



**THE ATTORNEY GENERAL
OF TEXAS**

January 30, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Representative Wilhelmina Delco
Chairman
Higher Education Committee
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78769

LO-89-8

Dear Representative Delco:

You have requested our opinion regarding the validity of a sales promotion being contemplated by a land developer. You explain the promotion in the following manner:

The developer's planned community has been selected for a participation in an upcoming 'Parade of Homes,' during which the public will be invited to tour the community. As a promotional effort, the developer would like to give away one of these homes, by allowing all persons who visit the development to register for a drawing, to be held at the close of the Parade of Homes.

All persons attending the Parade of Homes will be charged an admission fee in exchange for a tour of the homes. Payment of the admission fee will not be a prerequisite for participation in the drawing; nor does participation in the tour of homes automatically register someone for the drawing. For a period beginning approximately one month before the Parade of Homes, and continuing through the third and final weekend of the event, any adult may visit the community and register free of charge. Furthermore, the developer plans to promote the Parade of Homes and the giveaway through radio advertisements where people can register for the event through phone-in contests in which registration will be awarded to designated callers (e.g., the

tenth caller) without visiting the development.

There are three elements which are necessary to constitute a "lottery," which is invalid under Texas law: (1) one or more prizes "of value"; (2) distribution of the prizes by chance; and (3) the payment or promise of consideration for the chance to win. Attorney General Opinion JM-513 (1986). See Penal Code § 47.01(6) (definition of "lottery").

In Brice v. State, 242 S.W.2d 433 (Tex. Crim. App. 1951), the owner of a retail store held a drawing in which winners were selected from among visitors to the store who had registered for the drawing. The court found that the third element cited above, "the payment or promise of consideration," did not exist merely because an individual had walked into the store and registered for the drawing:

The 'consideration' in this case which moves from the parties participating in the drawing for the prize, or prizes, to appellant is entirely fanciful. It is not sufficiently substantial to be classed as a reality. If the people who registered are to be construed to have paid a consideration by merely stepping into the house and signing their names, we would find ourselves in conflict with all of the decisions of our civil courts on questions of contract involving a consideration.

242 S.W.2d, at 435.

The court added that the result was not altered by the fact that the store owner received "a benefit from the drawing in the way of advertising." Likewise, the situation you pose is not sufficiently similar to that in Attorney General Opinion JM-513 to bring it within the ambit of a "lottery." In Opinion JM-513, every participant in the drawing was asked to make a "voluntary" donation, and every ticket bore the statement "donations of \$5.00 requested." The opinion relied on City of Wink v. Griffith Amusement Co., 100 S.W.2d 695 (Tex. 1936), wherein the Supreme Court declared that

human nature is such that the average person would seldom, if at all, suffer the natural

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embarrassment of asking for a free
registration. (Emphasis in original.)

100 S.W.2d, at 697.

Under the circumstances you present, no embarrassment will occur, because only a portion of those persons eligible for the drawing will be asked to pay, i.e., those persons who tour the "Parade of Homes," and all of those individuals will be required to pay the admission charge. If, as you seem to indicate, the paying Parade of Homes participants constitute a relatively small subclass of all persons eligible for the drawing, we do not believe that their inclusion in the large class is sufficient to transform the entire drawing into a "lottery." On the basis of the facts presented here, we conclude the drawing at issue is not a "lottery" in violation of section 47.01 of the Texas Penal Code.

We caution, however, that, in circumstances as those described here, it is sound policy to avoid any suggestion of impropriety. As a result, we believe that the publicity for the sales promotion should emphasize that a person need not pay the admission fee for attendance at the Parade of Homes in order to be eligible for the drawing. Such publicity should begin well in advance of the Parade of Homes tour so that any interested person may visit the community and register for the drawing without paying the admission fee.

Yours very truly,



Rick Gilpin
Chairman
Opinion Committee

RG/lcd

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