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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 28 1996
DEPT. OF JUSTICE

DATE: October 24, 1996

SUBJECT: Interpretation of Provisions of the Quality Jobs Act, Neb. Rev. Stat. §§ 77-4901 to -4935 (Supp. 1995), ***amended*** 1996 Neb. Laws, LB 1368.

REQUESTED BY: M. Berri Balka, Secretary
Quality Jobs Board

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

In your capacity as Secretary of the Quality Jobs Board [the "Board"], you have requested our opinion on certain questions involving the interpretation of provisions of the Quality Jobs Act, Neb. Rev. Stat. §§ 77-4901 to -4935 (Supp. 1995), ***amended*** 1996 Neb. Laws LB 1368 [the "Act"]. Under the Act, employees of companies engaged in a qualifying business that enter into agreements to complete projects meeting specified levels of employment and investment are entitled to receive "wage benefit credits." Neb. Rev. Stat. §§ 77-4927 and -4928. The "wage benefit credits" are to be "paid or applied by the employee for company training programs, employee benefit programs, educational institution training programs, or company workplace programs, or any combination thereof. . . ." Neb. Rev. Stat. § 77-4927(2) (Supp. 1995).[1]

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[1] The Act was amended in 1996 to provide for an alternative use of the credit, permitting the wage benefit credit to be "charged against the company's income tax rather than individually computed and used against each employee's income tax." 1996 Neb. Laws, LB 1368, § 3. The agreement may therefore provide that the

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The questions submitted for our consideration were raised during the course of a recent meeting of the Board involving consideration of an application for benefits under the Act. Your initial question focuses on application of the statutory factors to be considered by the Board in considering an application for the wage benefit credit, and the discretion of the Board in applying these factors. Your second question concerns the respective responsibilities of the Board and the Nebraska Department of Revenue under the Act. Your final question seeks advice on the necessity for the Board to publish notice of the meeting at which consideration of the application in question will be resumed.

I. Discretion of the Board in Approving Applications for Benefits.

Your first question concerns the discretion of the Board in the approval of applications for benefits under the Act. You note that Neb. Rev. Stat. § 77-4928(4) "sets out the factors the Board is required to consider in making its determination on whether to approve or deny the application." You further note that one of these factors concerns "[w]hether the Board believes the project would occur in this state regardless of whether the application was approved." § 77-4928(4)(d). Your question then is: "If the Board determines that a project would have occurred even if the application is disapproved, does the Board have the authority required to approve the application based on its evaluation of the other factors in the section?"

A fundamental principle of statutory construction is to attempt to ascertain legislative intent and to give effect to that intent. ***County of Lancaster v. Maser,*** 224 Neb. 566, 400 N.W.2d 238 (1987). The reasons for the enactment of a statute and the purposes and objects of the act may be guides in attempting to give effect to the intent of lawmakers. ***State v. Jennings,*** 195 Neb. 434, 238 N.W.2d 477 (1976). A statute should be interpreted in such a manner as to give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute in its plain and ordinary sense. ***NC+ Hybrids v. Growers Seed Ass'n,*** 217 Neb. 11, 347 N.W.2d 554 (1984). In construing a legislative act, resort may be had to the history of its passage

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company will receive the credit. The credit must, nevertheless, "be paid or applied by the company for company training programs, employee benefit programs, educational institution training programs, or company workplace safety programs, or any combination thereof,. . . ." 1996 Neb. Laws, LB 1368, § 3. This "alternative" application of the credit is not involved in this instance.

for the purpose of determining legislative intent. ***Omaha Public Power Dist. v. Nebraska Dept. of Revenue,*** 248 Neb. 518, 537 N.W.2d 312 (1995); ***Georgetowne Ltd. Partnership v Geotechnical Services, Inc.,*** 230 Neb. 22, 430 N.W.2d 34 (1988).

"In order for the employee and company to be eligible for the wage benefit credit, the company shall file an application for an agreement with the [B]oard." Neb. Rev. Stat. § 77-4928(1). The application must include certain information, including "[a] detailed narrative that describes the proposed project, including how the company intends to attain and maintain the job and investment requirements;. . . ." Neb. Rev. Stat. § 77-4928(2)(c).

