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STATE OF NEBRASKA
OFFICIAL
MAY 27 1991
DEPT. OF JUSTICE

DATE: May 24, 1991

SUBJECT: Constitutionality of Legislature Act Providing Tax Credits to Producers of Certain Ethanol and Ethanol Coproduct Fuels (LB 754).

REQUESTED BY: Senator Loran Schmit
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General's opinion as to the constitutionality of Legislative Bill 754, an act relating to ethanol fuel. Specifically, you have expressed concern that provisions of LB 754 as amended, together with proposed amendments, would result in a constitutionally impermissible closed class.

LB 754 (the "Bill") provides, among other things, for certain tax credits to be given for each gallon of ethanol or ethanol coproduct produced at a Nebraska plant and to sellers of such Nebraska-produced products. It is our understanding, as stated in your opinion request, only one Nebraska plant currently qualifies for the credits provided for in the Bill. Thus, we must analyze the Bill under article III, §18 of the Constitution of the State of Nebraska.

Article III, §18 provides "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. . . ." Neb.Const. art. III, §18.

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A thorough statement of the operation of article III, §18 was set forth recently by the Nebraska Supreme Court in Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

> By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. [Citation omitted]. A legislative act that applies only to particular individuals or things of a class is special legislation. [Citation omitted]. General laws embrace the whole or a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. See 2 N. Singer, Statutes and Statutory Construction §40.07 (4th ed. 1986). It is because the legislative process lacks the safegrounds of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted. [Citation omitted].
>
> A legislative act can violate Neb. Const. 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).

Id. at 709.

Unreasonable Classification

> The term "class legislation" is a characterization of legislation in contravention of Neb. Const. art. III, 18. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935). It is that which makes improper discrimination by conferring privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference. 16B C.J.S. Constitutional Law §682 (1985).

Id. at 710.

The applicable test for determining the constitutionality of legislative classifications has been set out succinctly by prior case law.

> "A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, 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 illusive; 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."

Id. at 711 (quoting State ex rel. Douglas v. Marsh, 207 Neb. 598, 609, 300 N.W.2d 181, 187 (1980)).

We find no unreasonable classification problem with the Bill. The class of beneficiaries is based upon a "reason of public policy" and substantial differences in circumstances. See State ex rel. Douglas v. Thone, 204 Neb. 836, 286 N.W.2d 249 (1979). In Thone, the court held a statute which authorized a plan for the development of alcohol plants and facilities in Nebraska did not violate Article III, §18. The court expressly stated the activity authorized (promotion of the use of gasohol) constituted a public purpose. Id. at 842.

Closed Class

The Nebraska Supreme Court, in Haman, also discussed what constitutes a closed class under article III, §18.

> "The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted. . . ." City of Scottsbluff v. Tiemann, 185 Neb. 256, 262, 175 N.W.2d 74, 79 (1970) (quoting State v. Kelso, 92 Neb. 628, 139 N.W. 226 (1912)).

> 256, 262, 175 N.W.2d 74, 79 (1970) (quoting State v. Kelso, 92 Neb. 628, 139 N.W. 226 (1912)).

Lb 754, on its face, does not restrict the class of beneficiaries of the credits to the existing ethanol plant. Rather, the Bill applies to all qualifying fuels "produced in Nebraska." Thus, on its face, the Bill does not violate article III, §18. However, as the Nebraska Supreme Court stated in Haman.

> In determining whether a class is closed, this court is not limited to the face of the legislation, but may consider the act's application. See, Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942); Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964). In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment. Republic Inv. Fund I v. Town of Surprise, 166 Ariz. 143, 800 P.2d 1251 (1990).

Haman, 237 Neb. at 717-718.

Proposed amendment 1472 (AM 1472) to LB 754 would amend Neb.Rev.Stat. §66-1320 to provide that "No new investment may be made or letters of commitment given to an applicant that has not received approval of its final application by April 1, 1991." Section 66-1320 relates to applications for grants or loans under the Ethanol Authority and Development Act to facilitate the construction, acquisition, or expansion of ethanol facilities.

Clearly, nothing in LB 754 prohibits other interested individuals, associations or corporations from entering the ethanol business and receiving the benefits of the credits provided by the Bill. Indeed, a second ethanol plant is reportedly in progress. The possibility of new plants exists with or without continued funding of grants or loans for construction of new plants under §66-1320. Nonetheless, if the Bill is amended so as to cut off such funding for additional plants, a court could find, upon examination of evidence regarding the feasibility of entering the ethanol fuel business without such assistance, that the Bill creates a closed class in light of the improbability of any person or entity benefiting from the bill other than the existing plant or plants.

Consequently, it is our opinion the Bill, if amended so as to effectively provide credits only to one or two ethanol plants while

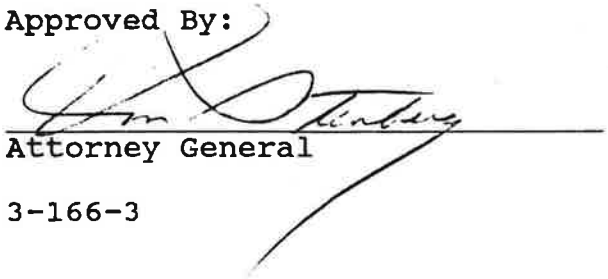
substantially reducing the probability of additional future beneficiaries, would be constitutionally suspect under article III, §18.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:



Attorney General

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