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OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 16, 2004

The Honorable Glenn F. McConnell
Chairman, Senate Judiciary Committee
101 Gressette Office Building
Columbia, South Carolina 29202

The Honorable Herb Kirsh
Member, House of Representatives
532-A Blatt Building
Columbia, South Carolina 29211

The Honorable James H. Harrison
Chairman, House Judiciary Committee
512 Blatt Building
Columbia, South Carolina 29202

The Honorable Becky D. Richardson
Member, House of Representatives
519-B Blatt Building
Columbia, South Carolina 29211

The Honorable Bessie A. Moody-Lawrence
Member, House of Representatives
414-C Blatt Building
Columbia, South Carolina 29211

The Honorable J. Gary Simrill
Member, House of Representatives
420-C Blatt Building
Columbia, South Carolina 29211

Dear Senator McConnell, Representatives Harrison, Simrill, Kirsh, Richardson and Moody-Lawrence:

By way of background, we have received two separate opinion requests concerning the 1993 Settlement between the State and the Catawba Indian Nation. Senator McConnell and Representative Harrison have asked the following questions:

1. Does the governing body of the Catawba Indian Nation Tribe have the right to operate video poker devices on the Tribe's Reservation in York County?

2. In the event that the Catawba Indian Tribe currently has the right to operate video poker devices on the Tribe's Reservation in York County, may the State of South Carolina revoke that right without putting itself at risk of being held liable to the Tribe?

3. Does the creation and continuing operation of the South Carolina Education Lottery put the State of South Carolina at risk of being held liable for violating a binding obligation to the Tribe imposed by contract and/or federal law?

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Request Letter

In addition, members of the House of Representatives from House Districts 46, 47, 48 and 49 – Representatives Simrill, Kirsh, Richardson and Moody-Lawrence respectively – have asked essentially the same question: "the Catawba's rights to operate video poker machines pursuant to the 1993 agreement and existing state law ...." We have combined the two opinion requests into one for purposes of convenience for you and are providing this single response to each requestor.

The letter from Senator McConnell and Representative Harrison provides the following background information, which is helpful to quote in full:

> [a]s you know, the State of South Carolina and the Catawba Indian Tribe entered into an agreement to dismiss two lawsuits in exchange for a monetary payment and certain additional commitments from the State. That agreement was codified by the South Carolina General Assembly and, in turn, was approved, ratified, and confirmed by the United States Congress.
>
> The Catawba Indian Tribe and its attorneys have asserted recently in published reports that because the Tribe has been prevented from gaining approval for a Class II bingo gaming facility in Orangeburg County that the Tribe might be forced for financial reasons to open a video poker facility on the Tribe's Reservation land in York County, a right they believe they have under the 1993 Settlement Act. In addition, the Tribe and its attorneys have claimed publicly that the Tribe is being hurt financially by the State's creation and operation of the South Carolina Education Lottery, due to the Lottery's competitive impact on the Tribe's state-regulated bingo facility in York County, and have asserted this gives rise to a legal claim by the Tribe. They claim they have also been damaged financially by the relaxation of rules and regulations governing competing bingo and gaming operations in South Carolina.
>
> With reference to these issues, I, after a conference with Senator Brad Hutto on the issues, asked the Senate Judiciary Committee attorneys to research this matter and determine whether there is any merit to the claim that the Tribe's governing body has the legal right to authorize the operation of video poker devices on the Tribe's Reservation. At the conclusion of that research, Senate staff attorneys concluded that there is considerable merit to the Tribe's claim. (Please see attached memorandum by Senate Judiciary Staff referenced above).
>
> More recently, Senator Hutto provided us with an exchange of correspondence between Jay Bender, attorney for the Catawba Indian Nation, and Crawford Clarkson, who served under Governor Carroll Campbell as South Carolina's chief negotiator with the Catawba Tribe when the Settlement Agreement was reached in 1993. It appears significant to us that Mr. Clarkson freely acknowledges that the Tribe was indeed promised, during the negotiations that the agreement gave the Catawba Tribe the right to operate video poker machines and

> similar electronic devices irrespective of whether such machines were illegal elsewhere. Mr. Clarkson also indicated the Tribe was promised gaming supremacy in South Carolina, which he describes as "best game in town" as an inducement to sign the agreement. (Please see attached correspondence with Mr. Clarkson. ....
>
> [T]hese issues could potentially lead to litigation and subject the State of South Carolina to great expense and liability ... .

