DON STENBERG
Attorney General

STEVE GRASZ
SAM GRIMMINGER
Deputy Attorneys General

WARREN D. LICHTY
Assistant Attorney General
Chief, Roads Section

OFFICE OF THE ATTORNEY GENERAL

STATE OF NEBRASKA

STATE HIGHWAY BUILDING
PO BOX 94759
LINCOLN NE 68509-4759

Telephone (402) 479-4611
FAX (402) 479-4325

ASSISTANT ATTORNEYS GENERAL

Gary R. Welch
Robert G. Avey
John E. Brown
William J. Orester
Jeffery T. Schroeder
K. Osi Onyekwuluje

#92113

NO.
STATE OF NEBRASKA
OFFICIAL
SEP 23 1992
DEPT. OF JUSTICE

DATE: September 22, 1992

SUBJECT: Authority for construction of highway weighing stations.

REQUESTED BY: Allan L. Abbott, Director-State Engineer

WRITTEN BY: Don Stenberg, Attorney General
Warren D. Lichty, Assistant Attorney General

Basically, your inquiry is whether a highway weighing station is a part of the State highway where it is located or is in the nature of a capital expenditure such as State office and other buildings. This question, in part, turns on an interpretation of Neb.Rev.Stat. §§81-1108.41 through 1108.43 having to do with State buildings. Section 81-1108.41 commences by prohibiting an appropriation for drawings and construction without certain things having happened. Such an appropriation would be normal for a capital construction project for the erection of a building, but not at all normal for a highway construction project. The Department of Roads has broad authority for highway engineering and construction. Therefore, it would seem that the power of the Department of Roads should be next examined.

At the outset, it would appear that the Department of Roads has authority to construct weighing facilities. Neb. Rev. Stat. §39-1309 (Reissue 1988) provides, in part, as follows: "(2) The state highway system may be redesignated, relocated, redetermined, or recreated by the department with the written advice of the State Highway Commission and the consent of the Governor."

Neb. Rev. Stat. §39-1316 (Reissue 1988) provides: "The department shall be responsible for the preparation and adoption of plans and specifications for the establishment, construction, and maintenance, of the state highway system."

Neb. Rev. Stat. §39-1320 (Reissue 1988) provides: "(1) The department is hereby authorized to acquire, . . . lands, real or personal property . . . for . . . state highway purposes . . . . (2) State highway purposes, . . . shall include . . . . (d) Weighing stations . . . ."

Neb. Rev. Stat. §39-1337 (Reissue 1988) provides: "The construction, maintenance, protection, and control of the state highway system shall be under the authority and responsibility of the department, except as otherwise provided in sections 39-1339 and 39-1372." Section 39-1339 refers to connecting links of State highways through municipalities, and section 39-1372 refers to freeways. Neither of those exceptions are relative to this subject.

Neb. Rev. Stat. §39-1301 (Reissue 1988) indicates:

> In designating the highway system of this state, as provided by the provisions of section 39-1301 to 39-1362, the Legislature places a high degree of trust in the hands of those officials whose duty it shall be, within the limits of available funds, to plan, develop, construct, operate, maintain, and protect the highway facilities of this state, for present as well as for future uses.
>
> . . . .
>
> To this end, it is the intent of the Legislature, subject to the limitations of the Constitution and such mandates as the Legislature may impose by the provisions of sections 39-1301 to 39-1362, to designate the Director-State Engineer and the Department of Roads, acting under his direction, as direct custodian of the state highway system, with full authority in all departmental administrative details, in all matters of engineering design, and in all matters having to do with the construction, maintenance, operation, and protection of the state highway system.
>
> . . . .
>
> . . . It is the intent of the Legislature to grant authority to the Director-State Engineer to exercise sufficient power and authority to enable him and the department to carry out the broad objectives hereinbefore stated in this section.

The authority of the Department of Roads over the State highway system, including construction, is evident. Conversely,

the statutes dealing with capital construction clearly appear not to cover the construction of roads on the State highway, including weighing stations. Neb. Rev. Stat. §81-1108.42 (Reissue 1987) prohibits the Director of Administrative Services from issuing a warrant for final payment for any contract for the construction of any capital facility for any State agency or department, unless there is on file a certificate of a professional engineer or architect that all work conforms to the plans and specifications. Neb. Rev. Stat. §81-1108.43 (Reissue 1987) prohibits State agencies and departments from performing for themselves any of the services normally performed by a professional consulting engineering or architect for preparations of plans and specifications for building construction. This section also contains the following: " . . . [E]xcept that the terms of this section shall not apply to section 83-134, or to the Department of Roads, ... " Thus, it seems clear that the provisions of Neb. Rev. Stat. §§81-1108.41 through 1108.43 do not apply to highway construction, including scales facilities.

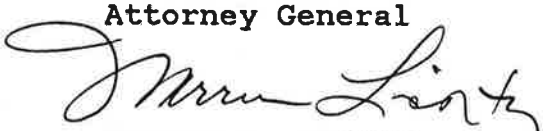
Do not, however, jump to the conclusion that the department is, perforce, exempt from all capital construction restrictions and regulations. Neb. Rev. Stat. §39-1355 (Reissue 1988) provides, in part:

> The department shall also have authority to lease, purchase, construct, or cause to be constructed, buildings for office accommodations, which are necessary in the administration of the duties of the department, and buildings for the storing and housing of materials, machinery, equipment, and supplies; *Provided*, that the department may not construct or cause to be constructed any building exceeding a cost of one hundred thousand dollars without the consent of the Legislature. The maintenance, protection, and control of the materials, machinery, equipment, supplies, tools, and buildings shall be under the authority and responsibility of the department.

From a practical point of view, it is our understanding that no part of a weighing station or scales facility, has, as a substantial function, the housing of offices or storage facilities. Based upon this understanding, it is our conclusion that the construction of weighing stations and scales facilities in connection with the State highway system are governed and controlled by the provisions of Chapter 39 of the statutes, and not by the provisions of Chapter 81.

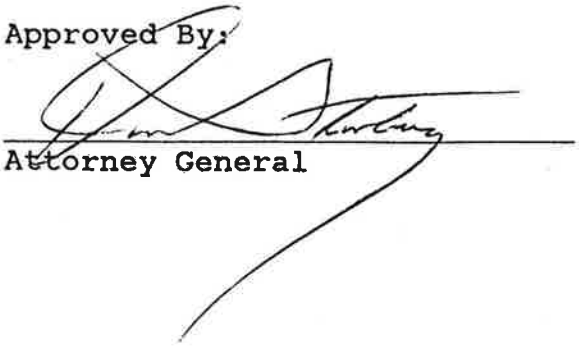
Sincerely,

DON STENBERG
Attorney General



Warren D. Lichty
Assistant Attorney General

Approved By:



Attorney General