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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 5, 1995

J. Gregory Hembree, Esquire
North Myrtle Beach City Attorney
1015 Second Avenue South
North Myrtle Beach, South Carolina 29582

Re: Informal Opinion

Dear Mr. Hembree:

You have asked the following questions, based on the fact that

> [a] group of developers, known as Million Dollar Mulligan, Inc., a Florida Corporation, is in the process of constructing a putt-putt course and golf hole in North Myrtle Beach, South Carolina. According to the developer, the golf hole will be used as a permanent, for free hole-in-one competition and is being called the "Million Dollar Mulligan". The developer has indicated that he will be applying for a business license in the City of North Myrtle Beach. Our city ordinances prohibit us from issuing a business license for illegal activities and we are attempting to determine if the proposed activity would constitute an illegal lottery or illegal gambling or both.
>
> The developer has informed me that the Million Dollar Mulligan will charge each contestant a ten ($10.00) dollar fee. In return, the contestant will receive twelve golf balls which he will hit at a hole approximately 135 yards away. If the contestant hits a shot within a certain distance of the hole, he qualifies to play for the million dollar prize. The owner subsequently holds a "shoot-out" among contestants who have qualified to play for the million dollar prize. Each contestant

> takes one shot at the hole, again approximately 135 yards away, and if a contestant makes a hole-in-one, he wins one million dollars. The owner carries insurance against a contestant winning the one million dollar prize and the insurance is paid from gross receipts of the business, including the ten ($10.00) dollar fee paid by the contestant.

Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1962) enunciates the criteria for determining a lottery which is prohibited by Art. XVII, Sec. 7 of the South Carolina Constitution. The elements, as specified by the Court, are:

1. the offering of a prize;

2. the payment of money or other consideration for the opportunity to win a prize;

3. the awarding of the prize by chance.

In addition, S.C. Code Ann. § 16-9-10 also forbids lotteries. Other statutory enactments prohibit various forms of gambling and gaming devices. See, e.g., § 16-9-40 (unlawful games and betting); § 16-9-50 (keeping unlawful gaming tables); § 16-19-80 (forfeiture of wagers); § 16-9-90 (betting on elections); § 16-19-130 (betting or wagers prohibited).

Previous opinions of this Office have concluded that the playing of the game of golf predominantly involves skill, not chance. In Op. Atty. Gen., March 24, 1986, we set forth the general definition of "chance" as it relates to lotteries and gaming:

> (c)hance, as one of the elements of a lottery, has reference to the attempt to attain certain ends, not by skill or any other known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity ... (I)t is not necessary that this element of chance be pure chance but it may be accompanied by an element of calculation or even of certainty; it is sufficient if chance is dominant or controlling factor ... .

Citing, 38 Am.Jur.2d, Gambling, Section 9 pp. 115-116. See also, Seattle Times Co. v. Tielsch, 495 P.2d 1366 at 1369 (Wash. 1972) ["(c)hance within the lottery statute is one which dominates over skill or judgment."]; Ops. Atty. Gen., December 5, 1978; October 11, 1978; March 17, 1978. See also, State v. Four Video Slot Machines, 453

S.E.2d 896 (S.C. 1995) ["Lucky 8 Line" machine involves chance and is illegal]. Therefore, in the 1986 opinion, we concluded:

> [i]nasmuch as the proposed golf tournament appears to be a game of skill, as opposed to a game of chance, such tournament would not constitute a lottery. However, as indicated above, such construction is based upon my understanding that an individual's success in such a tournament is based entirely upon his skills as a golfer.

Accord., Op. Atty. Gen., August 10, 1990 [proposed golf tournament not a lottery].

The 1990 opinion referenced a previous opinion of this Office which is particularly relevant to the inquiry here. In Op. No. 3397 (October 11, 1972), the question presented concerned the legality of games usually operated at fairs or carnivals. We concluded that such games, which involve a considerable degree of chance, were most probably illegal, both as lotteries and as contravening the gambling statutes, particularly § 16-19-130. We stated as follows:

> [u]nder South Carolina law, lotteries are specifically prohibited.
>
> Under this definition [as enunciated in Darlington], bingo, wheel games, number games decided by rolling balls, dice games and card games, inter alia, in which a small fee is paid in order to be allowed to participate with the hope of winning a greater sum or a prize of a greater value, and in which the result is decided by chance, are prohibited by statute. Both the operator and participant may be guilty of such violations.

