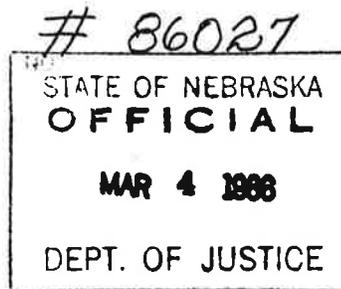


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



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DATE: March 3, 1986

SUBJECT: Constitutionality of LB 953 -- The Imposition of the State's Police Power

REQUESTED BY: Senator Rod Johnson
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
John Boehm, Assistant Attorney General

This is in response to your opinion request of February 10, 1986, in which you ask us about the constitutionality of LB 953. LB 953 would eventually require all retailers of gasoline in this state to make gasohol available for sale. Failure to comply with this section would constitute a Class V misdemeanor.

The Fourteenth Amendment to the Constitution of the United States provides in part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Article I, Section 1 of the Constitution of the State of Nebraska provides "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Article I, Section 3 of the Constitution of the State of Nebraska further provides "No person shall be deprived of life, liberty, or property, without due process of law."

Since LB 953 imposes a requirement on retailers of gasoline as to the conduct of their business, and in particular without regard to the consequences of this requirement in terms of

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potential losses, and because it makes failure to comply with this provision a criminal offense, it infringes upon those individuals' liberty and property interests guaranteed by the Constitution. "Liberty within the constitutional meaning includes absence of arbitrary and unreasonable restraint upon a person in the conduct of his business and handling of his property." McGraw Electric Company v. Lewis & Smith Drug Co., Inc., 159 Neb. 703 at 717, 68 N.W.2d 608 (1955). Such an infringement could be considered as

. . . an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our state constitution and also by the fourteenth amendment to the constitution of the United States. * * * This inalienable right is trespassed upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided also that it is not a business which is affected with the public use or interest.

State v. Sperry & Hutchinson Company, 94 Neb. 785 at 790, 144 N.W. 795 (1913).

These individual rights are not absolute, however, and may be curtailed by a proper exercise of the state's police power.

A police regulation, obviously intended as such, and not operating unreasonably beyond occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the Constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached. The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.

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Burns Baking Co. v. McKelvie, 108 Neb. 674 at 678, 199 N.W. 383, 26 LR 24, error dismissed 261 U.S. 625, reversed, Jay Burns Baking Company v. Bryan, 264 U.S. 504 (1922).

In addition our courts have stated that "The question of whether or not legislation is in the public interest is ordinarily one for legislative determination, however it may not under the guise of regulation in the public interest impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory." McGraw Electric Co., supra, at 720.

The test of whether an exercise of the police power is appropriate is essentially one of a reasonable relationship to the public welfare.

Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property; and if it is apparent that a statute under the guise of a police regulation does not tend to preserve the public health, safety, or welfare but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. (Omission of citations).

The exercise of the police power must be directed toward and have a rational relation to the basic interest of society rather than the mere advantage of particular individuals. (Omission of citations). A police regulation cannot arbitrarily invade private property or personal rights. There must be some clear and real connection between the assumed purpose of the law and its actual provisions.

United States Brewers' Assn., Inc. v. State, 192 Neb. 328 at 333, 220 N.W.2d 544, (1974).

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The issue raised here is whether there is a rational and reasonable relationship between the exercise of this police power and the public welfare. This purpose is obviously not spelled out in the statute itself, but we presume it to be one concerned with the general economic welfare of the state premised on the theory that this requirement will provide additional markets for growers of agricultural products and producers of gasohol which will, in turn, generally benefit the state's economy.

The first question that must be asked then is whether this statute has a rational relationship to the basic interest of society or merely would act to the advantage of those individuals who would sell the agricultural products to be turned into gasohol, and to the advantage of the producers of that gasohol. We are not convinced that a court would necessarily find the benefits of this provision to run to society at large as opposed to the special interests of a particular group of individuals. Likewise, we are not convinced that a court would necessarily conclude that a requirement that all gasoline retailers make gasohol available for sale regardless of any economic detriment to them was reasonably related to the preservation of the general public welfare of the State of Nebraska. The logic is simply too tenuous and the facts too speculative to support such a proposition in view of the substantial invasion of individual rights imposed by this purported exercise of the police power. "There must be a clear, real, and substantial connection between the assumed purpose of the enactment and its actual provisions." Eckstein v. City of Lincoln, 202 Neb. 741 at 744, 277 N.W.2d 91 (1979). Consequently, given the tendency of our courts to strike down attempted exercises of the police power where there is not a clear and substantial relationship to the promotion of the public welfare, we do not believe that this provision could be successfully defended against a determined constitutional challenge.

You further ask, that if in our judgment LB 953 imposes an unconstitutional burden on retailers, whether this could be overcome by adding a statement of public purpose and economic policy to the bill. As we have indicated above, a statute under the guise of a police regulation, which does not in fact preserve or promote the public's health, safety, and welfare is nevertheless an unconstitutional invasion of personal and property rights of the individual. Thus, mere statements as to a public or economic purpose would not sustain the statute if, in

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fact, there cannot be demonstrated a real and clear connection between the purported purpose of the law and its actual operation. As we have implied above, we doubt whether such a statement would be sufficient in this case.

Finally, we would point out one other constitutional defect with this piece of legislation. Section 1 of the bill provides that "A retailer who makes more than one type of gasoline available for sale shall make gasohol available for sale by January 1, 1990. A retailer who makes one type of gasoline available for sale shall make gasohol available by January 1, 1992."

The question is whether this is a reasonable classification or a violation of the equal protection requirement. In this regard our court has stated that

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 the 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. (Omission of citations).

Classification is proper if the special class has some reasonable distinction from other subjects of a 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.

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

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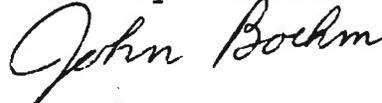
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The primary burden in implementing this legislation would appear to be essentially the same for all current retailers of gasoline, regardless of whether or not they presently offer more than one type of gasoline for sale. That would, in essence, require them to obtain facilities to provide yet an additional product, which burden would reasonably appear to be the same for all current retailers of gasoline regardless of the number of product lines they now carry. Consequently, we see no valid distinction, and thus it would appear that this bill in addition creates an invalid classification under the Constitution.

Sincerely,

ROBERT M. SPIRE
Attorney General



John Boehm
Assistant Attorney General

JB:jem

cc: Patrick J. O'Donnell
Clerk of the Legislature
1/25

APPROVED:



Attorney General