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STATE OF NEBRASKA
OFFICIAL
DEC 30 1992
DEPT. OF JUSTICE

DATE: December 22, 1992

SUBJECT: Proposed Legislation: One-Call Notification System Act

REQUESTED BY: Senator John C. Lindsay
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

You have requested our opinion regarding potential constitutional problems with the proposed One-Call Notification System Act. This legislation was drafted in response to federal requirements Nebraska must meet in order to maintain a Department of Transportation pipeline safety grant. Specifically, you are concerned that the proposed act may constitute special legislation under article XII, section 1, and article III, section 18, of the Nebraska Constitution, and that penalties imposed in the proposed legislation may violate article VII, section 5, of the Nebraska Constitution. We will first address your specific concerns; we will then discuss other constitutional issues raised by your legislation.

I. The Proposed One-Call Notification System Act

The legislation at issue establishes a "one-call notification center," which will be operated by a nonprofit corporation and will receive and provide notice of excavation occurring in various areas. The proposed act requires excavators to notify the center of any proposed excavation, and the center then notifies all operators of underground facilities in the area of the proposed excavation. The operators which will be notified of excavation activity include operators of water, sewage, oil, and gas

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equipment; electronic, telephonic, and telegraphic communications; fiber optics; cable television; and electric energy. Under the proposed legislation, these operators must advise excavators of the approximate location of their underground facilities by marking the facilities' locations. The center is also responsible for informing excavators of operators having underground facilities in the relevant excavation area.

The proposed act requires every operator in the state to become a member of the center, receive its services, and share the costs of the center's operation. The center, operated by what appears to be a private nonprofit corporation, will be governed by a 20-member board of directors consisting of representatives from telecommunications, cable television, natural gas distribution, and transmission pipeline companies; municipalities; public power districts and rural electric utilities; the Department of Roads; governmental utility providers; and the excavation industry. The board of directors is initially appointed by the Governor, but the directors' successors will be elected pursuant to the center's bylaws.

The legislation states that the board of directors shall:

> establish the operating procedures and technology needed for a one-call notification center, establish a notification process, establish a competitive bidding procedure to select a vendor to provide the notification service, and establish a procedure by which members of the center share the costs of the center on a fair, reasonable, and nondiscriminatory basis.
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> The board shall adopt and promulgate rules and regulations to carry out the One-Call Notification System Act. The initial rules and regulations shall be promulgated by March 1, 1994.

Proposed One-Call Notification System Act § 17.

The proposed act also provides penalties for damaging underground facilities and for violating the act in any respect. An excavator who fails to give notice of an excavation and who damages an underground facility is strictly liable to the damaged facility's operator for the cost of repairs. Similarly, an excavator who gives such notice and damages a facility is liable for the cost of repairs, unless the damage was due to the underground facility operator's failure to mark its facilities. Anyone who violates the act is also subject to a civil penalty. If

the violation relates to natural gas and hazardous liquid pipelines, the penalty is an amount not to exceed $10,000 for each violation for each day the violation continues, up to a maximum of $500,000. If the violation relates to any other type of underground facility, the penalty may not exceed $500 per day, up to a maximum of $5,000.

The legislation is unclear regarding whether the state or the nonprofit corporation imposes and receives the penalties; the standards for imposition of the penalties; who enforces the penalties or brings action to collect the penalties; and what procedural protections are available when one violates the act and is assessed a penalty.

Although the proposed act is also unclear in this regard, the act appears to assign specific functions to, and impose various deadlines upon, one private, nonprofit entity. While the act makes the first board of directors somewhat accountable to the state via the board's appointment by the Governor, all subsequent board members will be privately selected pursuant to the corporation's bylaws.