Subsection (4) of § 77-4928 provides:

> The [B]oard shall determine whether to approve the company's application by majority vote based on its determination as to whether the project will sufficiently help enable the state to accomplish the purposes of the Quality Jobs Act. The [B]oard **shall** be governed by and **shall** take into consideration **all** of the following factors in making its determination:
>
> (a) The timing, number, wage levels, employee benefit package, and types of new jobs to be created by the project;
>
> (b) The type of industry in which the company and the project would be engaged;
>
> (c) The timing, amount, and types of investment in qualified property to be created; and
>
> (d) Whether the [B]oard believes the project would occur in this state regardless of whether the application was approved.

(emphasis added).

Subsection (6) of § 77-4928 further provides, in pertinent part:

> A project shall be considered eligible under the act and may be approved by the [B]oard **only if** the application defines a project consistent with the legislative purposes contained in section 77-4902 in one or more qualified business activities within this state that will result in (a) the investment in qualified property of at

> least fifty million dollars and the hiring of a number of new employees of at least five hundred or (b) the investment in qualified property of at least one hundred million dollars and the hiring of a number of new employees of at least two hundred fifty. . . .These thresholds shall constitute the required levels of employment and investment for purposes of the act.

(emphasis added).

Neb. Rev. Stat. § 77-4902 (Supp. 1995), which sets forth the Legislature's statement of policy concerning the Act, provides:

> It is the policy of this state to make revisions in its statutory structure if this will encourage both new and existing businesses to relocate to and expand in Nebraska and to provide appropriate inducements to encourage them to do so if this will aid in the economic and population growth of the state and help create better jobs for the citizens of the State of Nebraska and if this can be done in a fiscally sound and effective manner.

A review of the foregoing provisions indicates that the purpose of the wage benefit credits authorized under the Act is to provide an "inducement" to businesses to undertake projects in Nebraska creating certain levels of employment and investment. Unlike other tax incentives provided under Nebraska law, which are authorized by virtue of an applicant's agreement to and meeting of specified investment and employment thresholds (Neb. Rev. Stat. §§ 77-4101 to -4112 (1990 and Cum. Supp. 1994) (Employment and Investment Growth Act ("LB 775"), or by a company's engaging in a qualifying business and increasing employment and investment (Neb. Rev. Stat. §§ 77-27,188 to -27,196 (1990 and Supp. 1995) (Employment Expansion and Incentive Act), the Act contemplates that, before a company may receive the benefit, the Board must approve the company's application. Neb. Rev. Stat. § 77-4928(4) (Supp. 1995). If approved by the Board, the company then enters into a written agreement to "be executed on behalf of the state by the Tax Commissioner." Neb. Rev. Stat. § 77-4928(7) (Supp. 1995).

The language of subsection (4) of § 77-4928, as noted, requires that, for the Board to approve an application, it must determine by majority vote "whether the project will sufficiently help enable the state to accomplish the purposes of the Quality Jobs Act." In doing so, the statute further directs that the Board "shall be governed by and shall take into consideration all" of certain specified factors. ***Id.*** These factors include: (1) "The timing, number, wage levels, employee benefit package, and types of

new jobs to be created by the project;" (2) "The type of industry in which the company and the project would be engaged;" (3) "The timing, amount, and types of investment in qualified property to be made at the project;" and (4) "Whether the "[B]oard believes the project would occur in this state regardless of whether the application was approved." Neb. Rev. Stat. § 77-4928(4)(a)-(d) (Supp. 1995).

As a general rule of statutory construction, the word "shall" is considered mandatory and inconsistent with the idea of discretion. ***Moyer v. Douglas & Lomason Co.***, 212 Neb. 680, 325 N.W.2d 648 (1982). Thus, to the extent that § 77-4928(4) provides that the Board "shall be governed by and shall take into consideration" all of the factors in subparts (a) through (d) of subsection (4), it seems clear that the Legislature intended to impose a mandatory duty on the Board to consider all of the listed factors in determining whether to approve an application for benefits under the Act.

While the Legislature mandated that the Board consider all of these factors in determining whether to approve an application, this does not mean that the Legislature did not intend to grant the Board discretion in interpreting and applying these factors to determine if an application should be approved or denied. Indeed, the very nature of the first three categories of factors listed (including wage levels, employee benefits, type of jobs, type of industry, and timing, amount and type of investment), all contemplate that the Board will exercise discretion in assessing if these factors indicate that the project, if approved, would "accomplish the purposes of the Quality Jobs Act." § 77-4928(4).

