribution, and sale of tickets, the purses awarded, AND the prize money awarded the holders of winning tickets[,] as well as the net expense incurred by the licensee necessary and incidental to the conduct of said races, WHICH AMOUNTS ARE HEREBY APPROPRIATED TO THE DEPARTMENT. NOT MORE THAN TEN PERCENT OF THE GROSS PROCEEDS RECEIVED FROM THE SALE OF SWEEPSTAKES TICKETS SHALL BE PAID TO THE LICENSED TRACKS FOR THE PAYMENT OF THEIR EXPENSES AND AMOUNTS PAYABLE TOWARD PURSES AWARDED.

"(2) The equivalent of forty-five percent of the net proceeds received by the state as receipts of the sweepstakes shall be distributed as money or prizes.

"(3) Any balance remaining in said fund shall be transferred by the state treasurer to the conservation trust fund.

"(4) Nothing in this section shall exclude the use of mechanical devices authorized by the DEPARTMENT [commission] for dispensing of said tickets.

"[Section 2. Refer to people under referendum. This act shall be submitted to a vote of the qualified electors of the state of Colorado at the next biennial regular general election, for their approval or rejection, under the provisions of the referendum as provided for in section 1 of article V of the state constitution, and in article 40 of title 1, Colorado Revised Statutes 1973. Each elector voting at said election and desirous of voting for or against said act shall cast his vote as provided by law either 'Yes' or 'No' on the proposition: 'Shall the conduct of sweepstakes races be authorized?' The votes cast for the adoption or rejection of said act shall be canvassed and the result determined in the manner provided for by law for the canvassing of votes for representatives in Congress.]"

Certainly, the Colorado General Assembly has the authority to amend and even repeal H.B. 1080, the referred law. Article V, Section 1 of the Colorado Constitution provides, in part, that: "This section shall not be construed to deprive the general assembly of the right to enact any measure." In In re Senate Resolution No. 4, 54 Colo. 262, 130 P. 333 (1913), the Court held this constitutional language to be "broad and comprehensive" and stated that the General Assembly is permitted to repeal any statutory law, however adopted or passed. (At issue in that case was a proposed repeal of an initiated and a referred law.) See also Greeley Transportation Co. v. People, 79 Colo. 307, 245 P. 720 (1926); and, People v. Herder, 122 Colo. 456, 223 P.2d 197 (1950).

However, amendment or repeal of a referred measure does not automatically destroy the measure or its nature. The law is clear that when an existing statute is reenacted by a later statute in substantially the same terms, the unchanged provisions which are restated in the new enactment are construed as having been continuously in force. Their effect is not destroyed. IA Sutherland, Statutory Construction §23.28 (4th Edition) and cases cited therein. And see Annotation, "Effect of Simultaneous Repeal and Reenactment of All, or Part, of Legislative Act", 77 A.L.R.2d 336 at 357-358. In Colorado, the above-stated common law

rule is codified in C.R.S. 1973, 2-4-208, which states:

> "A statute which is reenacted, revised, or amended, is intended to be a continuation of the prior statute and not a new enactment, insofar as it is the same as the prior statute."

Application of the common law and statutory rules in this case leads inescapably to the conclusion that the repeal and reenactment of H.B. 1080 by H.B. 1596 did not destroy the nature or effect of H.B. 1080 at least as to those provisions of H.B. 1080 which were continued in H.B. 1596. The basic authorization for sweepstakes races by vote of the people pursuant to H.B. 1080 continued in force, and the specific authorization for sweepstakes races which appeared in sections 12-60-116 and 117 of H.B. 1080 were continued in force in sections 12-60.1-103 and 105 of H.B. 1596.

2. IF ARTICLE XVIII, SECTION 2 OF THE COLORADO CONSTITUTION PROHIBITS THE PEOPLE OF THE STATE OF COLORADO FROM AUTHORIZING LOTTERIES THROUGH THE EXERCISE OF THEIR REFERENDUM POWER, GAMES A AND B AS DESCRIBED IN THE GOVERNOR'S INTERROGATORIES ARE NOT LOTTERIES; BUT GAME C IS A LOTTERY.

If this Court determines that the people of the state of Colorado may not authorize a lottery through the exercise of their referendum powers, then it is necessary to determine whether any of the games described in the interrogatories and proposed to be implemented by the Executive Branch are lotteries within the constitutional prohibition. In analyzing these games, the controlling Colorado court decision is Ginsberg v. Centennial Turf Club, 126 Colo. 471, 251 P.2d 926 (1952). In that case, the Colorado Supreme Court ruled that pari-mutuel betting upon horse and dog races did not offend the constitutional prohibition of Article XVIII, Section 2 which prohibits the General Assembly from

authorizing lotteries. The Court recognized that all lotteries are forms of gambling, but that all gambling is not necessarily a "lottery" as the term is used within the Colorado Constitution. The Court stated that an element of chance no doubt enters into horse and dog races, but it does not control those races. Additionally, the Court emphasized the opportunity for exercising skill and judgment available to the bettor in horse and dog races.