Law / Analysis

These issues represent a Gordian knot of law, logic and public policy. The Catawbas have credible claims. Extrinsic evidence may be required to fully resolve the issues.[1]

We begin by noting that the State of South Carolina has a long-standing public policy against gambling. As the South Carolina Supreme Court stated in Westside Quik Shop, Inc. v. Stewart and Condon, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000), "[i]n 1931, the General Assembly enacted a comprehensive statute outlawing the possession of all forms of gambling devices, including vending machines that could be operated as gambling devices." The Court stressed in Army Navy Bingo Garrison No. 2196 v. Plowden, 281 S.C. 226, 228, 314 S.E.2d 339, 340 (1984) that "... the State's power to suppress gambling is practically unrestrained." Ingram v. Bearden, 212 S.C. 399, 405, 47 S.E.2d 833, 835 (1948) emphasized that the State's police power has "the view of discouraging and suppressing the operation of gambling devices ..." and in State v. 192 Video Game Machines, 338 S. C. 176, 525 S.E.2d 872 (2000), the Court recognized that the State's interest in controlling gambling is "preeminent." 525 S.E.2d at 878.

Moreover, the Office of Attorney General has, virtually, from the founding of the State, represented the State's interest in gambling cases, both in the criminal and civil context. As the State's Chief Prosecutor under Art. V, § 24 of the State Constitution and the "highest executive law officer of the State, see, State ex rel. Wolfe v. Sanders, 118 S.C. 498, 100 S.E.808 (1920), the Attorney General has the "duty of seeing to the proper administration of the laws of the state and his duties are quasi-judicial." Id. Thus, the position of this Office has always been to defend the State's laws prohibiting gambling. We will continue to do so aggressively.

With respect to the questions you have raised, litigation is likely, as you suggest. Such litigation may assume the form of criminal prosecutions or a civil forfeiture proceeding if video poker machines are placed on the Reservation. Another possibility is a declaratory judgment action brought by the Catawba Nation. Such an action could also seek damages and injunctive relief, with recovery a possibility. If such litigation, in whatever form, ensues, this Office will represent the position of the State of South Carolina that no video gaming machine, including video poker

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[1] We recognize that litigation is pending as to the question of who legally speaks for the Tribe. See, Wade, et al. v. Blue, et al., No. 98-2584-17.

machines, may be possessed or operated on the Reservation or any other place in South Carolina. We will defend the State's interest vigorously and aggressively.

Alongside the interest of the State in suppressing gambling, particularly video gambling, we note also the strong public policy interest which resolves any ambiguity in a statute regulating Indian matters in the Native Americans' favor. As was said by the United States Supreme Court in Chickasaw Nation v. U. S., 534 U. S. 84 (2001), the canon of construction is often controlling that any ambiguity is resolved by construing the provision "liberally in favor of Indians with ambiguous provisions interpreted to their benefit." Justice Blackmun, dissenting in South Carolina v. Catawba Tribe, Inc., 476 U.S. 498 (1986) noted that this rule of interpretation "reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people who our Nation long ago reduced to a state of dependancy." 476 U.S. at 498.

We view the 1993 Settlement Agreement as essentially a contract. As our Supreme Court recognized in Cooper & Griffin, Inc. v. Bridwell, 177 S.C. 219, 181 S.E. 56 (1935),

> [i]t is only when a contract is clear, unambiguous, and free from doubt that its construction presents a question of law for the court. On the other hand, when there is ambiguity, uncertainty, or doubt, as to the proper construction of the contract, it becomes a question of fact of the jury to determine what the real intention of the parties was, and for their aid resort will be had to extrinsic evidence to show the conditions surrounding the parties, the circumstances under which the contract was executed, as well as the negotiations between the parties leading up to the execution thereof.