This interpretation is consistent with the legislative history of the Act. The Introducer's Statement of Intent on LB 829 provided: "This legislation is intended to provide an effective **discretionary** economic development tool to attract major projects to Nebraska and is geared only towards the size and type of project that requires these types of initiatives to locate in a state." Committee Records on LB 829, 94th Neb. Leg., 1st Sess., Introducer's Statement of Intent (February 1, 1995) (emphasis added). The Introducer's Statement of Intent further provided that the Board would "determine whether to approve the project based on whether it best accomplishe[d] legislative intent." ***Id.***[2]

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[2] As originally proposed, the Board was to have consisted of the Governor, Tax Commissioner, and Director of the Department of Economic Development. Committee Records on LB 829, Memorandum of Committee Counsel, 1 (February 1, 1995). The bill was amended in

The history contains further evidence that the Legislature intended that the Board exercise discretion in applying the statutory criteria to determine whether to approve or deny applications. During the Revenue Committee hearing on LB 829, Senator Withem, Principal Introducer of the bill, noted that the Board's actions in approving projects would be "discretionary", stating that the Board "will analyze economic development projects and make a determination as to whether these benefits ought to be applicable." Committee Records on LB 829, at 44-45 (Statement of Sen. Withem). During floor debate, Senator Withem again noted the discretionary authority granted the Board in approving or denying applications for benefits, and distinguished the bill from prior incentive legislation, stating:

> This bill is not LB 775. This is not a bill that individual companies merely qualify and get entitlements for, they have to make application for it, and part of the application process is going to be a justification that the job levels, the pay level of the jobs will be beneficial to Nebraska's economy, that they will, in fact, fit within the economic development plan of the state.

Floor Debate on LB 829, 94th Leg., 1st Sess., 1562 (February 22, 1995 (Statement of Sen. Withem).[3]

In contrast to the factors contained in subparts (a) through (c) of § 77-4928(4), which are the type of factors which the Legislature indicated that the Board would exercise discretion in evaluating to determine whether or not to approve an application,

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committee to change the composition of the Board to the Governor, State Treasurer, and chairperson of the Investment Council. Committee Statement on LB 829, 4. That, of course, is the membership composition ultimately enacted into law. Neb. Rev. Stat. § 77-4908 (Supp. 1995).

[3] This distinction was also noted by the Director of Economic Development during the Committee Hearing. Committee Records on LB 829, 51 (February 1, 1995) ("Unlike LB 775, however, a company would not automatically be entitled to receive the credits. Under the Quality Jobs Act, a board. . .would have the discretion to approve or disapprove each individual project. In making this determination, the board would [be] require[d] to consider among other things the number, wage levels, employee benefit package, and types of new jobs created by the project.") (Statement of Maxine Moul).

the fourth factor, contained in subpart (d), is somewhat different in nature, in that it requires the Board to determine if it "believes the project would occur in this state regardless of whether the application was approved." Unlike application of the factors in subparts (a) through (c), which, by their nature, admit to the exercise of discretion by the Board, this factor focuses on a singular question, i.e., whether the Board "believes the project would occur" if the application were not approved. The difficulty in the present case, of course, is whether, if the Board should find that consideration of this factor requires it to find the project would likely have occurred even if the application is not approved, the Board may nevertheless approve the project, based on consideration of the other factors in subparts (a) through (c) of § 77-4928(4).

As the language employed by the Legislature in defining the degree of discretion to be accorded the Board in approving or denying applications is somewhat ambiguous with respect to the factor contained in subpart (d) of § 77-4928(4), we believe it is appropriate to examine the legislative history to aid us in divining the apparent intent of the Legislature. ***See Coleman v. Chadron State College,*** 237 Neb. 491, 498, 466 N.W.2d 526, 531 (1991) (Noting that, when statutory language is ambiguous, "recourse should be had to the legislative history for the purpose of discovering the lawmakers' intent."). A review of the legislative history demonstrates that the Legislature did not intend the benefits authorized under the Act to be granted for projects which would have occurred in the state irrespective of whether the benefits were approved.

