

FORMAL OPINION

person responsible for the operation of the public place and *not by rule or regulations of an executive agency. The amendment would preclude enforcement of smoking regulations by an executive agency.*" (Emphasis added.)

We are mindful of the significant public health objectives underlying adoption of the Sanitary Code smoking regulations. As noted at the outset, however, the very statute pursuant to which the regulations were adopted states that Code regulations promulgated by the Public Health Council must be consistent with State statutes. *See Borden's Farm Products v. Board of Health*, 36 N.J. Super. 104, 114 (Law Div. 1955). In view of the unequivocal evidence of legislative intent to preclude the Council from adopting or enforcing regulations respecting smoking in public places, it must be concluded that the Sanitary Code regulations in question are superseded by N.J.S.A. 2C:33-13.

For these reasons, it is our opinion that the regulations promulgated by the Public Health Council dealing with smoking in public places in N.J.A.C. 8:15-1.1 *et seq.* have been superseded by the Code of Criminal Justice. Accordingly, the regulations may not be implemented or enforced.

Very truly yours,  
JOHN J. DEGNAN  
*Attorney General*

By: THEODORE A. WINARD  
*Assistant Attorney General*

January 10, 1980

JOSEPH P. LORDI, *Chairman*  
Casino Control Commission  
379 West State Street  
Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1980

Dear Chairman Lordi:

You have inquired with regard to the legality of a backgammon tournament which a casino hotel operator proposes to sponsor at its business premises. The hotel operator is currently undecided as to whether or not to charge a nominal admission fee to the tournament or to permit free participation by the contestants. We have concluded that the proposed backgammon tournament would not violate the criminal laws of New Jersey provided that no admission fee is charged, either directly or indirectly, for participation in the tournament.

The backgammon tournament format at issue is fairly standard and has been utilized at casinos throughout the world, including Las Vegas, Monte Carlo and Paradise Island in the Bahamas. Backgammon is a game in which a series of counters are moved over a board with the object of placing all the counters in a prescribed position. The movement of the

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counters is governed by the roll of dice. The results of a throw of the dice are applicable only to the contestant on behalf of whom the dice are thrown. Certain positioning of the counters in the course of the game will increase the probability of victory. A player who is adept at manipulating his or her counters to attain favorable positions has an advantage. Nonetheless, no matter how skilled a player is, she or he can only manipulate the counters in conformity to the roll of the dice. Hence, an unskilled player who attains a series of favorable throws of the dice can defeat a more skilled player whose throws of the dice preclude advantageous movement of her or his counters.

The sponsor of the proposed tournament intends to conduct the contest on a limited participation basis. The number of entries will be finite. Each player will engage in a single game of backgammon with another player. The loser is eliminated from the competition, while the winner goes on to play another round against another player. The single elimination process is repeated in a series of rounds until only one player remains undefeated. He or she is the winner of the competition. The tournament itself consists of a number of such single elimination contests so that each player has more than one opportunity to win. The winners of these various competitions are rewarded with valuable prizes, including substantial quantities of cash.

The purpose of the tournament is to promote commercial activity at the hotel and casino in which the tournament is being conducted. Additional spinoff benefits may accrue to other enterprises doing business in the general area. The tournament's sponsors hope to schedule it at a period when lessened commercial activity is anticipated at the hotel-casino.

New Jersey's Constitution establishes an antigambling policy. *N.J. Const.* (1947), Art. IV, §7, par. 2; *see F.O. No. 9, 1978.*<sup>1</sup> The Legislature has effectuated this policy through a series of statutory enactments. Those enactments applicable in the criminal context are embodied in the provisions of N.J.S.A. 2C:37-1 *et seq.* which superseded, on September 1, 1979, N.J.S.A. 2A:112-1 *et seq.* and N.J.S.A. 2A:121-1 *et seq.* *See* N.J.S.A. 2C:98-2.

Pursuant to N.J.S.A. 2C:37-2 promoting gambling is a criminal offense punishable by a scale of sanctions which range from a third degree crime to a disorderly persons offense. Criminal liability for maintaining a place where gambling activity is taking place is created by N.J.S.A. 2C:37-4.

1. The constitutional prohibition on legislatively authorized gambling provides:

No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes casted 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, par. 2.]

