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STATE OF NEBRASKA
OFFICIAL
OCT 4 1991
DEPT. OF JUSTICE

DATE: October 4, 1991

SUBJECT: McCulley Township Ordinance

REQUESTED BY: E. Benjamin Nelson, Governor

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

On August 21, 1991, the township of McCulley in Boyd County, Nebraska, passed an ordinance pursuant to Neb.Rev.Stat. § 23-224(6) (Reissue 1987) "to prevent the exposure or deposit of offensive or injurious substances within the limits of the town." You have asked several questions regarding the statute under which the ordinance was passed, the Low Level Radioactive Waste Act (Act) and the Central Interstate Low Level Radioactive Waste Compact (Compact). We will address these issues individually.

It is important first to understand the nature of a township and the relationship between local, state, and multi-state legislation. Township is the term employed to describe a subdivision of a county, created by the State Legislature as a governmental agency and sometimes vested with certain powers of local government. 87 C.J.S. Town §3 (1954). Townships partake of the nature of municipal corporations and are sometime referred to as "quasi corporations" or "quasi-municipal corporations" possessing to a certain extent corporate capacity. 87 C.J.S. Town §4 (1954). The Nebraska Legislature provided for the creation of a township form of government in counties so electing through the process set out in Neb.Rev.Stat. §23-201 et seq. (Reissue 1987). Section 23-224 specifically lists those powers given by the legislature to the electors of a township.

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If a conflict does exist between the Act and a local ordinance, the Act will prevail. Similarly, if a conflict exists between a state statute or local ordinance and the Compact, because the Compact possess the characteristics of federal law, it would prevail. In State v. Kubik, 159 Neb. 509, 67 N.W.2d 755 (1959), the court held "a municipal corporation derives all of its power from the State and it has only such authority as the Legislature has granted to it. If the ordinance conflicts with the statute the latter is the superior law and the former is not enforceable. Phelps Inc. v. City of Hastings, 152 Neb. 651, 42 N.W.2d 300." 159 Neb. at 512. And in Arrow Club Inc. the Nebraska Supreme Court held "generally, an ordinance cannot prohibit what the legislature has expressly licensed, authorized or permitted." 177 Neb. at 694. The Nebraska Supreme Court has also held that a general law of state-wide concern takes precedence over any action taken by a home rule city under its charter. Dell v. City of Lincoln, 170 Neb. 176, 102 N.W.2d 62 (1960). While the township of McCulley is not a home rule city, it does similarly derive its power from the State and, exists as a quasi-municipal corporation. Therefore its ordinances would be viewed in the same light a municipal ordinance.

The court in Henderson v. Delaware River Joint Toll Bridge Comm'n, 362 Pa. 475, 66 A.2d 843, 849 (1949), held that "[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact." See also Kansas City Area Transportation Authority v. State of Missouri, 640 F.2d 173 (8th Cir. 1981). Similarly a political subdivision of the state may legislate in approbation but not in reprobation of a multi-state compact. This is so because a multi state compact has not only been approved by the state legislature of each state but also, to be effective, must have been ratified by Congress. This gives the Compact the characteristics of federal law. When the law of a state or one of its political subdivisions conflicts with federal law, the supremacy clause of the United States Constitution, Article VI, clause 2, provides that federal law supersedes the law of the state or its political subdivision.

Your first question is whether Neb.Rev.Stat. § 23-224 is consistent with the Compact so as to require its enforcement for the protection of the health, safety and welfare of the citizens and the environment. It is our determination that § 23-224 is not inconsistent with the Compact. Section 23-224 merely sets out the powers of the electors at the annual town meeting of townships in counties under a township organization. Since the ordinance passed by the McCulley township is identical to § 23-224(6), it is clearly not inconsistent with the underlying statute nor is it, as it is written, inconsistent with either the Act or the Compact. An ordinance is inconsistent with a statute "if it is contradictory in

the sense that the two legislative provisions cannot coexist." State v. Kubik, supra. See also, Bodkin v. State, 132 Neb. 535, 272 N.W.2d 547 (1937) and Arrow Club Inc. v. Nebraska Liquor Control Commission, 177 Neb. 686, 131 N.W.2d 134 (1964).

You next ask what effect, if any, Neb.Rev.Stat. § 81-15,105 (Reissue 1987) has on the McCulley township decision since the township is neither a municipality nor a county. "A town or township is an agency of the State, being a territorial and political division, organized for the convenient exercise of portions of the political power of the State, and sometimes referred to as a `quasi-municipal corporation.'" 87 C.J.S. Town §4, (1954). Neb.Rev.Stat. § 81-15,105 (Reissue 1987) states: "the Low Level Radioactive Waste Disposal Act shall supersede ordinances, resolutions, or regulations, now or hereafter in effect, of the governing body of the municipality or county or of state agencies which are inconsistent with the act."

As pointed out above, a township exists as a quasi-municipal corporation. As such, a township ordinance would have status equal to or less than that of a municipal ordinance. If the McCulley township ordinance were inconsistent with State statute, then, based on Arrow Club and Kubik supra, the latter is the superior law and the former is not enforceable. However, as stated above, the McCulley township ordinance, as written, is not in conflict with the state statutes, the Act, or the Compact.

Finally, you have inquired, if Neb.Rev.Stat. § 23-224 is inconsistent with the Compact or inconsistent with Neb.Rev.Stat. § 81-15,105, whether Article VI of the Compact or § 81-15,105 are contrary to the United States or Nebraska Constitutions. As stated above, Neb.Rev.Stat. § 23-224 is not inconsistent with Neb.Rev.Stat. § 81-15,105 (Reissue 1987). Likewise, we find no inconsistencies between Neb.Rev.Stat. § 23-224 and Article VI of the Compact. Since we found no inconsistencies in the comparisons you requested, we did not proceed to the second half of your question. However, if there are specific sections of the state or federal constitutions with which you are concerned, we would be glad to address those concerns in the context of the statute cited herein.

As stated in your opinion request, the party states to the Compact have determined that it is a policy of those states to cooperate in the protection of the health, safety, and welfare of their citizens and the environment, and to provide for and encourage the economical management of low level radioactive waste. Compact, Article I. Additionally, the Act states at § 81-1579 that part of the policy of the State is its responsibility to cooperate and coordinate with the Central Interstate Low Level Radioactive Waste Compact Commission and to protect the health, safety, and

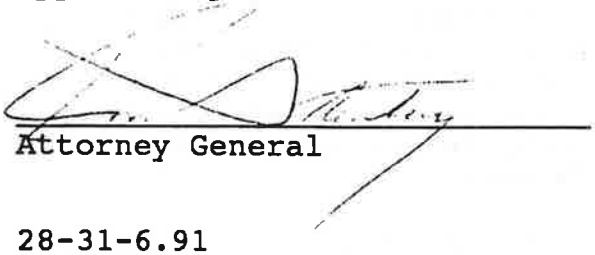
welfare of its citizens and the environment. Therefore, in response to your specific opinion request, it is our determination that Neb.Rev.Stat. § 23-224 (Reissue 1987) cited by the McCulley Township Board in passing their specific ordinance is not inconsistent with either the Compact or other cited State statutes. Further, it is our determination that the ordinance itself, as written, is not inconsistent with the Compact or other cited state statutes.

Sincerely,

DON STENBERG
Attorney General

Linda L. Willard
Assistant Attorney General

Approved By:



Attorney General

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