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NO.
STATE OF NEBRASKA
OFFICIAL
AUG 22 1994
DEPT. OF JUSTICE

DATE: August 19, 1994

SUBJECT: Interpretation of Neb. Rev. Stat. § 77-27,142.03, as amended - Submission of Local Option Sales Tax Questions to Electors of an Incorporated Municipality.

REQUESTED BY: Senator Joyce Hillman
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the interpretation and application of the provisions governing the submission of local option sales tax questions to electors of an incorporated municipality under Neb. Rev. Stat. § 77-27,142.03 (1990), as amended by 1994 Neb. Laws, LB 1175, § 3. Prior to its amendment, § 77-27,142.03 provided, in part: "The question of imposing a sales and use tax shall not be submitted to the electors of an incorporated municipality more often than once every twenty-three months." Section 3 of LB 1175 amended this language to provide as follows: "(2) The question of imposing a sales and use tax which has been submitted to the electors and failed shall not be submitted to the electors of an incorporated municipality again until twenty-three months after such failure." Your question is prompted by concerns as to the interpretation and application of § 77-27,142.03, as amended, to a situation involving the City of Scottsbluff, Nebraska [the "City"]. The City presently proposes to place a measure before the electors on the general election ballot in November, 1994, seeking approval of a local option sales tax of

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one-half of one percent to fund an economic development program. The City also anticipates submitting the question of renewing the current local option sales tax for the City of one-half of one percent on the primary election ballot in May, 1995. Your question is whether, if the voters do not approve the local option sales tax for economic development in November, 1994, will the failure of this measure preclude the City from placing the question of renewing the local option sales tax for the City on the primary ballot in May, 1995, as this would be within the twenty-three month period established by § 77-21,127,03, as amended, during which time the question of imposing a local option sales tax may not be submitted to the electors after failure of such a measure. You indicate that, if this is the case, you may introduce amendatory legislation in the next legislative session.

In construing a statute, courts should attempt to discover legislative intent from the language of the act and give effect to that intent. ***Peterson v. Minden Beef Co.,*** 231 Neb. 18, 434 N.W.2d 681 (1989). The reasons for the enactment of a statute, and the purposes and objects of the act, may be guides in attempting to give effect to the intent of lawmakers. ***State v. Jennings,*** 195 Neb. 434, 238 N.W.2d 477 (1976). A statute should be construed in the context of the mischief sought to be remedied and the purpose to be served. ***In re Boundaries of McCook Public Power Dist.,*** 217 Neb. 11, 347 N.W.2d 554 (1984). Statutory language should generally be given its plain and ordinary meaning and where the words of the statute are plain, direct and unambiguous, no interpretation is necessary to ascertain their meaning. ***Sorenson v. Meyer,*** 220 Neb. 457, 370 N.W.2d 173 (1985).

Prior to its amendment, § 77-27,127.03 provided that "[t]he question of imposing a sales and use tax shall not be submitted to the electors of an incorporated municipality more often than once every twenty-three months." Section 3 of LB 1175 amended this language to provide that "[t]he question of imposing a sales and use tax <u>which has been submitted to the electors and failed</u> shall <u>not be submitted to the electors of an incorporated municipality again until twenty-three months after such failure.</u>" (emphasis added). Thus, prior to its amendment, § 77-27,127.03 prohibited submitting the question of imposing a local option sales and use tax to the voters more than once during a twenty-three month period. This language precluded submission of a local option sales tax question for twenty-three months after either a successful, or unsuccessful, vote of the electorate on the question of imposing a sales and use tax. The language amending § 77-27,127.03, however, prevents the submission of additional questions to voters for approval of a local option sales and use tax for twenty-three months <u>only</u> after a local option sales and use tax question is submitted to the voters and has failed. Under § 77-27,127.03, as amended, if a local option sales and use tax question is submitte

to the voters and is passed, additional questions of imposing a local sales and use tax may be submitted to the voters of an incorporated municipality during the following twenty-three month period. If a local option sales and use tax question is submitted to the voters and rejected, however, § 77-27,127.03, as amended, precludes the submission of a local option sales and use tax question to the voters for a twenty-three month period.