Casino gambling, state lotteries to aid education and raffles and bingo games sponsored by charitable organizations have been exempted from this anti-gambling proscription. *N.J. Const.* (1947), Art. IV, §7, par. 2(A), (B), (C).

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N.J.S.A. 2C:37-1(b) provides:

“Gambling” means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor’s control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

This definition requires that a participant must risk “something of value” before any gambling can occur. “Something of value” is separately defined in N.J.S.A. 2C:37-1(d) as such items as money or tokens or such intangible forms of consideration as extensions of credit or free entries into games for which a charge is generally exacted.<sup>2</sup> If the participants in the backgammon tournament were required to pay any admission fee directly or indirectly, then they would be “risking” something of value on their chances of success in the tournament. However, the absence of any admission fee would preclude a finding that any gambling activity could occur because the backgammon players would not be risking “something of value.” This same analysis would apply to the question of whether the backgammon tournament was a “lottery,” within the meaning of N.J.S.A. 2C:37-1 *et seq.* Lotteries are defined as a specialized form of gambling scheme in which “something of value” is tendered as a consideration for participation. N.J.S.A. 2C:37-1(h). Once again, the absence of an admission fee establishes that nothing of value, as defined in the Code of Criminal Justice, will be transferred by the participants to the promoters or sponsors of the backgammon tournament. It seems clear that the definition of “something of value” in N.J.S.A. 2C:37-1(d) means that mere participation, or presence, by a contestant will not constitute “consideration” sufficient to support the existence of a lottery in violation of the criminal law. This is consistent with recent views on the scope of the concept of “consideration” in the gambling and lottery context. *See, e.g., F.O. No. 9, 1978.*

Finally, the promoters of the backgammon tournament have asserted that, “no betting of any kind on the players or the outcome will be permitted or sanctioned.” This is essential because any betting, including the formation of pools or “auctions” in which monies are divided based upon the results of the tournament, would constitute “gambling” within the meaning of N.J.S.A. 2C:37-1(b). The promoters or facilitators of any such pools or auctions would be criminally liable for promoting gambling in violation of N.J.S.A. 2C:37-2: If the hotel-casino operators know that such gambling activity is taking place on portions of their premises open to the general public, then they and the hotel-casino will be criminally liable under N.J.S.A. 2C:37-4 for maintaining a gambling resort. *See*

2. N.J.S.A. 2C:37-1(d) provides:

“Something of value” means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

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N.J.S.A. 2C:37-1(j). Provided that no such activity is permitted and that no admission fee is assessed either directly or indirectly such as by conditioning participation on the purchase of any goods or services, the proposed backgammon tournament will not contravene the criminal laws of New Jersey.

Very truly yours,  
JOHN J. DEGNAN  
*Attorney General*

By: EDWIN H. STIER  
*Assistant Attorney General*

January 18, 1980

MR. BARRY SKOKOWSKI  
*Acting Director*  
Div. of Local Government Services  
Department of Community Affairs  
363 West State Street  
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1980

Dear Mr. Skokowski:

You have raised questions as to whether municipalities and counties are permitted to enter into agreements with non-profit corporations to provide for the investment of deferred compensation funds or to participate in commercially managed investment firms providing plans for deferred compensation. You are hereby advised that municipalities and counties are not authorized to enter into agreements with either non-profit or commercially-operated organizations which provide for the investment of deferred compensation funds.

Any municipality or county may set up a deferred compensation plan for its employees. N.J.S.A. 43:15B-1 *et seq.* A local unit which establishes such a plan must designate one or a group of its public officials or its governing body as the "named fiduciary" responsible for implementing the plan. The named fiduciary is empowered to take "any steps reasonably necessary to implement the plan *consistent with this act* (emphasis added)" and with the requirements of the Internal Revenue Service. N.J.S.A. 43:15B-3(e). N.J.S.A. 43:15B-3(a) requires that the employer (the local unit) shall invest all moneys from the plan which are not needed for immediate payment of benefits in one of three specific ways: interest-bearing securities in which savings banks of the State are authorized to invest their funds; deposits in interest-bearing accounts; or deposits in the State of New Jersey Cash Management Fund. N.J.S.A. 43:15B-3(b) further provides that if the State creates a deferred payment compensation plan, the local units may participate in that plan. (Such a plan was created