Other states have enacted similar legislation, but many of these acts' key provisions differ from those contained in Nebraska's proposed legislation. *See* Colo. Rev. Stat. Ann. §§ 9-1.5-101 to 9-1.5-105 (West 1990) (underground facility operators <u>may</u> form a notification association; civil penalties to be imposed by court in favor of state; penalties collected credited to general fund); Iowa Code Ann. §§ 480.1 to 480.3 (West 1991) and 1992 Iowa Legis. Serv. ch. 1103 (West) (statewide notification center organized as nonprofit corporation; all underground facility operators must participate and share cost; penalties are collected in legal proceedings, remitted to state treasurer, and credited to general fund); Minn. Stat. Ann. §§ 216D.01 to 216D.09 (West 1992) and 1992 Minn. Sess. Law Serv. ch. 493 (West) (notification center administered through state commissioner of public safety and operated by nonprofit corporation approved by commissioner; underground facility operators must participate and share costs; civil penalties deposited in state treasury and credited to pipeline safety account; commissioner adopts rules establishing guidelines for imposing penalties; violations addressed through injunction proceeding where notice and opportunity for hearing are given); Mo. Ann. Stat. §§ 319.010 to 319.045 (Vernon Cum. Supp. 1992) (nonprofit organization operates notification center; membership to center optional unless required by federal law; center funded by participants; liability to state for violations; state initiates legal action to collect civil penalties); Pa. Stat. Ann. tit. 73, §§ 176 to 182.4 (Supp. 1992) (mandatory membership in one-call system; operators share costs; board of directors chosen

by operators; Auditor General may inspect information concerning system and system must submit annual report to General Assembly; state enforces penalties).[1]

II. Article XII, Section 1

Article XII, section 1, of the Nebraska Constitution provides in relevant part:

> The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations . . . . No corporations shall be created by special law . . . except those corporations organized for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state.

While the plain meaning of this constitutional provision may seem to prohibit creation of a specific nonprofit corporation to perform the functions described in the proposed legislation,[2] the

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[1]We were unable to locate any case law or attorney general opinions involving similar acts in other states.

[2]In ***Frye v. Haas***, 182 Neb. 73, 152 N.W.2d 121 (1967), the Nebraska Supreme Court stated that "the plain meaning of this constitutional provision is that you cannot create a corporation by special law." ***Id.*** at 82, 152 N.W.2d at 127 (emphasis in original). Members of the Nebraska Constitutional Convention of 1919-1920 commented on this general law provision in the course of amending general corporations provisions:

> MR. PETERSON: I think the Convention ought to bear in mind the original purpose of Section 1 in this article of our present Constitution. . . . The first sentence, "the legislature shall provide by general law for the organization of all corporations hereafter to be created" was intended as a limitation on the power of the legislature to incorporate corporations controlled by special acts. That was the old system where a corporation would go to the legislature and get a special act passed for the incorporation of that particular corporation. They found it was hampering . . . . The second provision has merely implied no corporations shall be created by special law, and it is merely stating it the other way around . . . . Why shall you say that the regulations of those corporations shall be by general law unless you intend that it shall be general as to all

Nebraska Supreme Court has interpreted "special law" within the meaning of article XII, section 1, as follows:

> An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the legislature has a basis in reason, and is not purely arbitrary. . . . If a law affects equally all persons who come within its operation, it cannot be local or special within the meaning of the Constitution. . . . A law is not local or special in a constitutional sense that operates in the same manner upon all persons in like circumstances. General laws are those which relate to or bind all within the jurisdiction of the lawmaking power, and if a law is general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides it is not a local or special law in the constitutional sense.

State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 454-55, 283 N.W.2d 12, 19-20 (1979).

The proposed One-Call Notification System Act operates uniformly and equally upon all persons who come within the act's operation: all underground facility operators meeting the statutory definition of "operator" must financially support the center and perform various other duties, and all people performing "excavation" within the meaning of the act must meet the act's requirements. While the act grants only one nonprofit corporation the privilege of operating the notification center, the analysis of article XII, section 1, of the Nebraska Constitution used by the Nebraska Supreme Court in *Douglas* seems to focus upon whom comes within the act's operation and how equally the act operates on

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> corporations?
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> MR. McDONALD . . . If you limit the Legislature to the power to regulate and control the corporations by general law, I think you are prohibiting the Legislature the power to control a corporation by a special law applicable to a particular body, to a particular corporation.

Proceedings of 1919-1920 Nebraska Constitutional Convention, at 1734-35, 1747.

those affected by the act. Here, the proper analysis should presumably focus upon the excavators and operators who must perform various statutory duties and the uniformity with which the act operates on them.

The classifications within the proposed act seem based in reason and not arbitrary because the Nebraska Legislature has classified as being bound by the Act persons performing excavations which pose the greatest risk to underground equipment and operators who manage and control that underground equipment. These classifications were evidently made in the interest of protecting both public and private equipment and promoting public safety, arguably making these classifications rational.

Therefore, the proposed act seems to create by general law, and not in violation of article XII, section 1, of the Nebraska Constitution, a nonprofit corporation to operate a one-call notification center.

