June 23, 1978

JOHN P. CLEARY, *Director*
Office of Cable Television
80 Mulberry Street
Newark, New Jersey 07102

FORMAL OPINION NO. 9—1978

Dear Director Cleary:

You have requested our opinion whether a cable television company may transmit a game which it characterizes as "bingo" without violating state constitutional and statutory provisions regulating gambling. In our judgment the game in question, although called "bingo," is not bingo as constitutionally and statutorily defined. Further, it constitutes "gambling" only within the narrow aspect of sponsorship by service stations. Therefore, in all other respects the game may be lawfully presented.[1]

The Constitution of 1947 declares the strong public policy against gambling. Except for particular forms of gambling specifically mentioned, the Legislature is prohibited from authorizing any kind of gambling:

> unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election. . . . [*N.J. Const.* (1947), Art. IV, §7, ¶2.]

Submission to and authorization by the people are not required with respect to the forms of gambling expressly mentioned in this constitutional section, including "bingo" in subsection A:

> It shall be lawful for bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs,

1. The format is that of "bingo" in all respects except that of consideration paid by the participants. Each game is to last one hour and will feature three prize categories. The viewer achieving diagonal, diamond, up, across or down bingo and who is the first to contact the studio by telephone will be awarded free home box office service for one month. The game will then resume under the same rules, with prizes worth up to $100 being awarded to those viewers achieving X or T bingo and blackout bingo (the entire card being filled). The numbers and letters are pulled at random and by chance from a machine in the studio, with the numbers and letters displayed on a tote board shown to the home audience. Presentation of the game is bottomed upon a contract signed by the cable television company and various merchants whose products are given as prizes and whose names are prominently mentioned. Each of the approximately 35 merchants pays $260 for a 13-week sponsorship period; in return, the cable television company provides, in addition to mention of the sponsor's name, posters and streamers for store windows and bingo cards to be distributed to viewers. The cards are given without charge and without condition of purchase, but a viewer may obtain a card only by visiting one of the participating stores.

> volunteer fire companies and first-aid or rescue squads to conduct, under such restrictions and control as shall from time to time be prescribed by the Legislature by law, games of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, 5 or more in one line, the holder covering numbers as objects, similarly numbered, are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers of such a card, when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or public-spirited uses, in any municipality, in which a majority of the qualified voters, voting thereon, at a general or special election as the submission thereof shall be prescribed by the Legislature by law, shall authorize the conduct of such games of chance therein.

The question presented is whether the sort of activity conducted by the cable television company is encompassed by these constitutional provisions. The Supreme Court of New Jersey in *Martell v. Lane,* 22 N.J. 110, 118 (1956), adopted the dictionary definitions by defining "to gamble" as "[t]o stake money or any other thing of value upon an uncertain event; to hazard; wager" and "gambling" as "the act of playing or gaming for stakes." In the following paragraph of *Martell* the court mentioned the constitution prohibition upon legislative sanction of gambling unless authorized by the electorate, thereby indicating that these were the constitutional definitions. In an earlier case, moreover, the court emphasized the element played by risk in gambling activity by defining gambling as "the act of risking or staking anything on an uncertain event." *State v. Western Union Telegraph Co.,* 12 N.J. 468, 490 (1953). The lower courts have held equivalently by stating that "the three components of a gaming episode are price, chance and prize." *State v. Ricciardi,* 32 N.J. Super. 204, 207 (Law Div. 1954), *aff'd* 18 N.J. 441 (1955); *O'Brien v. Scott,* 20 N.J. Super. 132, 137 (Ch.Div. 1952). *See also Formal Opinion No. 17-1961,* dated August 1, 1961.

To be sure, some New Jersey cases have indicated a broader definition of "consideration," but these decisions either dealt with statutory police power enactments more rigorous than the constitutional requirement or offered as legal principle statements apparently at variance with the more modern decisions. In *Hunter v. Teaneck Township,* 128 N.J.L. 164, 168-69 (Sup. Ct. 1942), construing a municipal ordinance prohibiting "game[s] of chance," the former Supreme Court mentioned a line of precendent from other jurisdictions stating that "if the game is designed to and does appeal to, and induces, lures, and encourages, the gambling instinct, it constitutes a game of chance," but Judge (later Justice) Haneman in *O'Brien v. Scott, supra,* lucidly observed that that test "begs the question [since] we are again relegated to an ascertainment of the meaning of the basic word 'gambling.' " 20 N.J. Super. at 137.

