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NO.
STATE OF NEBRASKA
OFFICIAL
MAY 3 1993
DEPT. OF JUSTICE

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

DATE: April 30, 1992

SUBJECT: Constitutionality of LB 183 (1993 Legislative Session)

REQUESTED BY: Forrest D. Chapman, Executive Director, Nebraska Liquor Control Commission

WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Assistant Attorney General

You have asked whether LB 183, enacted by the Nebraska Legislature with an emergency clause on February 16, 1993, is constitutional.

We find that it is not constitutional, and that Nebraska's liquor licensing statutes as they appear in the 1984 Reissue of the statutes remain in effect.

Some discussion of the history of the Nebraska Legislature's attempts to amend Nebraska's liquor licensing statutes will help to explain how our conclusion was reached.

In 1986, Nebraska legislators expressed concern about a number of Nebraska Supreme Court cases which required that liquor licenses be issued to applicants despite recommendations of denial by local governing authorities. The Nebraska Supreme Court noted that the absence of a "need" for the new liquor establishment was not a sufficient reason to deny an otherwise proper application for a liquor license. *See, e.g., McChesney v. City of North Platte*, 216 Neb. 416 (1984).

To vest more authority in the local political subdivisions with respect to approval or denial of applications for liquor licenses, the Nebraska Legislature passed LB 911 in 1986. LB 911 was codified in Neb. Rev. Stat. §§ 53-101.03, 53-103, 53-117.03, 53-117.04, 53-131, 53-132, 53-133, 53-134, 53-134.01, and 53-1,116 (Cum. Supp. 1986).

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In *Bosselman, Inc. v. State*, 230 Neb. 471 (1988), the Nebraska Supreme Court noted:

> Principal among the substantive changes and central to the purpose of the subject enactment [LB 911] is the grant to local governing bodies of the option to make recommendations concerning approval or denial of alcoholic beverage licenses, which recommendations are binding upon the defendant-appellee Nebraska Liquor Control Commission.

230 Neb. at 472.

In *Bosselman*, the Nebraska Supreme Court found that LB 911 unconstitutionally delegated the state's legislative power to local governing bodies. The court recognized that the legislature does have power to authorize administrative or executive departments to make rules and regulations to carry out an expressed legislative purpose, but that the standards by which such powers are to be administered must be clearly and definitely stated in the legislature's authorizing act and must not rest on indefinite, obscure, or vague generalities. *Id.* at 476. The court noted that LB 911 did not provide local governing bodies with adequate, sufficient, and definite standards within which they were to exercise their discretion. Finally, the court found that no part of LB 911 was severable from the unconstitutional delegation of legislative power, and so the entire enactment was unenforceable. *Id.* at 479.

In 1989, the Nebraska Legislature set about to address the deficiencies of LB 911. LB 781 was introduced for the purpose of providing local governing bodies with the authority to grant or deny liquor licenses based solely on explicit criteria. [Introducer's Statement of Intent, LB 781, February 13, 1989]. LB 781 was enacted with the emergency clause on May 24, 1989, and was codified in Neb. Rev. Stat. §§ 53-101, 53-101.01, 53-116, 53-117, 53-122, 53-124, 53-128, 53-129, 53-131, 53-132, 53-133, 53-134, 53-147, and 53-1,116 (Supp. 1989). Standards which the local governing bodies were to use to decide whether to grant or to deny applications for liquor licenses were set forth in Neb. Rev. Stat. § 53-134 (Supp. 1989).

In 1992, the Legislature took the additional precautionary measure of placing a proposed constitutional amendment on the November 1992 general election ballot to provide a constitutional basis for the authority of local governing bodies to approve or

deny retail liquor licenses. Legislative Resolution 9CA caused the new § 19 of article XV of the Nebraska Constitution to be presented to Nebraska voters at the November 1992 general election. The proposed amendment to the Nebraska Constitution was adopted, reading as follows:

> Notwithstanding any other provision of this Constitution, the governing bodies of municipalities and counties are empowered to approve, deny, suspend, cancel, or revoke retail and bottle club liquor licenses within their jurisdictions as authorized by the Legislature.

On February 16, 1993, the provisions of LB 781 were reenacted through LB 183 to bolster the Legislature's position that the provisions of LB 781 and LB 183 did not lack a constitutional basis.

On April 9, 1993, the Nebraska Supreme Court addressed the issue of the constitutionality of LB 781 in the case of ***Kwik Shop, Inc. v. City of Lincoln***, 243 Neb. 178 (1993). The Plaintiff, Kwik Shop, had challenged the constitutionality of LB 781 under both the Nebraska Constitution and the Federal Constitution. The Nebraska Supreme Court found that the 20 standards established by LB 781 (codified at § 53-134(2) (a) through (t)) did not provide local governing bodies with adequate, sufficient, and definite standards within which to exercise their discretion, and did not provide potential applicants with a reasonable opportunity to know what was required to obtain a license. The court found that the provisions of LB 781 incorporated in § 53-134 were, therefore, unconstitutionally vague and did not meet the requirements of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution. The court also found that the provisions of LB 781 contained in § 53-134 were an unconstitutional delegation of power from a legislative authority to an administrative or executive authority, in violation of art. II, § 1, of the Nebraska Constitution, because those provisions did not provide sufficient guidance to meet the requirements of a constitutional delegation of legislative power. Although the court noted that Kwik Shop did not have standing to challenge the provisions of LB 781 which concerned local governing bodies' authority as to existing licenses and licensed premises, the Court found that "the entire enactment is unenforceable" due to the fact that no part of the enactment is severable from the portion which contained the unconstitutional delegation. Because the 1986 version of the statutes (LB 911) was also declared unconstitutional

in ***Bosselman, Inc.***, the court noted that the statutes contained in the 1984 Reissue were controlling.

If the Nebraska Supreme Court had declared LB 781 unconstitutional due to a lack of a provision in the Nebraska Constitution authorizing the delegation of authority to local governing bodies, then it could be argued that LB 183 would not be affected by that decision. It is clear, however, that the Nebraska Supreme Court did not find LB 781 to be unconstitutional due to the lack of a provision in the Nebraska Constitution authorizing the Legislature to delegate to local governing bodies the power to approve, deny, suspend, cancel, or revoke retail and bottle club liquor licenses within their jurisdictions. Instead, the Nebraska Supreme Court found LB 781 unconstitutional due to its vagueness and its lack of adequate standards to guide the discretion of the local governing bodies. According to the court, the vagueness of LB 781 violated procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution. Even if the addition of § 19 to art. XV of the Nebraska Constitution and the reenactment of the provisions of LB 781 through LB 183 were adequate to address the deficiencies of the legislation under the Nebraska Constitution, those measures did not cure the federal constitutional infirmities found by the court.

It must be concluded that the provisions of LB 183 are void, as are the provisions of LB 781 and LB 911.

Sincerely,

DON STENBERG
Attorney General

Laurie Smith Camp
Assistant Attorney General

Approved By:

Attorney General

44-318-8.5