The Introducer's Statement of Intent on LB 829, as noted, provided that the bill was intended to provide a "discretionary economic development tool **to attract major projects to Nebraska and is geared only towards the size and type of project that requires these types of initiatives to locate in the state."** Committee Records on LB 829, ***supra*** (emphasis added). The bill's Principal Introducer, Senator Withem, in his testimony before the Committee on Revenue, reiterated that the benefits were to be provided only to companies which would not otherwise expand or locate in Nebraska, stating: **"[W]e'll not be providing tax breaks for companies that would have gone ahead and done whatever they wanted to.** ***Id.*** at 44 (Statement of Sen. Withem) (emphasis added).

The intent that the Board would not approve an application to permit the Act's benefits to businesses which would have engaged in a project, without regard to the granting of the benefits, is also supported by other portions of the Act. Reference to other portions of the Act is appropriate, as, in construing a statute,

"all parts of an act relating to the same subject shall be considered together,. . . ." ***State v. Jennings,*** 195 Neb. at 439, 238 N.W.2d at 481. In this regard, § 77-4928(4) provides that the Board "shall determine whether to approve the company's application by majority vote based on its determination as to whether the project will sufficiently enable the state to accomplish the purposes of the Quality Jobs Act." Section 77-4928(6) further provides that a project is not eligible for approval, and may not be approved by the Board, if it does not "define a project consistent with the legislative purposes contained in section 77-4902. . . ." The legislative statement of policy in § 77-4902, in turn, articulates a state policy to "encourage both new and existing businesses to relocate to and expand in Nebraska [by] provid[ing] appropriate **inducements** to encourage them to do so. . . ." (emphasis added).

"Inducement" is defined as: "motive; anything that leads the mind to will or to act; incentive." Webster's New Universal Unabridged Dictionary 934 (2d ed. 1983). "Motive", in turn, means: "some inner drive, impulse, intention, etc. that causes a person to do something or act in a certain way; an incentive;. . . ." ***Id.*** at 1173. Finally, "incentive" means "that which influences or encourages to action; motive; spur; stimulus;. . . ." ***Id.*** at 921.

Attempting to harmonize the language of §§ 77-4902, 77-4928(4), and 77-4928(6), with the language of subpart (d) of § 77-4928(4), it appears that the Legislature did not intend to authorize the Board to approve applications for benefits under the Act for projects which the Board determines would be (or would have been) undertaken without regard to the provision of the Act's benefits. Indeed, while we have endeavored to provide a lengthy legal analysis to explain our conclusion, it seems to us that the strongest support for our interpretation is rooted in basic common sense. For the reasons noted above, we believe that the Act was intended to allow the Board to approve applications by companies seeking the tax benefits afforded only if the Board finds the benefits served as an "inducement" or "incentive" to the project. By definition then, for the Board to approve an application for benefits regarding a proposed project, the Board must find that the benefits were a motivating factor behind the applicant's decision to undertake the project in Nebraska.

In sum, in response to your initial question, we conclude that, in light of both the language and history of the Act, while the Legislature intended to give the Board discretion in determining whether or not to approve an application for benefits, it does not appear that the Legislature intended to grant the Board authority to approve an application for a project if the Board

determined the benefits were not an inducement or motivating factor in the applicant's decision to undertake the project. In reaching this conclusion, of course, we do not (and cannot) express any opinion as to whether the Board should approve or disapprove the pending (or any future) application. With respect to the application at issue, we hope that, in our capacity as legal advisor to the Board, our opinion assists the Board in performing its duty to determine whether or not to approve this application.

We emphasize that resolution of the ultimate issue before the Board in the instant case is not, however, dependent on our view that the language and history of the Act indicates that the Board is authorized to approve an application for benefits only if it determines that the benefits were a motivating factor in the applicant's decision to undertake the project. As we see it, the issue before the Board, assuming it agrees with our legal analysis, requires resolution of a factual question which the Board, based on the evidence before it (including that presented by the applicant, the Department of Revenue, and any other interested persons or parties which may appear and present testimony), must ultimately decide. That issue, of course, is whether the facts warrant a finding by the Board that the Act's benefits were an inducement to the applicant's undertaking of the project in question. With respect to the present case, resolution of that factual issue may or may not lead the Board to deny the application for the project.[4] The determination of such issues, of course, is within the judgment of the Board.

