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NE. STATE OF NEBRASKA
OFFICIAL
APR 2 1996
DEPT. OF JUSTICE

DATE: March 28, 1996

SUBJECT: Constitutionality of LB 1248

REQUESTED BY: Senator Roger R. Wehrbein
State Legislature, Second District

WRITTEN BY: Don Stenberg, Attorney General
John R. Thompson, Senior Assistant Attorney General

This is in response to your February 26, 1996 letter concerning LB 1248, which, as amended by Amendment 7215 on February 29, 1996, establishes the Local Government Catastrophic Financial Emergency Fund and sets up a procedure for paying claims from such fund to local governmental bodies who suffered a catastrophic financial emergency under the conditions in the amendment. On March 12, 1996, the bill was further amended to clarify definitions and procedures for determining eligibility of the local government for reimbursement or loans.

In your letter you asked the following three questions:

1. Does the language of the bill create an entitlement such that a county, city, or village is granted the right to benefit from the emergency fund?

2. Can the State Claims Board's or Legislature's decision not to approve the claim, or only approve a portion of the claim, be appealed to a district court?

3. Is the provision that allows a local government to file a claim for a loan constitutional?

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With respect to question number one, we understand that you no longer need an answer since the amendment on March 12, 1996, clarifies the power of the State Claims Board and Legislature to exercise discretion with respect to approval or denial of the claim.

With respect to question number two, your question appears to be whether the local government making the claim may appeal from an adverse decision to the district court. The answer appears to be no.

Article V, § 22 of the Nebraska Constitution provides that "the State may sue and be sued, and the Legislature shall provide by law in what manner and in what court suit shall be brought." The Nebraska Supreme Court has held on numerous occasions that section of the Constitution is not self-executing and that specific legislative action is necessary to make it available. ***Gentry v. State***, 174 Neb. 515, 118 N.W.2d 643. Any waiver of the State's immunity pursuant to art. V, § 22 will be strictly construed in favor of retention of immunity. ***Gentry v. State, supra***. In this case, LB 1248, as amended, provides for claims to be first heard by the State Claims Board with appeal to the Nebraska Legislature, a process similar to that provided in the State Miscellaneous Claims Act, Neb. Rev. Stat. § 81-8,294 to § 89-8,301. Neither LB 1248 as amended or the State Miscellaneous Claims Act provide for any appeal beyond that of the Legislature. Since such waivers of immunity must be strictly construed in favor of retention of immunity, the conclusion must be that the State will not waive its immunity from suit in district court for claims made pursuant to LB 1248.

In your third question you ask whether LB 1248 is constitutional. There appear to be two parts to that question; (1) whether the bill would violate art. XIII, § 3 of the Nebraska Constitution by giving or loaning the credit of the State and (2) whether the bill would violate art. III, § 18 of the Nebraska Constitution as special legislation.

First, with respect to art. XIII, § 3 of the Nebraska Constitution, we must determine whether the credit of the State would be given or loaned in aid of any individual, association, or corporation. The Nebraska Supreme Court has interpreted § 3 of art. XIII of the Nebraska Constitution on numerous occasions, holding "section 3, article XIII, of the Constitution, was intended to prevent the state from extending its credit to private enterprises." ***United Community Services v. The Omaha National Bank***, 162 Neb. 786, 77 N.W.2d 576 (1956) and ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991). In the instant case, the State money would clearly be for a public purpose and not in aid of private enterprise. Accordingly, there appears to be no serious

question that LB 1248 is permissible under art. XIII, § 3 of the Nebraska Constitution.

A question concerning special legislation is somewhat more difficult to answer. Article III, § 18 of the Nebraska Constitution provides in pertinent part as follows:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable no special law shall be enacted.

A legislative act can violate Nebraska Constitution art. III, § 18 as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class. ***See, City of Scottsbluff v. Tiemann***, 185 Neb. 256, 175 N.W.2d 74 (1970), ***Haman v. Marsh, supra***.