This interpretation of the 1994 amendment to § 77-27,127.03 is confirmed by the legislative history of the amendment. The sponsor of the amendment, in discussing its purpose, stated:

> [W]hat it does is some clarification with some municipalities that were looking at the city sales tax and what they might do and that they had some problems with the fact that once they had offered an initiative that they would not be able to submit anything to the voters again for 23 months. And I think what the intent was there was that if an initiative failed, that they would not be able to come back. But if it passed there wouldn't be any problems with them coming back with another initiative and looking at again increasing their sales tax on a local level. . . .[T]he purpose is that if an initiative is offered or if the option is offered and the voters vote it down, that you aren't allowed to hassle local entities if they had said no if it failed. . . .[I]t's a clarification that you can't come back only if it has failed, but if it had not failed they wouldn't be able to come back.

Floor Debate on LB 1175, 93rd Neb. Leg., 2nd Sess. 13252 (April 12, 1994) (Statement of Sen. Hillman).

In construing a legislative act, resort may be had to the history of its passage for the purposing of determining legislative intent. ***Georgetown Ltd. Partnership v. Geotechnical Services, Inc.***, 230 Neb. 22, 430 N.W.2d 34 (1988). While the language of § 77-27,127.03, as amended, is plain and unambiguous, and resort to legislative history is unnecessary, the explanation of the purpose of the amendment in the floor debate confirms that the amendment was intended to prevent the submission of local sales and use tax questions to voters after failure of a submission for a period of twenty-three months, while allowing further submission of questions to the voters during this period if a local option sales and use tax vote was approved by the electorate.

With respect to the specific situation regarding the City, the local option sales and use tax question to be placed on the general election ballot in November, 1994, would propose a local option sales and use tax to fund an economic development program under the

Local Option Municipal Economic Development Act, Neb. Rev. Stat. §S 18-2701 to -2738 (1991 and Supp. 1993) [the "Act"]. Section 18-2713 of the Act provides that, "[b]efore adopting an economic development program, a city shall submit the question of its adoption to the registered voters at an election." This section further requires that the ballot question include "the year or years within which the funds from local sources of revenue are to be collected, the source or sources from which the funds are to be collected, [and] the total amount to be collected for the program from local sources of revenue,. . . ." The Act authorizes voters to approve "a local option sales tax" as a source of funding an economic development program. § 18-2713.

The question which arises is whether, if the vote on the local option sales and use tax question for economic development purposes submitted in November, 1994, fails, is the City prohibited from submitting to the voters in May, 1995, the question of approval of a local option sales and use tax for city purposes, as this would be within twenty-three months of the voters' rejection of a local option sales and use tax. In our view, the language of § 77-27,127.03, as amended, would preclude submission of a local option sales and use tax question by the City in May, 1995, if the question submitted in November, 1994, fails. The statute is worded in such a manner as to preclude submission of "[t]he question of imposing a sales and use tax" for twenty-three months if a measure has been submitted and failed. While the question to be submitted in November, 1994, is designated for the purpose of funding an economic development program, and the question to be submitted in May, 1995, is to impose a sales and use tax for general city revenue purposes, we do not believe the different purposes served by the proposed taxes render inapplicable the twenty-three month waiting period if the question submitted in November, 1994, fails. The statute does not condition application of the waiting period on the nature or purpose for which a local option sales and use tax question is submitted; rather, it speaks simply in terms of the submission of a local option sales and use tax question to the voters. This is consistent with the interpretation LB 1175 recently adopted by the Nebraska Department of Revenue. Revenue Ruling 9-94-2 (August 9, 1994). While construction of a statute by the department or agency charged with enforcing it is not controlling, considerable weight will be given to such construction. ***McCaul v. American Sav. Co.***, 213 Neb. 841, 331 N.W.2d 795 (1983).

An argument could be made that § 77-27,127.03, as amended, prevents only resubmission of the same question regarding imposition of a local option sales and use tax for twenty-three months after a specific question has been rejected by the voters. Applying this interpretation to the facts presented, if th question seeking approval of a local option sales and use tax fo

economic development purposes failed, the City would only be precluded from submitting the question of imposing a sales and use tax for this specific purpose for twenty-three months, and would not be precluded from submitting the question of imposing a sales and use tax for general revenue purposes within this time period. While such an interpretation is not implausible, it is by no means clear that, if the November, 1994, measure fails, the City could submit a local option sales and use tax question again in May, 1995. If the November measure fails, and the question submitted in May, 1995, is approved, the City could be subject to a lawsuit challenging the validity of the sales tax authorized by the May election. Such a lawsuit, if successful, would surely have an adverse effect on the City's finances. Therefore, in view of your stated intent in requesting our advice on this question, we urge you to consider introducing legislation clarifying this issue in order to avoid any uncertainty as to the interpretation and application of § 77-27,127.03 under these circumstances.

Very truly yours,

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

APPROVED BY:

DON STENBERG, Attorney General