

II.

Another point for consideration is that according to the advertising campaign only charitable organizations may redeem the bottle caps.

The only provision in the law exempting charitable organizations from the application of the overall gaming prohibitions of the Code of Alabama 1940, Recompiled 1958, which includes the lottery prohibition, is Title 14, Section 258, Code of Alabama 1940, Recompiled 1958. This exemption is applicable only to billiard tables and only where the billiard tables are operated by charitable organizations. I think it is beyond question that this exemption is not applicable to the facts presented in your letter.

Furthermore, the Supreme Court has made clear that Section 275 of the Code and Section 65 of the Constitution do not exempt charitable organizations. *Mosley v. State*, 255 Ala. 130, 50 So. 2d 433.

III.

Finally, a question may arise from a possible finding that the lottery was set up in another state i.e., the bottles and bottle caps were manufactured in and distributed from another state — and only advertised and sold in Alabama.

In *Salomon v. State*, 27 Ala. 26 (1855), the Alabama Supreme Court held that the selling of lottery tickets in this State on behalf of a proprietor in another state, constitutes the carrying on of a lottery in violation of the Alabama lottery laws. From this case, it follows that the selling in Alabama of the beverage bottles and caps, though manufactured in another state, also constitutes the carrying on of a lottery and, therefore, is prohibited by Section 275 of the Code and Section 65 of the Alabama Constitution. See *Try-Me Bottling Co. v. State*, *supra*.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

August 3, 1973

Honorable Roy H. Phillips
City Attorney
City of Phenix City
Russell County
Post Office Box 1207
Phenix City, Alabama 36867

Attorney General — Constitutionality — Elections
— Fees — Municipalities.

1. A qualifying fee for candidates for municipal office may be fixed by ordinance only if such ordinance provides a method by which a pauper may become a candidate.
2. An opinion of the Attorney General is advisory only.
3. The constitutionality of an ordinance may be determined only by the courts.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion dated June 26, 1973, is as follows:

"On October 6, 1970, the Board of Commissioners of the City of Phenix City adopted an Ordinance which provided in part 'There is hereby established a qualifying fee of Fifty (\$50.00) Dollars which shall be paid by all candidates who seek election to the Board of Commissioners of the City of Phenix City, Alabama, said qualifying fee shall be paid to the City Clerk at the time of the filing of the qualification papers with said City Clerk.' You will note that this Ordinance did not contain a provision for a person to sign an affidavit that he was unable to pay the \$50.00 qualifying fee. This Ordinance refers to the provisions of the Court of Alabama, as Recompiled 1958, Title 37, Section 33(2).

"Please advise if you feel this Ordinance is unconstitutional because it does not contain provision for the person to sign an affidavit if he cannot pay the qualifying fee and also advise if you feel the Ordinance would be constitutional if a provision of this sort were added by amendment."

The statute to which you refer, now codified as Title 37, Section 33(2), Code of Alabama 1940, Recompiled 1958, provides that all municipalities in which the election of officers is controlled by the general laws of this State may establish and fix a qualifying fee for candidates, by ordinance, not to exceed \$50.00 for any office.

Under the provisions of a statute of local application to one of the municipalities of this State, a filing fee was required to be paid by candidates for municipal office. No other method was provided for becoming a candidate. This statute was found to be unconstitutional by the United States District Court for the Southern District of Alabama in *Thomas v. Mims et al.*, 317 Fed. Supp. 179. The opinion in said case reads, in part, as follows:

"The door should not be closed on reasonable, non-arbitrary, or non-exorbitant qualifying fees as an aid to 'screening out fictitious and trumped-up candidates' provided such tests that a 'candidate can get his name on the ballot in some other fashion, either by nominating petition, primary election, or pauper's affidavit,' are met."

Based upon the case of *Thomas v. Mims et al.*, supra, you are advised that the Ordinance of the City of Phenix City is unconstitutional. You are further advised that, in order to constitutionally impose a qualifying fee upon candidates, the Ordinance to which you refer must be amended to provide a reasonable method by which paupers may become candidates. The filing of a verified pauper's oath would be one such reasonable method.

Due to the nature of the problem presented, we should here specifically state that the opinions of the Attorney General are advisory only and afford to a public officer only that protection prescribed by Title 55, Section 241, Code of Alabama 1940, Recompiled 1958. An authoritative determination of the constitutionality of any municipal ordinance may be made only by the judicial branches of the governments of the State of Alabama and the United States of America.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

August 30, 1973

Honorable Lewis W. Headley
P. O. Box 471
Clanton, Alabama 35045

County Board of Education — Teachers — Merit System —
Officers and Offices — Candidates.

1. A public school teacher may be a candidate for membership on a county board of education.
2. An employee in the classified service of the state may be a candidate for public office upon obtaining a leave of absence and is not required to resign his position in the service in order to become such candidate.
3. One may serve in the classified service of the state and at the same time be a member of county board of education.
4. All former opinions of this office including the one in Quar-