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STATE OF NEBRASKA
OFFICIAL
APR 1 1992
DEPT. OF JUSTICE

DATE: April 1, 1992

SUBJECT: LB 1241; Constitutionality of a proposed procedure whereby the Executive Board of the Legislative Council would approve completion of certain construction projects after funds for those projects were appropriated.

REQUESTED BY: Senator Ron Withem
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 1241 is a bill which, among other things, would change the responsibilities and powers of the various divisions within the Department of Administrative Services with respect to the purchase, lease and disposition of real and personal property for state agencies. The intention of the bill is apparently to centralize and coordinate the real property resources owned and leased by the State.

Section 1(2) of LB 1241 appropriates various sums to renovate the Stone Office Building at the Norfolk Regional Center. You are concerned with certain proposed amendments to Section 1(2). Specifically, you are concerned with that portion of AM3692 which would add the following language to Section 1(2) of LB 1241:

> The State Building Administrator shall report to the Executive Board of the Legislative Council a detailed analysis of the estimated cost to provide safe and comfortable office space in the Stone Office Building that conforms to applicable building and fire codes on or before July 1, 1992. If the cost exceeds the

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> appropriation provided in this section, the executive board shall determine whether or not the project should be completed.

You have posed a number of questions concerning the propriety of this amendatory language. We will consider your various questions in a somewhat different order than they were presented.

You ask whether the portion of AM3692 quoted above, "...constitutes an unconstitutional distribution of power in violation of Article II, Section 1 [the Separation of Powers Clause], of the Nebraska Constitution." We believe there are constitutional difficulties with the language in question.

We have previously considered the propriety of legislative bills which proposed procedures similar to those set out in AM3692. For example, in Opinion of the Attorney General No. 87114, December 9, 1987, we considered a proposed procedure for distribution of the Nebraska Energy Settlement Fund whereby the Governor developed a plan for disbursement of the energy overcharge monies in the Fund and submitted that plan to the Legislature. The Appropriations Committee of the Legislature then conducted hearings on the plan and considered appropriations to carry out the Governor's proposal. No monies could be spent from the Fund without an appropriation based upon legislative approval of the Governor's plan.

In Opinion No. 87114, we concluded that the proposed disbursement procedure violated Article II, Section 1 of the Nebraska Constitution because it involved the Legislature in the functions of the Executive Branch of government. We stated:

> The Legislature is, in essence, requiring legislative approval before expenditure of the funds. The fact that the bill is written in terms of legislative approval for the appropriation does not alter the clear intent of the act requiring legislative approval for the expenditure. The Legislature is in effect attempting to both make the law and administer it; appropriate money, and spend it. This is a violation of the separation of powers article of the Constitution of the State of Nebraska.

Opinion No. 87114 at 3.

Similarly, in 1963, we considered a bill which would have provided that no expenditure of funds for the construction of state buildings could be made from the state institutional building fund without prior authorization of the Legislature. Report of the Attorney General 1963-1964, No. 22 at 37. In that opinion, we again concluded that such strictures upon executive agencies

involved the Legislature in encroachment upon the Executive power, and violated the Separation of Powers doctrine. We stated:

> It is our conclusion that, while the Legislature has exclusive control over appropriations and the granting of the power to take title to real estate, it must exercise this control when it passes the bills in which it limits or restricts, or permits the action of the executive agency involved. It may not retain control over the expenditure or use of the power by requiring approval of the Legislature or any committee of the Legislature subsequent to the passage of the law in which the appropriation or power is given. To do so is to invade the executive functions in such a manner as to violate Article II of the Nebraska Constitution requiring the separation of powers of government.

Id. at 39.

It seems to us that the approval process contemplated by the portion of AM3692 at issue is quite similar to the situations discussed in the opinions cited above. AM3692 would appropriate money for renovation of the Stone Office Building. However, after the appropriation, the Executive Board of the Legislative Council would still retain some control over completion of the project. In our view, this continued control impermissibly involves the Legislature in functions of the Executive branch of government. Any decision as to whether the renovation project should be completed if its costs overrun the appropriation should be left to the executive agency involved, since the determination if other funds are available or if there are other means to complete the project is really an executive function. Therefore, we believe this portion of AM3692 is of suspect constitutionality.

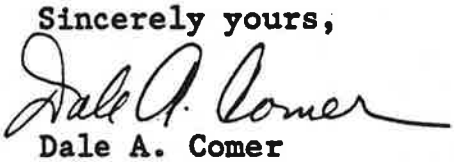
You also ask whether the portion of AM3692 giving review authority to the Executive Board of the Legislative Council constitutes some form of improper delegation of legislative authority. In previous opinions, we have indicated that the Legislative Council and its Executive Board are creatures of the Legislature which are not separate and distinct from it, but merely part of the Legislature itself. Opinion of the Attorney General No. 49, March 6, 1981; Opinion of the Attorney General No. 50, March 13, 1981. As a result, we believe that those bodies can perform investigatory and other functions for the Legislature so long as they do not perform duties specifically required of the Legislature itself in the Nebraska Constitution. In that light, we do not believe there is a delegation problem with the language in AM3692.

Finally, you ask whether "Amendment 3692 is a violation of any other provisions in law." We would respond to that general question in a broader sense with respect to LB 1241 in its entirety.

In previous opinions, we have indicated that substantive legislative provisions should not be included in the same bill along with appropriation legislation. Opinion of the Attorney General No. 91020, March 25, 1991; Opinion of the Attorney General No. 24, February 13, 1981; Opinion of the Attorney General No. 289, May 14, 1980; Report of the Attorney General 1977-1978, No. 241 at 368 and No. 75 at 112; Report of the Attorney General 1975-1976, No. 201 at 281. This position is based upon the constitutional provisions relating to appropriations bills which indicate that they should be restricted to making appropriations only, and should not enact substantive legislation.

LB 1241 contains several appropriations provisions for renovation of the Stone Office Building and for other purposes. It also contains considerable substantive legislation dealing with the administration of the real property owned by the State. For the reasons set out in our various opinions cited above, we believe that LB 1241 impermissibly joins appropriation and substantive legislation in the same bill.

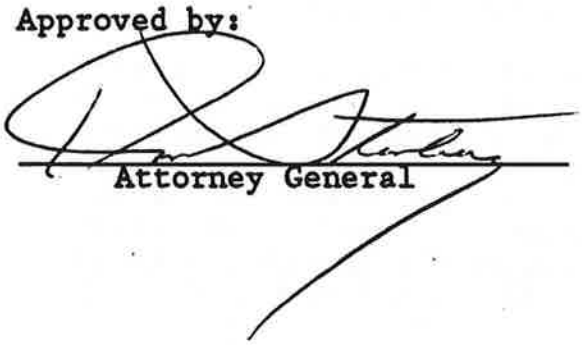
Sincerely yours,



Dale A. Comer
Assistant Attorney General

cc. Pat O'Donnell
Clerk of the Legislature

Approved by:



Attorney General