181 S.E. at 59. The difficulties which this Office encounters in issuing on opinion as to a particular contract provision were also expressed in detail in Op. S.C. Atty. Gen., Op. No. 85-132 (November 15, 1985) wherein we observed that

> [a] legal opinion cannot resolve such obviously critical questions as: precisely what expectations the parties may have had or what reliance was placed upon any representations made ....
>
> Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine the difficult factual questions present here.
>
> A fact-finding body normally possesses the authority to call witnesses, swear them under oath and compel them to testify in a public proceeding. Witnesses are

> usually subject to cross-examination, to bring out all the relevant facts. A factual record of the proceedings is maintained and numerous documents admitted into evidence. Of course, none of these important mechanisms for bringing out all the relevant facts is available in a legal opinion of this Office.

With these caveats in mind, we turn to the specific issues raised by the opinion requests. The Catawba Indian Claims Settlement Act," codified at S.C. Code Ann. Section 27-16-10 et seq., was enacted on June 14, 1993. The Act implemented a Memorandum of Agreement with the Catawbas which was memorialized in a document entitled "Agreement In Principle." The Agreement In Principle is referenced in the findings of the General Assembly, regarding the Settlement and is contained in § 27-16-20 as follows:

> (1) The Catawba Indian Tribe has filed lawsuits in both the United States District Court for the District of South Carolina, claiming possessory rights to certain lands in South Carolina and trespass damages and in the United States Court of Federal Claims seeking monetary damages against the United States.
>
> (2) The pendency of these lawsuits has resulted in severe economic and social hardships for large numbers of landowners, citizens, and communities in the State, and therefore for the State as a whole. If these claims are not resolved, further litigation involving tens of thousands of landowners would be likely.
>
> (3) The Indian claimants and the State, acting through the Governor, have reached an agreement in principle to settle their differences which constitutes a good faith effort on the part of all parties to achieve a fair and just resolution of claims which, in the absence of this settlement, could be pursued through the courts for many years to the detriment of the State and all its citizens, including the Indians.
>
> (4) The implementation of the settlement requires legislation by the Congress of the United States and by the General Assembly of South Carolina.

Importantly, Section 27-16-40 subjected "the Catawba Tribe, its members, lands, natural resources, or other property owned, by the Tribe or its members ... to the civil, criminal, and regulatory jurisdiction of the State, its agencies, and political subdivisions other than municipalities...." Furthermore, the Tribe was made subject to "... the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State, except as otherwise expressly provided in this chapter or in the federal implementing legislation.[2]

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[2] Congress implemented the Agreement in Principle through the enactment on October 27, 1993 of the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 (PL 103-

(continued...)

The key provision of the Agreement In Principle, Settlement Agreement and state and federal acts of implementation and which has created the public debate as to whether or not the Catawba Tribe presently has the right to possess and operate video poker machines and other similar electronic devices on the Reservation is found at §27-16-110 (G). [Paragraph 16.8 of the Agreement in Principle]. Section 27-16-110 (G) provides as follows:

> [t]he Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. The Tribe is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law. (emphasis added).

The core issue is what impact, if any, the statewide prohibition of video poker enacted by the General Assembly in Act No. 125 of 1999 has upon any right to possess or operate video poker machines on the Reservation which the Tribe may have gained under the Settlement Agreement and implementing legislation. In other words, did Act No. 125 eviscerate any right of the Catawbas to possess or operate video poker machines on the Reservation? Or is such right extant today, notwithstanding that video poker has been outlawed throughout the State of South Carolina?

Legal opinions, all authored by highly respected attorneys, which address this question strongly disagree with each other. We are aware of at least three opinions, two of which support the Tribe's position that it continues today to have the right to possess and operate video poker machines on the Reservation. A third opinion strongly disagrees, concluding that the Tribe possesses no such right. It is helpful to review each of these opinions in some detail, as each presents arguments which would certainly be voiced in any litigation.

Opinion of Mr. Lightsey

The first opinion was authored by Wallace Lightsey, Esquire on behalf of the South Carolina Policy Council. Mr. Lightsey concluded that, "[b]ased upon a review of the Settlement Agreement and the relevant state and federal legislation" the Tribe today has

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[2](...continued)
116, 107 Stat. 1118). This statute is codified at 25 U.S.C. §§ 941-941n. The Settlement Agreement itself was executed on November 29, 1993. 25 U.S.C. 941a makes the federal Indian Gaming Regulatory Act inapplicable to the Tribe.