In ***Haman v. Marsh*** the court, quoting from ***State ex rel. Douglas v. Marsh***, 207 Neb. 598, 300 N.W.2d 181 (1980), held that:

> A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not elusive. They cannot be based on distinctions without a substantial difference.
> . . .
>
> Classification is proper if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.

In reviewing LB 1248 as amended, it appears the purpose of the bill is to provide state assistance for local governmental operations in those situations where the local governmental body

suffers from some catastrophic financial situation which resulted from performing its duties which are mandated by state law along with financial emergencies from natural disasters such as fires, floods, epidemics, etc. That appears to be a reasonable classification since it applies to those local governmental bodies who are in some extreme financial situation and require immediate and substantial financial assistance for reasons beyond their control. There is clearly a substantial difference between a local governmental entity suffering such severe financial problems which result from performing acts mandated by the state law as opposed to other counties who are not presented with the same costly problems.

Finally, we must discuss whether the class of potential claimants created by LB 1248 is a permanently closed class. Under LB 1248 the class of potential claimants are local governmental entities who suffer a catastrophic financial emergency caused by expenses of government which are beyond the local governments' ability to pay and which create an undue burden on the local government due to a lack of unobligated fiscal resources and are incurred as a result of activities mandated by state law. Eligible claimants must also have unreimbursed expenses incurred in relation to a natural disaster which qualified for federal assistance. All such expenses must have been incurred within the five fiscal years immediately preceding the making of the claim but may be related to acts or incidents that occurred not more than eight years prior to making the claim.

While it appears that this bill was intended to alleviate the special financial problems of Richardson County created by a combination of circumstances, that does not by itself render the class suspect.

The Nebraska Supreme Court in ***Haman, supra***, held that in determining whether a class is closed, you may consider the act's application as well as the legislation itself. You must consider the actual probability that others will come under the act's operation, not merely the possibility.

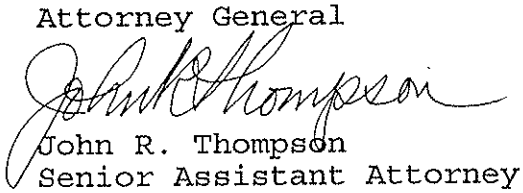
In this instance, the bill will clearly apply to the recent problems of Richardson County. However, while there may or may not be other local governmental bodies presently eligible, it is probable that some other counties in the state may have similarly unusual expenses relative to criminal prosecutions and other losses related to some natural disaster in the future.

The primary concern whether the class is closed in this case stems from the relatively short life of the law. LB 1248 provides for automatic termination on June 30, 1999. That provision reduces the probability that some other counties may become eligible within the life of the act. Nevertheless, we believe the probability of

other class members is sufficiently high that the act will not violate art. III, § 18 of the Nebraska Constitution. Removal of the automatic termination provision would obviously enhance the act's viability.

Very truly yours,

DON STENBERG
Attorney General



John R. Thompson
Senior Assistant Attorney General

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cc: Patrick O'Donnell
Clerk of the Legislature

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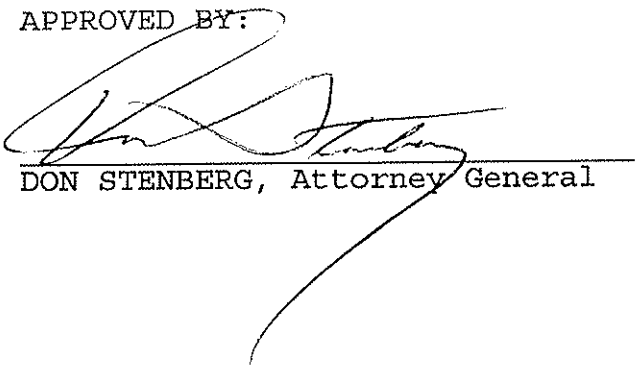

DON STENBERG, Attorney General