III. Article III, Section 18

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 the special laws provision by (1) creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class. ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991); ***Mapco v. State Bd. of Equalization***, 238 Neb. 565, 471 N.W.2d 734 (1991).

To be valid under the first prong above, legislative "[c]lassifications must be based on some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." ***Haman v. Marsh***, 237 Neb. at 713, 467 N.W.2d at 847 (emphasis in original). "`[T]he test for statutes challenged under the special-laws prohibitions . . . is that they must bear "a reasonable and substantial relation to the objects sought to be accomplished by the legislation."'" ***Id.*** (quoting ***Benderson Devel. Co. v. Sciortino***, 236 Va. 136, 372 S.E.2d 751 (1988)).

As discussed in section II of this opinion, the proposed act does not create a totally arbitrary and unreasonable method of classifying which operators and excavators are covered by the act. If the objects sought to be accomplished by this legislation are to protect public and private equipment and to promote public safety, requiring notification of excavation which may potentially damage expensive or hazardous equipment arguably bears a reasonable and

substantial relation to those objects. Therefore, the legislation would probably be held not to violate the special-laws prohibition as creating totally arbitrary classifications.

With regard to the closed class concern, "a classification which limits the application of the law to a present condition, and leaves no room for opportunity for an increase in the numbers of the class by future growth or development, is special." ***Haman v. Marsh***, 237 Neb. at 716, 467 N.W.2d at 848. Clearly, the proposed act allows an increase in the number of class members because the act applies to all excavators and underground facility operators. Anyone who becomes an excavator or operator in the future will thus be bound by the act and will increase the existing class.

Because the proposed act's classifications are not unreasonable and class membership may increase, the act would probably not violate Neb. Const. art. III, § 18, as special legislation.

IV. Article VII, Section 5

Under Article VII, section 5, of the Nebraska Constitution, all fines, penalties, and license money arising under the general laws of the state must be appropriated exclusively to the use and support of the common schools.

"Penalty," within the meaning of this constitutional language, means a pecuniary punishment imposed by, and for violations of, laws, ordinances, or police regulations. ***School Dist. of McCook v. City of McCook***, 163 Neb. 817, 81 N.W.2d 224 (1957). If money exacted is punitive in character, and not remedial or compensatory, that money is a penalty within the meaning of article VII, section 5, of the Nebraska Constitution. ***Id. See also Decamp v. City of Lincoln***, 202 Neb. 727, 277 N.W.2d 83 (1979); ***School Dist. of Omaha v. Adams***, 147 Neb. 1060, 26 N.W.2d 24 (1947). A statute that imposes liability for actual damages and additional liability for the same act provides a penalty. ***Abel v. Conover***, 170 Neb. 926, 104 N.W.2d 684 (1960).

As described in section I of this opinion, the proposed act does impose liability for the cost of repairing damaged underground facilities. This liability is not a "penalty" within the meaning of article VII, section 5, because it is remedial and compensatory toward actual damages. However, the legislation also imposes large civil penalties for any violation of the act, whether or not damage occurs. Such penalties are obviously punitive and are in addition to liability for actual damages. Therefore, the civil penalties collected under section 22 of the proposed act must be appropriated exclusively to the use and support of the common schools.

Because the proposed act does not expressly direct that these civil penalties be diverted from school funds, the proposed act, in theory, does not appear to violate the Nebraska Constitution. However, if, in practice, these penalties will be diverted from the use and support of the common schools, it will probably be deemed a violation of article VII, section 5.

V. Other Constitutional Issues

A. Delegation of Legislative Authority

Although the proposed act does not appear to violate the constitutional provisions discussed above, we are concerned that the legislation unconstitutionally delegates legislative power to a private nonprofit corporation.

The Legislature may not delegate legislative authority, power, or functions to an administrative or executive authority or to private individuals. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961); Neb. Const. art. III, § 1 (the legislative authority of the state shall be vested in the Legislature). However, the Legislature may authorize an administrative or executive department to make rules and regulations to carry out an express legislative purpose, or to completely operate and enforce a law within designated limitations. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988). These designated limitations and the standards by which the powers granted are to be administered must be clearly and definitely stated in the authorizing act. *Id.* These standards must be reasonably adequate, sufficient, and definite to guide the agency in exercising the power conferred upon it and must enable those affected to know their rights and obligations. *Id.* If the Legislature provides reasonable limitations and standards for carrying out delegated duties, there is not an unconstitutional delegation of legislative authority. *Id.*