> ... more than just a colorable or good-faith argument that can be made to support [the Tribe's] ... position. In my view, a judge or a court looking at the question carefully and objectively, and applying proper legal standards, would almost certainly reach the same conclusion. Obviously, therefore, there would be a substantial risk of litigation – and a substantial risk of the State's losing such litigation – should the Tribe initiate video poker operations and the state attempt to prosecute or shut down the operations.

Lightsey Opinion at 1.

Mr. Lightsey's opinion, dated September 23, 2003, first traced the history of the Catawba Nation and its longstanding claim against the State of South Carolina. He recited the fact that "[i]n the Treaty of Nation Ford in 1840, the Tribe entered into an agreement with the State of South Carolina without the approval or participation of the federal government in which the Tribe ceded its treaty reservation to the State." Lightsey Opinion at 2. Such cession consisted of 144,000 acres which the Tribe had earlier been guaranteed. In 1980, the Tribe sued in federal court to regain possession of its treaty land. Following years of negotiations, a settlement was reached in 1993. Mr. Lightsey describes the state and federal legislation, referred to above, as essentially a ratification and implementation of the Settlement Agreement. Lightsey Opinion at 3.

Mr. Lightsey explains that "[u]nder the Settlement Agreement and the state implementing legislation, the Tribe is authorized to conduct two types of gaming operations." In his words,

> [f]irst, it may operate bingo at two locations under either a regular license from the S.C. Tax Commission or under a special license subject to detailed provisions regarding the frequency of the sessions, the amount of the prizes, and the disposition of the proceeds. See S.C. Code § 27-16-110 (B) - (F). Second, "[t]he Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law." Id. § 27-16-110 (G) (emphasis added). This provision specifically states that the Tribe may operate video poker or similar devices in a county that prohibits such devices pursuant to state law. Id.

Video poker was lawful in South Carolina at the time the Settlement Agreement was executed and the implementing legislation was enacted. In Mr. Lightsey's Opinion, "by operation of state law at that time the Settlement Agreement granted the Catawba Tribe a contractual right to conduct video poker operations on reservation property, even if the particular county in which it was located did not allow video poker, as long as such activity was lawful under state law." Lightsey Opinion at 5.

Concluding that the Catawbas were given the right by the 1993 Settlement Agreement and implementing legislation to operate video poker on the Reservation, Mr. Lightsey proceeds then to analyze what impact, if any, Act. No. 125 of 1999, which banned video poker completely in South

Carolina, may have had upon the Catawba's pre-existing right to have video poker on the Reservation. As part of the history of Act 125, he references Joytime Distributors & Amusement Co. v. State, 338 S.C. 634, 525 S.E.2d 647 (1999), a case in which the South Carolina Supreme Court struck down Part II of Act 125 requiring a statewide referendum as to whether video poker payouts should remain legal after June 30, 2000. In Joytime, the Court concluded that the referendum constituted an unlawful delegation of the General Assembly's power to legislate. However, the Joytime Court found that Part II was severable from the remainder of the Act. As Mr. Lightsey correctly points out, effective July 1, 2000, Part III of Act 125 made video poker machines illegal per se contraband. Joytime, supra.

As to the impact of Act 125 upon any right to operate video poker on the Tribe's Reservation, Mr. Lightsey acknowledges that "[a] superficial argument can be made that the Catawba Tribe no longer has any right to conduct video poker operations, because the legislation implementing the Settlement Agreement permits video poker only to the same extent that the devices are authorized by state law." Lightsey Opinion at 6. However, the Lightsey Opinion rejects this argument based upon § 22 (C) of Act No. 125. Such provision reads as follows:

> It is the intent of the General Assembly that the provisions of this act shall not be construed to:
>
> (1) affect any pending lawsuit, as prescribed in Section 21; or
>
> (2) affect any provision of current law, unless or until it is specifically modified or expressly repealed as provided in this act.

Finding that "nothing in Act 125 specifically modifies or expressly repeals the gaming provisions of the Catawba Indian Claims Settlement Act ...," Mr. Lightsey concludes that "the general prohibition of video gaming does not abrogate the Catawba Tribe's right to conduct video poker operations under the Claims Settlement Act." Id.