Of particular relevance to the question of whether any of the sweepstakes games described in the Governor's interrogatories and proposed to be implemented by the Executive Branch are "lotteries" within the prohibition of Article XVIII, Section 2, was the recognition in Ginsberg that the exact amount of winnings cannot be determined by the bettor at the time he places his bet. The Court's opinion describes the pari-mutuel betting process and properly indicates that the amount of winnings depend upon the "odds", and the final odds are not determined until all of the bets are in and betting closed on the race.*

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* The Court in Ginsberg impliedly approved Quinella and Daily Double betting. These two types of betting even more clearly show the Court's distinction between the opportunity to exercise skill in determining a winner of the game, and the element of almost pure chance which determines the actual amount of winnings. In Quinella betting, the player chooses two animals from one race which he feels will finish in the first two places. The wagers of all players participating in that Quinella are placed into a betting pool and the players selecting the winning combination share in the distribution of a certain percentage of the money in that pool. The amount that is paid to a winning player depends upon two factors: the amount of money bet in that Quinella and the number of winning tickets which share in the distribution of the pool. Thus the actual amount which any winner might receive varies significantly depending upon various factors. The Daily Double operates in much the same manner except that the player wagers on the animals he believes will place first in two consecutive races. In Ginsberg, the Court impliedly held that, because of the opportunity to exercise skill in the selection of animals to wager upon, neither the Quinella nor the Daily Double fell within the legal definition of a lottery. This was true even though the odds against picking a winning combination were great and even though there is an element of almost pure chance which determines the actual amount of the winnings.

From Ginsberg, it appears that a particular game is not a lottery within the prohibition of Article XVIII, Section 2 if there exists for the bettor an opportunity to exercise skill and judgment in selecting the winner of the game, even though an element of chance enters the game, and even though the exact amount of winnings may be unknown when placing the bet and dependent upon chance. This test for determining what is or is not a "lottery" is similar to the test adopted by the Michigan Supreme Court in Rohan v. Detroit Racing Commission, 314 Mich. 326, 22 N.W.2d 433 (1946) which was cited with approval by the Colorado Supreme Court in the Ginsberg case.

In Rohan, the Michigan Supreme Court ruled that pari-mutuel betting on a horse race is not a lottery within the Michigan constitutional prohibition. The Michigan court indicated that the bettor has an opportunity to exercise his judgment and discretion in determining the horse on which to bet; and, the fact that a bettor cannot determine the exact amount he may win at the time he places his bet, because the odds may change during the course of betting on a race, did not make the betting a mere game of chance. Other courts also appear to have recognized that the unknown "chance" involved in determining the amount of winnings does not create a "lottery", so long as there exists an opportunity to exercise skill and judgment in selecting the winning animal. See Oneida County Fair Board v. Smylie, 86 Ida. 341, 386 P.2d 374 (1963); Opinion of the Justices, 287 Ala. 334, 251 So.2d 751 (1971); and, Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 78 So.2d 504 (1955).

Applying the principles of Ginsberg to the games described in the Governor's interrogatories, the League and the Society submit that Games A and B are not lotteries prohibited by Article XVIII, Section 2. In Game A, the sweepstakes player has the opportunity to make his own choice of the animal which he believes will win, place, or show in a

particular horse or dog race. Because the sweepstakes is tied into a particular horse or dog race, information will be available--just as in any regularly scheduled horse or dog race--regarding the nature of the race, the number of the horse or dog, its post position, past performance, information on the animal and the jockey (if a horse race), and so forth. The winning players would be determined by the outcome of the race and the accuracy of the player's selection as to the outcome of the race. The winning players would share in a pool of money collected from the sale of tickets and be entitled to participate in a drawing for an additional prize. Thus, just as in Ginsberg, the opportunity to exercise skill and judgment in selecting a winner of the sweepstakes race would exist, even though the exact amount of the prizes awarded to the winning players could not accurately be determined at the time the bet is placed.

Game B also falls within the Ginsberg exception since any prizes awarded are based upon the results of a particular horse or dog race in which the player has the opportunity to make his own choice of the animal which he believes will win, place or show; again, information will be available on the nature of the race, the past performance of the dogs or horses entered in the race, along with appropriate information on the breeding and physical characteristics of the racing animal, and so forth; and the winning players would then share in a pool of money collected from the sale of tickets for the weekly races. Under both Games A and B, the winning players would receive no prizes but for their successful participation in a game in which they had the opportunity to exercise skill and judgment.

Game C, as described in the Governor's interrogatories and as proposed to be implemented by the Executive Branch, is a lottery. It is a game based solely on chance, with no opportunity on the part of the bettor to exercise any skill or judgment in the selection of the

race winner.

The League and the Parks and Recreation Society submit that this Court should rule that Games A and B, proposed to be implemented by the Executive Branch, are not lotteries within the meaning of Article XVIII, Section 2 of the Colorado Constitution, but that Game C is a lottery within the constitutional prohibition.

CONCLUSION

The Colorado Municipal League and the Colorado Parks and Recreation Society urge the Court to uphold the constitutionality of the sweepstakes races act, thus enhancing the likelihood of implementation of the will of the majority of the state's electors voting in the 1976 general election. Specifically the League and the Society urge the Court to answer "no" to interrogatory number one. If the Court does so, then it is not required to answer interrogatory number two. If, however, the Court's answer to interrogatory number one is "yes", then the League and the Park and Recreation Society would urge the Court to answer that Games A and B, as described in the Governor's interrogatories, are not lotteries in violation of Article XVIII, Section 2 of the Colorado Constitution, but that Game C is such a lottery.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief of the Colorado Municipal League and the Colorado Parks and Recreation Society have been served upon the following listed parties of record by first class mail, postage prepaid, this 24th day of July, 1978:

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