DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
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December 8, 1986

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NO.
STATE OF NEBRASKA
OFFICIAL
DEC 8 1986
DEPT. OF JUSTICE

Senator John W. DeCamp
Nebraska State Legislature
1116 State Capitol
Lincoln, Nebraska 68509

Dear Senator DeCamp:

This is in response to your letter of December 5, 1986, in which you ask whether, under the terms of the call of the Governor for the recent special session, the Legislature has the authority to consider an increase in the sales and income tax as one of the methods to address the budgetary cuts proposed, in light of the entire picture of legislative authority in setting tax rates.

A similar question was presented by Senator Jerome Warner in his letter of October 17, 1985, to the Attorney General for his opinion. That question was prompted by the Governor's call which included some revenue enhancers, but had restricted the Legislature from considering the sales and income tax method of revenue raising. Attorney General Opinion No. 135, October 24, 1985 (a copy of which is attached).

When presented with that question, we stated an argument could be advanced to allow the Legislature to examine the sales and income tax rates after it had <u>acted on</u> the various revenue and appropriation measures contained in that call. (Emphasis added). Even under that argument, we stated that, consistent with our previous comments, we did not believe that the scope of the call was broad enough for the Legislature to consider any bills standing <u>alone</u> which would raise the sales and income tax rates. That subject by itself was simply not within the scope of the call. However, we noted that one could argue that, after examining the proposed reductions in appropriations and the proposed increase in revenues contained in the <u>call</u>, and <u>acting</u> upon them, the Legislature would at that point in time be required to exercise its responsibilities under §77-2715.01(b) by examining the new levels of appropriations and estimated receipts, and setting the sales and income tax rates accordingly. Should the Legislature then determine an adjustment to the sales and income tax rate is necessary, it could arguably so act prior to the close of the special session.

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As you are aware, the Governor did amend the call of the special session last year by including for consideration by the Legislature an increase in the income tax rate for the 1985 tax year. The action of the Governor to amend the call was challenged by an original action in our Supreme Court which this office defended successfully. A question still remains whether, and at what point in time, the Legislature may act under Neb.Rev.Stat. §77-2715.01(b) (Supp. 1985) under the circumstances previously outlined.

Under the current call of this special session, the call, among other things, limits the Legislature to reducing appropriations approved by the Eighty-Ninth Legislature, Second Session. Under the current call, which is more restrictive than the previous special session call in that it makes no provision for consideration of revenue enhancers, we have found no reason to change the conclusion reached in our opinion of October 23, 1985, No. 135.

In that opinion we concluded then as we do now that, given the restrictive view which our Supreme Court has taken in interpreting the scope of the Governor's call during special sessions, we cannot conclude that an increase in the sales tax rate would be upheld if challenged in a lawsuit as beyond the scope of a call. Thus, the more prudent course of action, should the Legislature subsequently determine after exhausting the items on the call that a sales or income tax increase is warranted, would be for the Legislature to petition the Governor under §58-125 for a special session for that purpose. This would be the preferred method of bringing within the call the issue of sales and income tax increases should the Governor decide not to amend the call to include them for consideration in this session.

This would clearly avoid any court challenges that could leave the matter in a state of uncertainty for a matter of months if not years. It is our conclusion that LB 4 would, in all likelihood, be held outside the scope of the Governor's call.

Very truly yours,

ROBERT M. SPIRE
Attorney General

Approved: ROBERT M. SPIRE

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