Mr. Lightsey presents several additional arguments in support of his conclusion. He notes that the law does not favor implied repeals, citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000), and thus Act 125 did not alter § 27-16-110(G). Further, he notes that "in cases involving Indian law ... statutes are to be construed liberally in favor of the Indians, with ambiguous provision interpreted to their benefit." [citing Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)]. Mr. Lightsey additionally observes that § 27-16-110 (G) which authorizes video poker on the Reservation even if prohibited by the county in which it is located, shows that the General Assembly viewed the Catawba's right to conduct video poker gaming as a separate category from the similar right of other citizens at that time. Finally, he argues that § 27-16-110 (F), when compared to Subsection (G) is strong evidence that the Tribe's right to operate video poker continues today. Subsection (F) expressly terminates the Tribe's right to operate bingo games if no longer licensed by the State. Such termination language is not included in Subsection (G) which deals with video poker, however.

Mr. Lightsey argues that this demonstrates an intent to view "the Catawbas' contractual right to operate video poker as a separate and distinct category from the similar rights of citizens in general at that time." Lightsey Opinion at 8.

Senate Judiciary Committee Opinion

A second opinion favorable to the Tribe's position was issued by Nancy Coombs, Esquire, a staff attorney for the Senate Judiciary Committee on January 26, 2004. Ms. Coombs makes many of the same arguments articulated by Mr. Lightsey and similarly concluded that the Catawbas "do have a right to operate video poker on their Reservation ...." Like Mr. Lightsey, Ms. Coombs makes the comparison between the language used in § 27-16-110 (F) and (G). She emphasizes that

> [i]f the parties to the Settlement intended that the Catawbas would not be authorized to operate video poker devices on their Reservation if the operation of the device were no longer allowed in the State, they could have explicitly provided so in the Settlement as they did with bingo. Since the devices were authorized by state law on November 29, 1993 when the Settlement was signed, that law should be read into the Settlement and the Catawbas should be authorized to operate the devices on their Reservation unless and until the parties agree otherwise.

Senate Judiciary Opinion at 4.

Ms. Coombs presents the additional argument that "it would be in violation of both the United States and the South Carolina Constitutions to pass a law impairing the obligation of the Settlement between the State and the Catawbas." For this reason as well, she argues that "[t]he passage of Act 125 of 1999, which outlawed video poker, should not apply to the Catawbas." She also reasons that because the Settlement has been adopted by Congress in 25 U.S.C. § 941 (b) and states that the Settlement "should be complied with in the same manner and to the same extent as if they had been enacted into Federal law ... [t]he State is prohibited from amending the Settlement and the State Act unless both the State and the Catawbas agree to such amendment." Senate Judiciary Opinion at 5-6. Finally, she concludes that "South Carolina should honor its agreement that the Catawbas be allowed to operate video poker devises on their Reservation" because to do otherwise might cause other parties to be reluctant to enter into contracts with the State. Id.at 6.

Mr. Gergel's Opinion

A third opinion, dated February 2, 2004 was authored by Richard M. Gergel, Esquire and was rendered to Senator Robert W. Hayes, Jr., Esquire, chairman of the York County Legislative Delegation. In marked contrast to the two previous opinions of Mr. Lightsey and Ms. Coombs, Mr. Gergel concluded that "since video gambling was prohibited in South Carolina under the State's

criminal and civil laws effective July 1, 2000, the Catawba Tribe has no right to engage in video gambling on its Reservation or another location in South Carolina at this time." Gergel Opinion at 1.

Mr. Gergel rejects at the outset any argument that §§ 12-21-2806 and 12-21-2808 of the Video Game Machines Act, which authorized the county-by-county referendum in 1994, had any "bearing on the authority of the Tribe to operate video poker in the same manner as in the thirty-four counties ..." which voted to retain video poker in 1994. He explains his conclusion in this regard as follows:

> [i]n Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (S.C. 1996), the South Carolina Supreme Court held that the local option referenda provisions of the Video Game Machines Act to be unconstitutional. This allowed video gambling operations to be conducted on a statewide basis, and rendered the exception provided to the Tribe moot.

Gergel Opinion at 3, n.1.

