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REC.
STATE OF NEBRASKA
OFFICIAL
SEP 30 1992
DEPT. OF JUSTICE

DATE: September 29, 1992

SUBJECT: Scope of the Governor's Special Session Call under Article IV, Section 8 of the Nebraska Constitution; LB 11 and the Municipal Infrastructure Redevelopment Fund

REQUESTED BY: Senator Stan Schellpeper
Nebraska State Legislature

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

LB 11, introduced in the Third Special Session of the Ninety-Second Nebraska Legislature, would amend Neb.Rev.Stat. § 77-2602 (1991 Supp.) so as to reduce the amount of cigarette tax revenues placed in the Municipal Infrastructure Redevelopment Fund from 4.5 million dollars each fiscal year to 3 million dollars each fiscal year. Under LB 11, the tax revenues taken from the Municipal Infrastructure Redevelopment Fund would be placed in the State's General Fund. You have now requested our opinion as to whether LB 11 is within the scope of the call established by Governor Nelson's Proclamation of September 16, 1992, calling the Legislature into special session commencing on September 21, 1992. As discussed below, we believe that LB 11 is within the scope of the call.

Article IV, Section 8 of the Nebraska Constitution provides as follows:

> The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together.

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We have discussed this constitutional provision in numerous previous opinions, and we have noted that the final portion of Article IV, Section 8 places an express limitation on the power of the Legislature to act during a special session. Opinion of the Attorney General No. 89069, November 9, 1989. That limitation was described in Arrow Club, Inc. v. Nebraska Liquor Control Commission, 177 Neb. 686, 689, 131 N.W.2d 134, 137 (1964):

> It is well established that the Legislature while in special session can transact no business except that for which it was called together. The proclamation may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation.

(citations omitted).

While the court in Arrow Club noted the express constitutional limitation on the power of the Legislature to act in a special session, it also stated:

> While the Legislature must confine itself to the matters submitted, it need not follow the views of the governor or legislate in any particular way. Within the special business or designated subjects submitted, the legislature cannot be restricted or dictated to by the governor. It is a free agent, and the governor, under the guise of definition, cannot direct or control its action. The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened. . . .The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the call if it can be done by any reasonable construction.

Id. at 689-90, 131 N.W.2d at 137. We have also previously indicated that, in applying the principles surrounding legislative action and the scope of the call, ". . . the majority of courts deciding cases challenging legislation enacted at special legislative sessions as outside the scope of the call have adopted a liberal construction, upholding legislative acts if they can conceivably fall within the subjects mentioned within the call." Opinion of the Attorney General No. 86078, November 14, 1986. With these various legal propositions in mind, we will turn to the legislation and call at issue in your opinion request.

The initial portion of Governor Nelson's legislative call of September 16, 1992, provides that the Legislature is called into special session to consider enacting legislation: "1. To reduce appropriations approved by the 92nd Legislature, and to appropriate funds for certain deficit appropriations." We believe that LB 11 fits within this portion of the call.

Neb.Rev.Stat. § 77-2602 (1991 Supp.) provides, in pertinent part,

> (1) Every person engaged in distributing or selling cigarettes at wholesale in this state shall pay to the Tax Commissioner of this state a special privilege tax. . . . Commencing July 1, 1989, and continuing until July 1, 2009, the State Treasurer shall place the equivalent of sixteen cents of such tax less four million five hundred thousand dollars each fiscal year of proceeds of such tax in the General Fund. . . . The State Treasurer shall distribute the remaining proceeds of such tax in the following order: . . .
>
> (g) Seventh, beginning July 1, 1989, and continuing until July 1, 2009, the State Treasurer shall place in the Municipal Infrastructure Redevelopment Fund the sum of four million five hundred thousand dollars each fiscal year to carry out the Municipal Infrastructure Redevelopment Fund Act. The Legislature shall appropriate the sum of four million five hundred thousand dollars each year for fiscal year 1989-90 through fiscal year 2008-09.

Section 77-2602 was most recently part of LB 703, passed by the Legislature in 1991. The 1991 legislative session was the first session of the 92nd Nebraska Legislature. As a result, it appears to us that subsection (1) (g) of Section 77-2602 quoted above involves an appropriation "approved by the 92nd Legislature" as described in the Governor's call.

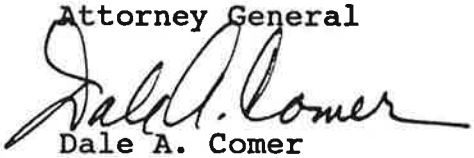
LB 11 would essentially re-enact Section 77-2602 including those portions of that section quoted above while reducing the amounts to be placed in the Municipal Infrastructure Redevelopment Fund each fiscal year from 4.5 million dollars to 3 million dollars. Therefore, we believe that the effect of that bill would be to reduce an appropriation approved by the 92nd Legislature in 1991. As such, the bill falls squarely within Section 1 of the Governor's call noted above.

Your opinion request letter appears to indicate that you have some concern that the alleged uncertainty with whether LB 11 fits within the Governor's call could adversely impact the effectiveness

of Section 77-2602 in the future. In that regard, we would simply note that the Governor could amend the call to remove any uncertainty as to whether LB 11 is appropriate in this special session. Jaksha v. State, 222 Neb. 690, 385 N.W.2d 922 (1986). We would also note that our views as to whether LB 11 fits within the Governor's call for the special session go only to that issue. We do not in any way take a position on the substantive merits of LB 11 through this opinion.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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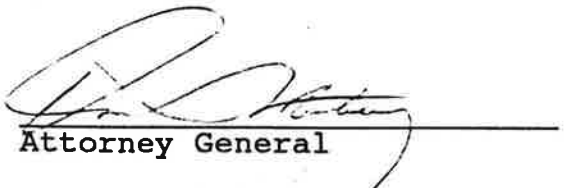

Attorney General

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