With respect to the proposed legislation at issue, the question is whether its provisions contain adequate, sufficient, and definite standards within which the nonprofit corporation is to exercise its discretion. As described in section I of this opinion, section 17 of the proposed act requires the board of directors to establish notification center procedures, technology, and processes with absolutely no guidelines or standards by which to complete its assigned tasks. Instead of the Legislature performing its function of formulating policies, rights, duties, and rules of conduct and granting to the nonprofit corporation the authority to operate, enforce, or carry out legislatively formulated purposes within designated limits, the Legislature has

extended the corporation complete discretion to decide what technology is needed to create the center and the standards to be used in selecting this technology; who shall actually provide the notification service and the standards by which the vendor will be selected; and how much and when center members must pay to operate the center. The proposed act also fails to state a legislative purpose to be carried out by the nonprofit corporation.

Because the proposed act fails to set reasonably adequate, sufficient, and definite standards to guide the nonprofit corporation in exercising powers conferred upon it, we believe the act contains an unconstitutional delegation of legislative authority.

B. Rules and Regulations

You should also note that the rules and regulations to be adopted by the board of directors pursuant to section 17 of the proposed act may not have the force of law, as do regulations properly promulgated under the Administrative Procedure Act ("APA"), Neb. Rev. Stat. §§ 84-901 to 84-920 (1987). ***Nucor Steel v. Leuenberger***, 233 Neb. 863, 448 N.W.2d 909 (1989).

As stated above, the Legislature may delegate to an administrative or executive agency or department the power to make rules and regulations to implement statutory policy. ***Bosselman, Inc. v. State***, 230 Neb. 471, 432 N.W.2d 226 (1988); ***State ex rel. Spire v. Stodola***, 228 Neb. 107, 421 N.W.2d 436 (1988). Here, it is highly questionable whether the nonprofit corporation that will operate the center is an administrative or executive agency or department; therefore, it is also questionable whether the Legislature may delegate to the nonprofit corporation the responsibility to adopt rules and regulations. Further, since the APA applies to "agencies," which are defined as units of state government, Neb. Rev. Stat. § 84-901 (1987), rules and regulations adopted by a private nonprofit corporation would not be properly promulgated under the APA and would therefore have no legal effect.

C. Potential Due Process Concerns

Even if the above constitutional problems are remedied, it is conceivable that a due process argument could be made regarding the act's provisions that force all underground facility operators to financially support the notification center and receive its services, and that impose large civil penalties without outlining applicable procedural safeguards. Neb. Const. art I, § 3.

VI. Conclusion

We conclude that the proposed act probably does not violate the provisions of the Nebraska Constitution contained in article XII, section 1; article III, section 18; and article VII, section 5. However, the legislation appears to unconstitutionally delegate legislative power to a nonprofit corporation in violation of article III, section 1, of the Nebraska Constitution; to provide for the adoption of rules and regulations which will have no legal effect; and to be vulnerable to due process attacks.

It may be possible to cure these constitutional infirmities by providing a legislative purpose and sufficient standards by which the corporation is to carry out legislative policy. Further, if the act were administered by a unit of state government, see Minn. Stat. Ann. §§ 216D.01 to 216D.09 (West 1992), rules and regulations adopted by that unit under the APA would be legally effective; other procedural safeguards afforded by the APA would be available; and the governing board of the center would have a much higher degree of political and public accountability.

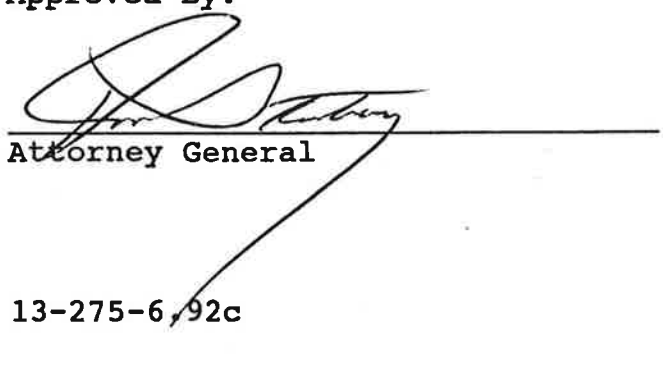
Sincerely,

DON STENBERG
Attorney General

Jan E. Rempe
Assistant Attorney General

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

Approved By:



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