Next, Mr. Gergel discusses how video poker became illegal statewide in South Carolina as a result of the passage of Act. No. 125 of 1999, referencing the Joytime, supra decision, discussed above. He argues that § 27-16-110 (G) cannot now be applicable because "there are no 'taxes, license requirements, regulations and fees governing electronic play devices' currently provided by state law" as to video poker because such devices are now illegal throughout the State. He states that "[s]uch regulatory oversight is anticipated and required for operation of gambling devices by the Tribe." Gergel Opinion at 3.

Mr. Gergel further contends that the "plain language" rule of statutory construction governs this question:

> [t]he plain language of the Agreement and Act establish that the Catawba are authorized to operate video gambling only under the express approval and regulation of State law. The ban on video gambling which took effect July 1, 2000 therefore applies to the Catawba with the same force and effect as all other persons or parties.

Gergel Opinion at 3. Concluding that the provision in the second sentence of § 27-16-110 (G) "which protected the Tribe from their existing opt out provisions available to counties was limited to this circumstance above," Mr. Gergel finds no ambiguity in either the Settlement Agreement or the Act. Thus, he reasons that there is no need to resort to the doctrine of interpretation that any ambiguity is construed in the Tribe's favor. His analysis is that

> [i]f the Catawba or the General Assembly had intended to allow gambling by the Tribe regardless of any change in law, this intent would have been expressly stated and a means of regulating video gambling by the Tribe only provided.

Gergel Opinion at 4.

Other Arguments

It can also be argued that even though video poker is now illegal statewide pursuant to Act No. 125 of 1999, the literal language of the second sentence of § 27-16-110(G), together with the legislative intent implied thereby, is favorable to the Tribe's claim. The exception in § 27-16-110(G) states that "if the Reservation if located in a county or counties which prohibit the devices pursuant to state law," the Tribe is permitted to operate such devices on the Reservation. Thus, it may be argued that the Reservation is indeed literally in a "county or counties" in which video poker is illegal because video poker is illegal in every county in the State. Consistent with this argument, one could assert, would be the underlying intent of the General Assembly by § 27-16-110(G) that even if video poker is illegal generally, the Catawbas obtained the right of continuing legality as part of the settlement negotiations with the State.

A weakness with this argument, however, is that § 27-16-110 (G) speaks of "a county or counties which prohibit the devices pursuant to state law ...." (emphasis added). Under current law, to our knowledge, York County itself (as opposed to state law) has not spoken with regard to any prohibition on video poker since the county-by-county referendum was struck down in Martin v. Condon, supra. Certainly, it could be argued that the phrase "county or counties which prohibit the devices ..." is referring to a prohibition by the County as an entity, namely the referendum which was authorized by §§ 12-21-2806 and 12-2108 to be held in November 1994.

This brings us then to the Martin v. Condon case itself. Martin concluded that the legislation authorizing a "local option" referendum conducted statewide in each of the State's 46 counties in November, 1994 was unconstitutional "special legislation" in contravention of Art. III, § 34 of the State Constitution. The Martin Court recognized that in State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), cash payouts for video poker had been deemed legal under a then-existing exception to the State's gambling laws for machines with a "free play feature." In the Martin Court's view, § 12-21-2806 ("local option" law) allowing counties to opt out of the exception provided by former §16-19-60 for non-machine cash payouts had the effect of criminalizing "conduct that remains legal elsewhere under State law." 478 S.E.2d at 274. What made the local option provision a special law was that

> ... the effect of § 12-21-2806 is to criminalize in twelve counties conduct that is legal under a State criminal law. This effect conflicts with the constitutional requirement of uniformity in the area of State criminal laws and thus violates article III, § 34, as unconstitutional special legislation.

478 S.E.2d at 275.

There are two countervailing arguments which the Martin decision creates which may have applicability here. First, even though Martin struck down the county-by-county referendum, there is a well recognized body of law which concludes that a declaration of unconstitutionality does not remove all evidence of the unconstitutional act's existence. In Dillon County v. Md. Casualty Co., 220 S.C. 204, 67 S.Ed.2d 306 (1991), our Supreme Court recognized this rule by quoting Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U.S. 71 (1940). The Court noted that Chicot had declared that

> [t]he actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.

