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Memorandum

To: Mayor Keith Corbett and Council Members, Jeff Weldon, City Manager, and Shari Thornes, City Clerk

From: Steven J. Britzman, City Attorney

Date: May 2, 2018

Re: Municipal Regulation of Video Lottery location Pre-empted by State Law

Conclusion: State law does allow a municipality to consider the following criteria for authorizing video lottery machine placement when issuing an on-sale wine or malt beverage license (no other type of alcoholic beverage license). The criteria, as fully set forth below, include the number of establishments currently licensed for video lottery, the proximity of the business to other establishments licensed for video lottery, the type of business and manner in which the applicant proposes to operate it, the location of the business in relation to other businesses, residential areas, or activities within the same general area, the extent to which minors frequent a business connected to the one proposed, and the effect the proposed business has on economic development. I believe the final determination is made by the South Dakota lottery, but at least with respect to two alcoholic beverage license types—on-sale wine and malt beverages—the city can consider these State law criteria with respect to the decision whether to authorize video lottery machine placement in the proposed establishment. No other City ordinance or Home Rule Charter provision is applicable to the decision making. Please let me know if you have any comments or questions concerning this opinion.

Discussion: The South Dakota Supreme Court case of Law v. City of Sioux Falls (2011), resolved a number of questions concerning the ability of a municipality to regulate video lottery and in particular the location of video lottery. The Supreme Court ruled:

It specifically gave only the executive director [of the State Lottery Commission] the power to approve or disapprove any application for a license. SDCL 42-7A-57. In doing so, it provided that the director consider the application's proposed location.... In only one statute is a municipality given any power with regard to video lottery. SDCL 42-7A-64 allows a municipality to consider, when issuing two types of on-sale alcoholic beverage licenses, certain factors relevant to the placement of video lottery machines. Municipalities, however, are not given any power to license video lottery establishments, or otherwise control the location of such establishments. See SDCL 42-7A-64.

[¶14] Based on the character of the obligations imposed by the Legislature, we see no delegation of power or responsibilities to municipalities and no entrusting to municipalities the control video lottery. Rather, the statutes place all burdens upon the State. Thus, we conclude that South Dakota's legislative video lottery scheme is sufficiently comprehensive to make reasonable the inference

that the Legislature left no room for supplementary regulation of video lottery by municipalities. It is immaterial that the City is governed by a home-rule charter or empowered to enact zoning regulations.

SDCL 42-7A-64 is restricted in its application to applicants for a wine retailer alcoholic beverage license and to applicants for malt beverage licenses. In these two limited circumstances, a municipality may consider, in addition to the criteria for the issuance of an on-sale wine or malt beverage license, “the following criteria for authorizing video lottery machine placement issued an on-sale wine or malt beverage license”:

- (1) The number of establishments currently licensed for video lottery;
- (2) The proximity of the business to other establishments licensed for video lottery;
- (3) The type of business and manner in which the applicant proposes to operate it;
- (4) The location of the business in relation to other businesses, residential areas, or activities within the same general area;
- (5) The extent to which minors frequent a business connected to the one proposed; and
- (6) The effect the proposed business has on economic development.

The Full Text of the Statute is set forth below:

42-7A-64 Additional criteria for on-sale alcoholic beverage licensees in video lottery licensed establishments.

42-7A-64. Additional criteria for on-sale alcoholic beverage licensees in video lottery licensed establishments. A municipality or county may consider, in addition to the criteria for the issuance of an on-sale alcoholic beverage license, the following criteria for authorizing video lottery machine placement in establishments issued an on-sale alcoholic beverage license pursuant to subdivisions 35-4-2(12) and (16):

- (1) The number of establishments currently licensed for video lottery;
- (2) The proximity of the business to other establishments licensed for video lottery;
- (3) The type of business and manner in which the applicant proposes to operate it;
- (4) The location of the business in relation to other businesses, residential areas, or activities within the same general area;
- (5) The extent to which minors frequent a business connected to the one proposed; and
- (6) The effect the proposed business has on economic development.

The governing board shall certify on each application filed with the Department of Revenue for a license granted under subdivisions 35-4-2(12) and (16) whether the business premises is authorized for video lottery machine placement. An existing video lottery license may not be denied renewal or transfer based upon the criteria set forth in this section. The lottery may issue a video lottery license to those establishments certified pursuant to this section. Notwithstanding the above provisions, a county or municipality may not restrict the number of alcoholic beverage licenses issued under subdivisions 35-4-2(12) and (16) and certified for video lottery to a number less than those licensed as video lottery establishments on March 1, 1994.