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NO.
STATE OF NEBRASKA
OFFICIAL
APR 14 1995
DEPT. OF JUSTICE

DATE: April 11, 1994

SUBJECT: Constitutionality of Proposed AM0545 to LB 615; Special Legislation, Detached Branch Banks

REQUESTED BY: Senator Timothy J. Hall
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

You have requested our opinion regarding the constitutionality of a proposed amendment, AM0545, to LB 615. The proposed amendment restricts the number of detached branch banks which may be established in a city of the primary class to three if the main office of the bank is located within an unincorporated city or area in a Class II county.

The amendment would change certain provisions of Neb. Rev. Stat. § 8-157 (1994 Cum. Supp.) to include the following:

> (ii) With the approval of the director, any bank in existence on the effective date of this act, the main office of which on the effective date of this act is located within an unincorporated city or unincorporated area in a Class II county which contains a city of the primary class, may establish prior to July 1, 2005, and maintain not more than three detached branch banks within the corporate limits of such city of the primary class, at which all banking transactions allowed by law may be made.

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Specifically, you inquire whether the restriction set forth in the proposed amendment would constitute special legislation as either "an unreasonable or a closed classification."

Article III, Section 18, of the Nebraska Constitution prohibits the Legislature from passing "local or special laws . . . [g]ranting to any corporation . . . any special or exclusive privileges, immunity, or franchise whatever. . . ." A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary method of classification, or (2) by creating a permanently closed class. ***Mapco v. State Bd. of Equal.***, 238 Neb. 565, 471 N.W.2d 734 (1991); ***City of Scottsbluff v. Tiemann***, 185 Neb. 256, 175 N.W.2d 74 (1970).

UNREASONABLE CLASSIFICATION

At first glance, it appears that the amendment would establish an unreasonable class consisting of banks with main offices within an unincorporated city or area and outside the corporate limits of a city of the primary class (City of Lincoln). To be valid as a reasonable classification, the legislative class must be based on some substantial difference or circumstances that would suggest the validity of diverse legislation with respect to the objects so classified. The amendatory language precludes a bank from establishing more than three detached branched banks within a city of the primary class if the bank is located within an unincorporated city or area. Other banks with their main offices located in the corporate limits are authorized to establish nine detached branch banks. ***See*** Neb. Rev. Stat. § 8-157(c)(i). Thus, the amendment establishes two classes of banks. The first class includes banks within the corporate limits of the city, and the second includes banks with main offices located in an unincorporated area outside the corporate limits of the city. It is only the latter class that is subjected to the limitation of three detached branch banks.

The Legislature may make classifications but cannot do so arbitrarily and unreasonably. ***Cox v. State***, 134 Neb. 751, 279 N.W. 482 (1938). Further, the classifications must be based on substantial differences of situations or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. ***State ex rel. Douglas v. Marsh***, 207 Neb. 598, 300 N.W.2d 181 (1980). The proper inquiry therefore is whether branch bank limitations imposed on banks with main offices located in unincorporated areas bears a reasonable and substantial relationship to the state's interest in regulating the number of branch facilities that may be established. In viewing this inquiry, we note that a bank located in a Class I or a Class III county may establish an **unlimited** number of detached branch banks. Class I counties are defined as counties in this

state with a population of three hundred thousand or more; Class II counties are those counties with a population of two hundred thousand and less than three hundred thousand; and Class III counties are counties with a population of at least one hundred thousand and less than two hundred thousand. *See* Neb. Rev. Stat. § 8-157(2)(f)(i), (ii), (iii). Accordingly, only banks in Class II counties are restricted to a limited number of branch bank facilities in counties having a population of one hundred thousand or more.

Further, there appears to be only one Class II county having a city of the primary class located therein. Cities of the primary class are defined by Neb. Rev. Stat. § 15-101 (1994 Cum. Supp.) to be cities having more than one hundred thousand and less than three hundred thousand inhabitants. The only city we are aware of that is a city of the primary class is Lincoln, Nebraska. For this reason, it seems that only banks in Lancaster County having their main offices in unincorporated areas are subject to the limit of three branch bank facilities within the corporate limits of the city. In this state, branch banks are authorized on a county-wide basis, and the number of branches that may be established is dependent on the population of the county categorized by class. Only banks in a Class II county with main offices in unincorporated areas are subject to the limitation. For this reason, we believe the classification is constitutionally suspect because the classification appears to bear no substantial and reasonable relationship to the stated objects of the legislation.

CLOSED CLASS

The second consideration in determining whether the classification constitutes special consideration depends on whether the class of banks is a closed class. A classification which limits the application of the law to a present condition and leaves no room or opportunity for an increase in the numbers of the class by future growth or development is special. In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. *See* ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991); ***City of Scottsbluff v. Tiemann***, 185 Neb. 256, 175 N.W.2d 74 (1970).

The class of banks created and so restricted appears to be a closed class since the number of banks is limited to those with main offices in unincorporated areas on the effective date of the legislation. That is, it is highly unlikely that the class of banks can expand since the number of banks affected would be fixed as of the effective date of the act. It seems that banks established in unincorporated areas after the effective date would not be subject to the branch bank limitation. Clearly, the restrictions would not operate equally on all banks similarly

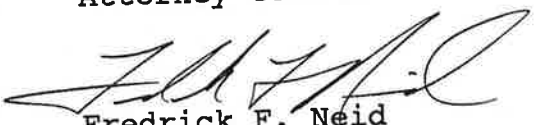
located in the county. The class is so narrowly constructed that we do not perceive any sequence of events whereby the class of banks could expand beyond the number in existence on the effective date of the legislative act.

CONCLUSION

The legislative class appears unreasonable, and the classification to be absolutely closed. For these reasons, we conclude that the amendatory provisions would be subject to legal challenge as special legislation in contravention of Neb. Const. art. III, § 18.

Sincerely yours,

DON STENBERG
Attorney General



Fredrick F. Neid
Assistant Attorney General

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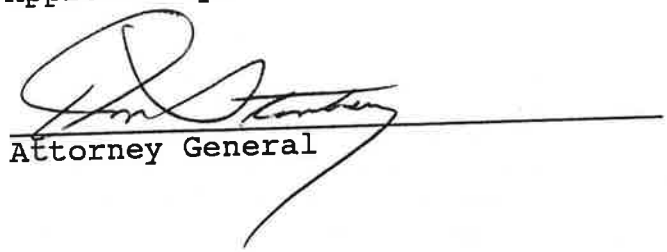
cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved by:



Attorney General