67 S.E.2d at 308, quoting 308 U.S. at 374. Based upon this reasoning, it could certainly be argued that even though the county-by-county referendum was subsequently struck down by Martin, the vote to "opt out" of the exemption making video poker legal by the voters of York County in November, 1994 was valid at the time of the vote, and thus for purposes of triggering the "right" of the Catawbas to have video poker on the Reservation was effective to do so. In other words, the decision of the voters of York County to opt out of video poker's status of legality vested the Tribe's right to continue to be empowered to have video poker on the Reservation, notwithstanding that the county-by-county referendum was ultimately declared unconstitutional in Martin. This same reasoning is implied by the Court's decision in Mibbs, Inc. v. S.C. Dept. of Revenue, 337 S.C. 601, 524 S.E.2d 626 (1999). [Court rejects that an unconstitutional taking of video poker machines seized in the 12 counties voting to opt out of video poker's status of legality had occurred when the General Assembly enacted referendum law.].

Martin v. Condon also has considerable relevance as to how § 27-16-110(G) will be interpreted with respect to the subsequent banning of video poker as part of a statewide criminal law. Clearly, the teaching of Martin is that criminal laws enacted by the General Assembly must be uniform statewide and that any statute which treats parts of the State differently for purposes of the criminal law runs the risk of violating Art. III, § 34 of the Constitution prohibiting "special legislation."

Here, it may be argued that if § 27-16-110(G) is interpreted to grant the Catawba Nation the right to operate video poker on the Reservation even after the enactment of Act No. 125 of 1999 making possession of video poker machines a criminal offense, such provision is invalid because it is a special law. Just as giving the counties the right to "opt out" of the statewide law granting an exception for video poker machines to the criminal statutes outlawing gambling was special legislation under Martin, so too could it be argued that granting the Tribe the right on its Reservation to "opt out" of Act No. 125, which criminalizes video poker, is a special law.

Our Supreme Court has consistently concluded that statutes must be interpreted to avoid potential constitutional problems. See, e.g., State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2002) [statute purporting to give DHEC the authority to determine whether to pursue prosecution "would cause it to run afoul of S.C. Const. art. V, § 24 [which] ... vests sole discretion to prosecute matters in the hands of the Attorney General ..."; therefore, the Court construed statute "to give DHEC authority over civil prosecutions."] 579 S.E.2d at 300. Thus, in view of the holding in Martin, a court might well construe § 27-16-110(G) consistently with the current State law prohibiting video poker and conclude the Tribe has no right to operate video poker on its Reservation. Such a reading would be consistent also with § 27-16-40's command making the Tribe subject to the "criminal ... jurisdiction ... of the State ...."

Conclusion

As stated above, the Catawbas' claims are credible, but not above legal challenge.

As to matters of fact, we conclude that a court would likely find § 27-16-110(G) to be ambiguous and seek extrinsic evidence to resolve the factual issues. The fact that highly skilled attorneys differ so dramatically as to the meaning of this provision of the Settlement Agreement and are in disagreement as to how the subsequent prohibition of video poker in South Carolina affects any rights the Catawba Tribe may have obtained under this Agreement demonstrates this ambiguity. In addition, persons directly involved in the negotiations which led to the 1993 Agreement have asserted informally their emphatic – and opposite – understandings of the meaning of the statute. Different interpretations, with opposite results, are clearly possible, based upon the language of the Agreement and implementing statutes.

The words of an instrument ordinarily must be given their plain meaning. However, where there exists an ambiguity, extrinsic evidence is necessary to interpret the drafters' intent accurately and completely. Fabian v. Fender, 326 S.C. 349, 483 S.E.2d 474 (Ct. App. 1997). As stated above, a court would likely find that such ambiguities and inconsistencies do indeed appear in the words of the several documents bearing upon this Agreement. Thus, we believe that resort to extrinsic evidence will probably be required to determine the full and accurate meaning of the provisions related to this question. This probability, as well as the strongly held positions of all concerned, makes litigation likely.

The collection of such extrinsic evidence has long been deemed beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., Op. No. 85-132, supra. An opinion of the Attorney General cannot adjudicate factual disputes. Id. However, such evidence could be collected, examined and interpreted by the appropriate body and by the usual means contemplated by the Rules of Civil Procedure and the Rules of Evidence. Sworn testimony, affidavits, depositions, requests for admission, subpoenas and similar fact-finding mechanisms would normally be accomplished under court supervision or, more infrequently, under the auspices of legislative hearings.