II. Responsibilities of the Board and the Department of Revenue Under the Act.

Your second question concerns whether the Board or the Department of Revenue is responsible for determining if the required levels of employment and investment are attained and maintained by an applicant for benefits under the Act.

As you note, for an applicant to receive benefits under the Act, the Board must first approve the company's application. Neb. Rev. Stat. § 77-4928(4) (Supp. 1995). The Act provides the Board may approve a project "only if the application defines a project consistent with the legislative purposes contained in section 77-

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[4] We note that the Board must consider all of the factors in § 77-4928(4) in making it's decision to approve or deny an application. Thus, the Board should not disregard the factors in § 77-4928(4)(a) to (c) in determining whether to approve of deny an application for benefits under the Act.

4902 in one or more qualified business activities" that will result in achievement of the specified levels of investment and employment. Neb. Rev. Stat. § 77-4928(6) (Supp. 1995). This subsection further provides: "The new investment and employment shall occur within five years, meaning by the end of the fourth year after the end of the year the application was filed, and shall be maintained for the entire entitlement period." *Id.*

Once the Board approves an application, the Act provides that "the company and the state shall enter into a written agreement which shall be executed on behalf of the state by the Tax Commissioner." Neb. Rev. Stat. § 77-4928(7) (Supp. 1995). "In the agreement the company shall agree to complete the project and the state shall designate the approved plans of the company as a project and, in consideration of the company's agreement, agree to allow the wage benefit credit as provided for in the act." *Id.* Subsection (7) of § 77-4928 further provides: "The agreement shall contain provisions to allow the Department of Revenue to verify that the required levels of employment have been attained and maintained."

You indicate that the applicant in the present case has "asked the Board to decide if the applicant has already attained the required level of investment in the project." In light of this request, you ask whether the Board, or the Department of Revenue, is responsible for determining if an applicant has attained or maintained the required levels of investment and employment under the Act.

In our view, it appears that a sensible construction of the Act requires us to conclude that the Legislature did not intend for the Board to be responsible for determining whether applicants have actually attained or maintained required levels of employment or investment. The Board, of course, must determine whether to approve an application, considering the factors set forth in § 77-4928(4). The Board may certainly receive evidence relating to these factors to assist it in determining whether to approve an application. The application is required to include, among other things, "[a] detailed narrative that describes the proposed project, including how the company intends to attain and maintain the job and investment requirements." § 77-4928(2)(c). The Act provides that a project may only be approved by the board "if the **application defines a project** consistent with the legislative purposes in section 77-4902" that will achieve the required levels of investment and employment. § 77-4928(6) (emphasis added).

This language suggests that the Board, in determining whether a project proposes to satisfy the required levels of employment and

investment, is to base this decision by considering the application alone, including the required narrative describing how the applicant intends to satisfy these requirements. It does not appear to authorize the Board to receive evidence or make factual findings regarding whether actual investment or employment by the applicant constitutes qualified investment or increased employment for purposes of determining if the applicant shall receive benefits.

The Act appears to contemplate that the Board considers only whether the project, as described in the application, proposes to satisfy these requirements. If approved by the Board, the company and state enter into an agreement, which is executed for the state by the Tax Commissioner. Neb. Rev. Stat. § 77-4928(7) (Supp. 1995). The company agrees to complete the project, and the state, in consideration of this agreement, agrees to allow the benefit. ***Id.*** The agreement is required to "contain provisions to allow the Department of Revenue to verify that the required levels of employment have been attained and maintained." ***Id.***

While § 77-4928(7) specifically refers to the agreement containing a provision allowing the Department to verify that the required level of "employment" is attained and maintained, without mentioning verification of satisfaction of the "investment" requirement, we do not believe that this evinces a legislative intent to impose on the Board responsibility for determining or verifying if the level of investment required by the Act is attained or maintained. In construing a statute, a construction which results in absurd, unjust, or unconscionable results should be avoided. ***State v. Beerbohm,*** 229 Neb. 439, 427 N.W.2d 75 (1988). We do not believe that the Legislature intended that the Board be charged with responsibility for determining whether specific investment or employment activities of an applicant actually satisfy the required investment or employment levels in the Act. The Act contains no mechanism for the Board to do so. Rather, it indicates that verification of a company's meeting and attaining the employment and investment thresholds is the duty of the Department of Revenue. Indeed, during floor debate, Senator Warner indicated that the bill had been amended by the Revenue Committee to "clarify[ ]. . .that the Department of Revenue can verify that the required levels of investment [and] employment have been reached. . . ." Floor Debate on LB 829, ***supra***, at 1540.

