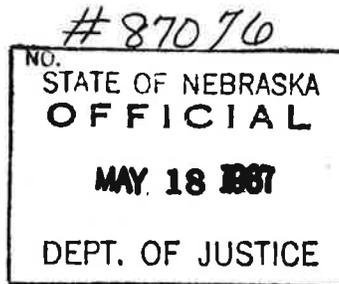


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE May 15, 1987

SUBJECT: Constitutionality of LB279 As Amended By Committee Amendment AM0510

REQUESTED BY: Senator Loren Schmit  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
Bernard L. Packett, Assistant Attorney General

You have asked our opinion as to the constitutionality of LB279, as amended by Committee Amendment AM0510.

Before addressing your question, we believe it would be helpful to cover some previous opinions which we have given on legislation dealing with funds such as are involved in LB279.

In 1981, the Legislature enacted LB331 which provided in part that the Nebraska Gasohol Committee could award a development gratuity of up to \$50,000.00 to a person who would develop the best high protein food made from distiller's grain or the process of ethanol distillation.

In Opinion No. 81, dated April 24, 1981, we expressed serious concerns as to the constitutional validity of the bill under Article XIII, Section 3 of the Nebraska Constitution, which provides in part:

"The credit of the State shall never be given or loaned in aid of any individual, association or corporation . . ."

In that opinion, we said:

"Our Supreme Court has stated that this constitutional provision prohibits the Legislature from appropriating the public monies of the state to encourage private enterprises. Oxnard Beet Sugar Co. v. State, 73 Neb. 57, 105 N.W. 716 (1905). More recently, in State ex rel. Beck v. City of York, 164

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Neb. 223, 82 N.W.2d 269 (1957), our Supreme Court stated:

It is clear that the framers of our Constitution had in mind a prohibition against giving or loaning the credit of the State or any subdivision thereof for a purely private purpose. This supports the fundamental principle that public moneys may not be used for private purposes. . . . It is the plain intention of this provision [Article XIII, Section 3] that state government, including political subdivisions thereof, shall not extend credit in aid of private persons and private enterprises.

Id. at 225, 82 N.W.2d at 271. Under this case law, it is clear that state monies may not be appropriated to private persons for essentially private purposes. While LB331 contains a recital of public purpose, it appears to us that a development gratuity paid by the state to a private person for the development of a new product does entail the payment of state monies for a private purpose. Therefore, we feel that the development gratuity provisions in LB331 are of suspect constitutional validity under Article XIII, Section 3 of the Nebraska Constitution."

In 1986, the Legislature enacted LB1230, the Ethanol Authority and Development Act, now §§66-1300 et seq.

By letter to the Chairman of the Ethanol Board, dated October 17, 1986, we stated that we were unable to approve "proposed guidelines for grants to cities, counties and villages" because we had some serious doubt that some provisions of the "guideline" could overcome a challenge of constitutionality under the provisions of Article XIII, Section 3 of the Nebraska Constitution. From our examination of the proposed guidelines we concluded that pursuant to the authority contained in Section 66-1318 they were intended to authorize the grant or the loan of funds derived from an excise tax on wheat and other grains to eligible cities, counties and villages which would in turn provide "grants, loans and loan guarantees" to eligible "individuals, for profit and not for profit corporations, cooperatives, partnerships or such other legal entities" to provide "the capitol costs associated with the development of an ethanol plant or facility related to the processing and storage of ethanol, "or other related facilities".

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In rejecting the "guidelines" we pointed out that passing the funds to private individuals or corporations through a city, county or village does not make the grant or loan any less violative of the provisions of Article XIII, Section 3 of the Nebraska Constitution and if the funds were granted or loaned directly to the private entity.

In our opinion, that part of the standing committee's amendment which repeals §66-1318 satisfies the objection we expressed in our October, 1986 letter to the Chairman of the Ethanol Board.

From our examination of other changes proposed by Amendment 0510 we find one which should be addressed. Section 2 would amend §66-1317 to provide that in addition to cities, counties and villages, Indian Tribes may also apply for grants from the Ethanol Board to facilitate the construction or acquisition of Ethanol plants. It is our opinion that this change would constitute lending the credit to an "association" and would be in violation of Article XIII, Section 3 of the Nebraska Constitution.

Very truly yours,

ROBERT M. SPIRE  
Attorney General

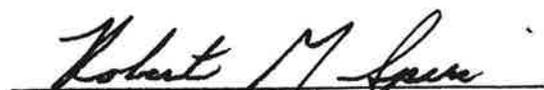


Bernard L. Packett  
Assistant Attorney General

BLP:cde

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

APPROVED BY:



Attorney General