The decisions in *State v. Berger,* 126 N.J.L. 39 (Sup. Ct. 1941), and

*Furst v. A & G Amusement Co.*, 128 N.J.L. 311 (E. & A. 1942), are explained by the opinion of the new Supreme Court in *Lucky Calendar Co. v. Cohen*, 19 N.J. 399 (1955). Relying upon those earlier decisions, the *Lucky Calendar* court construed the statute forbidding lotteries as it then existed and held not only that the statute did not require consideration of any kind, *Id.* at 410-14, but that, even if consideration were required, it was present in the form of a participant's inconvenience in simply filling out a coupon. *Id.* at 414-18. With *Berger* having held that payment for admission to a theater was consideration and with *Furst* having held that mere attendance without payment satisfied that requirement, the court in *Lucky Calendar* concluded that the statute demanded only consideration sufficient to sustain a simple contract. *Id.* at 415. Nevertheless, as the Supreme Court itself said, *Id.* at 417, and as the Attorney General later pointed out, *Formal Opinion No. 17-1961, Lucky Calendar* was dealing with a legislative definition. Through N.J.S.A. 2A:121-1 *et seq,* the Legislature had in effect created a statutory type of "gambling" which required no consideration whatever or only the most minimal consideration. The constitutional definition was untouched.[2]

In fact, *Lucky Calendar* when combined with subsequent legislative response supports our conclusion that the game proposed here is neither "gambling" nor "bingo" within their constitutional and statutory meanings. In 1961 the Legislature amended the lottery statute to provide a definition of "lottery" which, while accepting actual inconvenience as a form of consideration, exempted games in which the only consideration was the doing of an act to enter the class of eligible persons. N.J.S.A. 2A:121-6. The Attorney General later held, however, that box-top contests and contests open to patrons of a theater or a store remained unlawful, *Formal Opinion No. 17-1961,* and, presumably in response to this conclusion, the Legislature in 1964 again revised the lottery statute to authorize such games and to circumscribe the meaning of "consideration" so as not to include actual inconvenience:

> As used in this chapter, the term 'lottery' shall mean a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing. Consideration shall

2. The Court of Errors & Appeals in *Furst v. A. & G Amusement Co.* had intimated that the definition of "consideration" adopted there, which comprehended mere attendance at a theater drawing, was the constitutional definition. 128 N.J.L. at 312. That statement, nonetheless, seems too broad in light of later judicial and legislative action. As has been discussed the Supreme Court and the lower courts have emphasized the requirement of risking something of value, and the Legislature itself has determined, presumably without infringing constitutional boundaries, to revise the statutory definition of "lottery" so as to exclude games in which consideration does not take the form of money or some other item of actual value. That statutory modification would have to be invalidated as unconstitutional if the *Furst* statement concerning attendance without payment of value being consideration were considered constitutional doctrine. But since a statute must be construed so as to render it constitutional if possible, *State v. Profaci,* 56 N.J. 346, 350 (1970); *State v. Hudson County News Co.*, 35 N.J. 284, 294 (1961); *Woodhouse v. Woodhouse,* 17 N.J. 409, 416 (1955), the statement should instead be considered only *dictum.*

> not be deemed to exist with respect to a distribution of prizes by chance in a contest where admission to the class of distributees is based upon the submission of a box top, package, label, coupon or other similar article connected with merchandise produced or sold by the sponsor of the contest in the regular course of business, provided that the sales price of said merchandise does not include any direct or indirect charge to the purchaser for the right to participate in such contest. [N.J.S.A. 2A:121-6.]

Consequently, the lottery statute as it stands now does not condemn games in which consideration does not take the form of money or some other item of actual value. As mentioned, note 2, *infra,* the statute by so providing would violate the state constitution if "consideration" in a constitutional sense included slight inconvenience or even no inconvenience whatever. The New Jersey constitution is, however, "not a grant but a limitation of powers," with the Legislature free to exercise the power of sovereignty if not so restricted. *Gangemi v. Berry,* 25 N.J. 1, 7 (1957); *Behnke v. N.J. Highway Authority,* 13 N.J. 14, 24 (1953); *State v. Baldinotti,* 127 N.J.L. 46, 48 (Sup. Ct. 1941). A statute must, therefore, be interpreted so as to render it constitutional if possible. Cases cited, note 2, *infra.* To conclude that "consideration" is so broad a term would require constitutional voiding of the present version of the lottery statute; the Attorney General declined to so hold in 1961, *Formal Opinion No. 17-1961,* and we reaffirm that determination.

Not only does the constitutional definition of "gambling" encompass only the staking of an item of value upon chance, but this requirement is an element of both the constitutional and statutory definitions of "bingo" and the statutory definition of "lottery." The constitutional provision includes " the selling of rights to participate," and the equivalent statutory definition within the Bingo Licensing Law, N.J.S.A. 5:8-24 *et seq,* requires the "selling [of] shares or tickets or rights to participate. . . ." N.J.S.A. 5:8-25. Without doubt the Legislature, as it once did with regard to lotteries, could regulate as an exercise of the police power an activity which, as that proposed here, does not include the selling of rights to participate, but it has not done so. The only restriction is that of the constitutional provision and the substantially identical statutory definition, and that definition does not comprehend this kind of game, for here rights to participate are not sold, but are given away at no cost to all who ask. Moreover, as has been discussed, the game is not a lottery, since under its present statutory definition the necessary consideration must be "in the form of money or other valuable thing," N.J.S.A. 2A:121-6, and that sort of consideration will not be present.