Therefore, in response to your third question, we conclude that, if the applicant requests that the Board make findings concerning whether the applicant has, in fact, undertaken qualified investment sufficient to satisfy the level required by the Act, the Board should decline to make any such determination.

III. Necessity of Publishing Notice of Resumption of the Board's Meeting.

As indicated in your letter, the Board, desiring to receive an opinion from this office on certain questions, recessed its previous meeting on the application, subject to the call of the Governor after our response had been received. After the meeting is resumed, the Board will further consider the application and reach a decision. You further indicate that the Board has adopted a policy of publishing notice of meetings of the Board ten days prior to the meeting. In light of these facts, you ask whether the Board must "republish" notice ten days prior to the meeting at which consideration of the application in question is resumed, "or since this is a continuation of [a] previously noticed meeting can other more informal procedures be used?"

Pursuant to the Nebraska Public Meetings statutes, Neb. Rev. Stat. §§ 84-1408 to -1414 (1994), "meetings" of a "public body" are, absent certain circumstances, required to be open to the public. The basic statement of our state policy on public meetings is contained in § 84-1408, which declares it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret." "Public body" is defined to include "all independent boards. . .created by the Constitution of Nebraska, statute, or otherwise by law." Neb. Rev. Stat. § 84-1409(1)(c). "Meeting shall mean all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body;. . . ." Neb. Rev. Stat. § 84-1409(2). Obviously, the Board is a "public body", and its meetings to consider applications for benefits under the Act are "meetings" as defined in § 84-1409(2).

Neb. Rev. Stat. § 84-1411 (1994), which governs the giving of notice of meetings of public bodies, provides, in pertinent part:

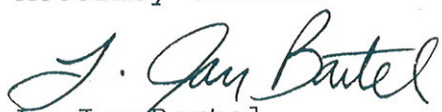
> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public.

In our view, the Board must publish notice of its meeting to continue consideration of the application in question. In a prior opinion, this office concluded that "advance publicized notice" means a separate, specific advance notice must be given for each meeting of a public body. 1971-72 Rep. Att'y Gen. 314 (Opinion No.137, dated August 8, 1972). While the Board technically

"recessed" its prior meeting, rather than adjourning, we do not believe that, under the circumstances presented, some form of "informal" notice of the Board's resumption of the meeting is permissible. Thus, we believe that the Board, consistent with its adopted policy, should, at least ten days prior to its next meeting to consider this application, give notice to the public in conformance with § 84-1411.[5]

Very truly yours,

DON STENBERG
Attorney General



L. Jay Bartel
Assistant Attorney General

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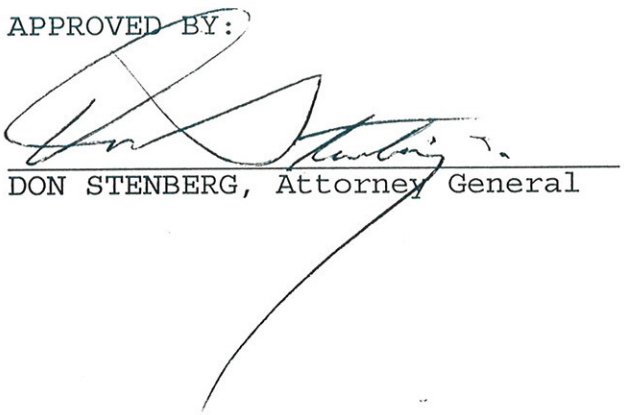

DON STENBERG, Attorney General

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[5] Of course, as the Board is aware, while it is a public body whose meetings are required to be open to the public, that portion of the Board's meetings involving discussion of confidential information submitted by applicants is subject to discussion in closed session under Neb. Rev. Stat. § 84-1410 (1994). The fact that part of the Board's meetings will be conducted in closed session, of course, does not impact the need for the giving of advance public notice of the meeting.