As to matters of law, our analysis of the relevant provisions, discussed herein, leads us to conclude that the Catawbas have a serious claim. Although we will strongly argue against that claim on behalf of the State, there exists at least the possibility that the Tribe could prevail in court. Ambiguous statutes relating to Indians are construed liberally and most favorably on Native Americans' behalf. A court would be likely to so construe the provisions in question here. Moreover, the Tribe can argue that their right to operate video poker on the Reservation vested either with the Settlement Agreement itself, or at the moment the voters of York County voted to prohibit video poker in 1994 as part of the local option referendum. Notwithstanding the fact that such referendum was ultimately struck down in Martin v. Condon, supra, the Tribe could reasonably contend that the vote was valid at the time it was held. Once any right to operate video poker on the Reservation vested, the Tribe could assert that such right was not, or could not be, altered by the statewide prohibition on video poker created by the General Assembly in Act 125 of 1999. Since video poker is prohibited today in a county in which the Reservation is located (as it is in every county) the Tribe could also argue that § 27-16-110(G) by the express terms of the exception contained in its second sentence protects its right to currently operate video poker on the Reservation. The fact that § 27-16-110(F) specifically states that the Tribe's right to operate bingo ceases if the State discontinues the licensing of bingo, while such language is not employed with respect to video poker, arguably suggests a further intent not to terminate the Tribe's right when video poker became illegal statewide.

Notwithstanding these arguments which the Tribe may legitimately make, the State of South Carolina possesses a strong policy against gambling, particularly video gambling, and the Attorney General's Office will seek to strictly enforce that policy in any litigation with the Tribe. We will vigorously assert that the Tribe presently possesses no right whatever to operate video poker on its Reservation. We will contend, as Mr. Gergel does in his opinion, that the first sentence of § 27-16-110(G) is controlling and that any right the Tribe possesses to operate video poker on the Reservation exists only "to the same extent that the devices are authorized by State law." (emphasis added). As of July 1, 2000, state law no longer authorized video poker, but instead declared video poker machines to be illegal contraband.

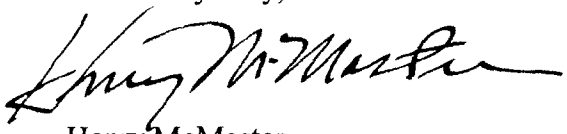
Thus, while the Tribe may possess legitimate legal arguments which cannot be readily dismissed, the State possesses substantive arguments, too. This Office will vigorously assert that "State law" making video poker operations and machines illegal statewide takes precedence over any vote by the voters of York County which might have earlier preserved video poker operations for the Tribe on its Reservation. Simply put, the State's position is that video poker is no longer "authorized by State law" and thus the Tribe has no present claim to any operation of video gambling on its Reservation.

We will also argue that, together with § 27-16-40, which demonstrates the General Assembly's intent to subject the Tribe to the same criminal laws as other citizens, § 27-16-110(G) could not have intended to make video poker legal on the Reservation at the same time that the General Assembly made it illegal statewide. Consistent therewith is the fact Martin v. Condon

mandates that the criminal laws must be uniform throughout the State and that the General Assembly may not constitutionally create a situation where a state criminal law is inapplicable in a particular geographic area. To authorize the Catawba Nation to make legal video poker in this lone area of the Catawba Reservation and nowhere else in South Carolina would arguably create an unconstitutional special law as was the case in Martin. Thus, we will argue that § 27-16-110(G) must be construed consistent with the State Constitution, with the result that once video poker was made illegal statewide, the Tribe lost any rights it may have earlier had to operate video poker on the Reservation.

In summary, one central argument the State will forcefully assert is that while the 1993 Settlement may have intended that video poker remain legal on the Reservation if the county or counties where the Reservation is located voted to prohibit such activity as part of the local option referendum, video poker did not continue to be legal on the Reservation after it was banned statewide by state law in 1999. Nevertheless, we must acknowledge that contrary arguments exist. One must conclude that the Tribe possesses a serious legal claim, but a claim which is not impervious to the strong arguments which we will assert against the Tribe's contentions. Thus, resort to extrinsic evidence – either in a judicial, quasi-judicial or legislative proceeding – will likely be necessary to fully and completely resolve this matter.

Yours very truly,



Henry McMaster

HM/an