The opinion further noted:

> When a lottery involves chance alone, and not the skill of the player, Section 16-515 [now § 16-19-130], South Carolina Code of Laws, provides further:
>
> > "[a]ny person within this State who ... records or registers bets or wagers ... with or without writing, upon the result of any ... trial ... of skill ... shall be guilty of a misdemeanor."

> It is the opinion of this Office that Section 16-515 [now § 16-19-130], above, prohibits games involving the shooting of firearms or the throwing of balls, inter alia, in which a fee is paid to participate and the skill of the participant is rewarded by a greater sum or a prize of greater value.

I recognize that courts in other jurisdictions have concluded that hole-in-one contests do not constitute a lottery or gambling. See, Las Vegas Hacienda v. Gibson, 359 P.2d 85, 87 A.L.R.2d 645 (Nev. 1961); Cobaugh v. Klick-Lewis, 561 A.2d 1248 (Pa. 1989). However, in Cobaugh, a well-reasoned dissenting opinion presented a strong argument that a hole-in-one contest, was different even from a golf tournament, and thus constituted a game of chance. The Justice thought the question so significant, he raised the issue sua sponte. Reasoning that while the game of golf is one of skill,

> [m]aking a hole-in-one, however, is such a fortuitous event that skill is almost an irrelevant factor. Because of that fact (an element of chance) combined with the payment of an entry fee to the East End Open Golf Tournament (consideration) and the automobile prize (reward), my view is that the necessary elements of gambling are present thus rendering the contract sub judice unenforceable as violating the Commonwealth's policy against gambling.

561 A.2d at 1251. The Justice further noted that "the possibility of a hole-in-one, even for the world's best players, is still remote." 561 A.2d at 1252. Estimating that the odds of making a hole-in-one were about 10,000 to 1, he concluded that

> ... the professional's chances of aceing a hole are more akin to an act of God than a demonstration of skill. Clearly, the possibility of a hole-in-one is sufficiently remote to qualify as the necessary gambling requirement of an element of chance.

Supra.

South Carolina has a longstanding, strong public policy against gambling. See, Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993). As was stated in Holliday v. Governor of State of S.C., 78 F.Supp. 918, 924 (D.S.C.W.D. 1948), affd., 335 U.S. 803, 69 S.Ct. 56, 93 L.Ed. 360 (1948), "it is the public policy of the State of South Carolina to suppress gambling." In view of this policy, our Court has refused to enforce wagers won. Rice v. Gist, 1 Strob. 82 (1846). And this Office has previously concluded that pari-mutual betting constitutes a lottery. Op. Atty. Gen., No. 86-119 (Dec. 1, 1986).

Former Attorney General McLeod has ruled that a hole-in-one contest could constitute a lottery, assuming the three elements of prize, chance and consideration were met, thus referring the inquiry to the local Solicitor to determine the exact facts. Op. Atty. Gen., April 25, 1977. It is highly significant that the well-respected former Attorney General of twenty-four years was unwilling to give his stamp of approval even to a hole-in-one contest on a mini-golf course.

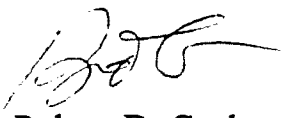
Accordingly, we think that the referenced commercial proposal would likely constitute a lottery, as well as gambling. We find particularly persuasive the reasoning that, unlike a golf tournament, where skill is primarily involved, the making of a hole-in-one "is such a fortuitous event that skill is almost an irrelevant factor." Cobaugh, supra at 1251. Statistics appear to fully back up our conclusion. In addition, we are advised that the difficulty of the pin placement is a significant factor in determining the likelihood of a hole-in-one. In view of all this, I see little to distinguish this game from the carnival games found illegal in Op. No. 3397, discussed above.

Thus, I strongly doubt that the proposal outlined above would pass muster under South Carolina law. This is particularly the case in view of the well-recognized rule that provisions against gaming are remedial in nature and, thus, should be broadly construed, State ex rel. District Atty. Gen. v. Crescent Amusement Co., 95 S.W.2d 310 (Tenn. 1936), and in light of South Carolina's strong public policy against gambling and lotteries. Of course, as with any other criminal matter, the ultimate decision to prosecute or not would rest primarily with the Circuit Solicitor, based upon his view of the precise facts. See, Op. Atty. Gen., April 25, 1977, supra.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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