Our conclusion is buttressed by two federal decisions. In *Federal Communications Comm'n v. American Broadcasting Co.,* 347 U.S. 284, 294, 74 S. Ct. 593, 98 L. Ed. 699 (1954), the Supreme Court of the United States held that the mere listening to a program was not of itself consideration so as to make the game show a lottery within the meaning of a federal statute whose elements were consideration, chance and prize. Similarly, *Caples Co. v. United States,* 243 F. 2d 232, 234 (D.C. Cir. 1957), held that viewers did not provide consideration by journeying to a sponsor's store

to obtain the necessary game card.[3] While these decisions do not directly bear upon New Jersey law, they do reinforce our opinion both that the state constitutional prohibition is relatively narrow and that the game proposed will not violate either that provision or the statutory sections cited.

Although we have concluded, consequently, that the game is generally lawful, we wish to note that the game would be unlawful in one particular. As discussed, the game is not a lottery under the definition of N.J.S.A. 2A:121-6, but the game would constitute a lottery under the statute controlling the retail sale of motor fuels. N.J.S.A. 56:6-1 *et seq.* The statute provides that:

> It shall be unlawful for any retail dealer to use lotteries, prizes, wheels of fortune, punch-boards or other games of chance, in connection with the sale of motor fuels. [N.J.S.A. 56:6-2(f).]

Although "lotteries" is not defined by this statute, the judiciary has declined to adopt the definition of N.J.S.A. 2A:121-6. In *United Stations of New Jersey v. Kingsley,* 99 N.J. Super. 574, 585-86 (Ch. Div. 1968) and *United Stations of New Jersey v. Getty Oil Co.,* 102 N.J. Super. 459, 467-68 (Ch. Div. 1968), the Chancery Division held the definition contained within the lottery statute did not control the Title 56 provision and that, adhering to *Lucky Calendar v. Cohen, supra,* consideration is not required, 99 N.J. Super. at 486, and, alternatively, consideration is present with the mere visiting of the service station by a customer. 102 N.J. Super. at 468. The court so held because the legislative purposes underlying the two statutes differed, the lottery statute having been designed to prevent the public from being defrauded of their money in return for a chance to receive something possibly of less value than the sum invested and the motor fuels trade statute having been designed to regulate the adverse aspects of competition. These decisions, therefore, support still further our conclusion that the Legislature is constitutionally free to impose upon various activities restrictions more or less rigorous in order to protect the public welfare and that it has not done so with respect to the game in question here. Nonetheless, since a gasoline station dealer may not operate a lottery as thus defined at his place of business, he would also violate the statute dealing with the sale of motor fuels if he did so through a communications medium such as cable television. Consequently, a cable television company presenting the proposed game should not contract with service stations to sponsor the game.

3. The position of the Federal Communications Commission adheres to these decisions, for in its letter of June 28, 1976 addressed to the Telamerica Corporation that agency ruled that with no purchase from participating merchants being necessary to participate, "it is our view that the element of consideration is not present and that, accordingly, the proposed cable bingo game would be compliant with our rules."

In summary, we have concluded that the game proposed to be conducted on cable television is lawful except to the extent noted.

Very truly yours,
JOHN J. DEGNAN
*Attorney General*
By: BERTRAM P. GOLTZ, JR.
*Deputy Attorney General*

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July 19, 1978

JOSEPH H. LERNER, *Director*
Division of Alcoholic Beverage Control
Newark International Plaza
U.S. Route 1-9 (Southbound)
P.O. Box 2039
Newark, New Jersey 07114

FORMAL OPINION NO. 10—1978

Dear Director Lerner:

You have requested an opinion as to whether holders of State Beverage Distributor's licenses (hereafter S.B.D.'s) may sell malt alcoholic beverages in original containers for off-premises consumption on Sundays and weekdays during the same hours as the sale of alcoholic beverages for on-premises consumption is permissible. It is our opinion that S.B.D. licensees may sell malt alcoholic beverages under these circumstances.

For many years the permissible hours for retail sale of alcoholic beverages for off-premises consumption were governed by a rule of the Division of Alcoholic Beverage Control. N.J.A.C. 13:2-36.1 prohibited sales on Sunday and limited sales on other days to the hours of 9:00 a.m. to 10:00 p.m. In 1971 the Legislature enacted N.J.S.A. 33:1-40.3 which provides as follows:

> Whenever the sale of alcoholic beverages for consumption on the premises and off the premises or either thereof is authorized in any municipality by ordinance or rule or regulation of the Division of Alcoholic Beverage Control, by the holder of a retail consumption or retail distribution license, such ordinance or rule shall authorize the sale of malt alcoholic beverage[s] in original bottle or can containers for consumption off the premises on the same days and during the same hours as the sale of alcoholic beverages for consumption on the premises is permitted and authorized in said municipality.
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> All parts of ordinances and regulations of the Director of the Division of Alcoholic Beverage Control inconsistent with the provisions of this act are superseded to the extent of such inconsistency.