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15-001

NO. STATE OF NEBRASKA
OFFICIAL
FEB 3 - 2015
DEPT. OF JUSTICE

SUBJECT: Authority Of A City To Amend An Economic Development Program Under The Local Option Economic Development Act

REQUESTED BY: Senator Colby Coash
Nebraska State Legislature

WRITTEN BY: Doug Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

You are considering introducing legislation to clarify the authority of a city council or village board to amend an economic development program under the Local Option Municipal Economic Development Act. Neb. Rev. Stat. §§ 18-2701 to 18-2739 (2012). The Act, in general, authorizes a city or village to propose an economic development program and to use such funds as may be necessary for economic development activities if the program is approved by a majority of the registered voters of the city or village voting upon the question. The Act constitutes the enabling legislation to permit cities and villages to exercise the authority granted by Neb. Const. art. XIII, § 2.

You state that if the Legislature amends the Act to add a qualifying business or eligible activity after the voters have approved a particular economic development plan, this results in confusion about what action a city must then take to include the new business or activity in the plan. You have requested our opinion on two questions concerning amendment of an economic development plan. First, you ask whether, in such a circumstance (if the Legislature amends the Act to add a qualifying business or eligible activity), a city council may amend the plan to include the new business or activity as provided under § 18-2714(2) or whether the change must first be approved by the voters as provided in § 18-2714(3). Second, you ask whether Neb. Const. art. XIII, § 2 would prohibit amendment of the Act so as to instead authorize the city council to amend the plan without voter approval.

Discussion

Reviewing the relevant statutes of the Act, Neb. Rev. Stat. § 18-2705 defines "economic development program" to mean a "project or program utilizing funds derived from local sources of revenue for the purpose of providing direct or indirect financial assistance to a qualifying business . . . ." Section 18-2709 then defines "qualifying business" as a business which derives its principal source of income from that statute's list of eligible sources. There are several steps in the adoption of an economic development program. Section 18-2710 requires the city's governing body to prepare a proposed plan which includes the "description of the types of businesses and economic activities that will be eligible under the program for the city's assistance." Section 18-2712 provides that the city must present the plan at a public hearing and then adopt the proposed plan and any amendments by resolution. The city must also submit the question of the adoption of the proposed economic development plan to the registered voters at an election and, if a majority of those voting on the issue vote in favor of the question, the city then establishes the program by ordinance. §§ 18-2713 and 18-2714.

Question 1. If the Legislature amends the Act to add a qualifying business or eligible activity, can a city amend the plan to include the new business or activity or does the change have to be approved by the voters?

In our view, it appears from the language of the Act that it was the intent of the Legislature to require voter approval of a specific, detailed economic development plan. Here, pursuant to Neb. Rev. Stat. § 18-2710, the city's proposed plan must describe "the types of businesses and economic activities that will be eligible under the program for the city's assistance." As discussed above, the city must propose those types of qualifying businesses and economic development activities which are within the statutory definitions found at §§ 18-2705 and 18-2709. The governing body's resolution adopting the proposed plan must include either the full text of the proposed plan or it may be incorporated by reference and both the resolution and the proposed plan must be filed with the city clerk's office where it is available for public review. § 18-2712. The question of the adoption of the economic development program is then submitted to the registered voters at an election and, if a majority of those voting vote in favor of the question, the governing body then implements the program "upon the terms set out in the resolution." §18-2713. Further, the economic development program is adopted by ordinance "in conformity with the terms of such program as set out in the original enabling resolution." § 18-2714(1). Thus, these statutes indicate the Legislature's overall intent that the voters approve a specific program containing a description of eligible businesses and activities and the city then adopts the program approved by the voters.

As to amendment of the approved plan, § 18-2714(3) provides:

> The governing body of a city shall not amend the economic development program so as to fundamentally alter its basic structure or goals, either with regard to the qualifying businesses that are eligible to participate, the

> local sources of revenue used to fund the program, the uses of the funds collected, or the basic terms set out in the original enabling resolution, without submitting the proposed changes to a new vote of the registered voters of the city in the manner provided for in section 18-2713.

When construing a statute, courts should attempt to discover legislative intent from the language of the act and give effect to that intent. *Tracfone Wireless, Inc. v. Nebraska Public Service Comm'n*, 279 Neb. 426, 433, 778 N.W.2d 452, 459 (2010); *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989). Statutory language should generally be given its plain and ordinary meaning and where the words of the statute are plain, direct and unambiguous, no interpretation is necessary to ascertain their meaning. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). And, a court will "construe statutes relating to the same subject matter together to maintain a sensible and consistent scheme, so that effect is given to every provision. *Tracfone Wireless, Inc.* at 433, 778 N.W.2d at 459.

With these rules of statutory construction in mind, it seems to us that the language of § 18-2714(3) is plain, direct and unambiguous and requires voter approval before the city may amend the plan to include a new qualifying business or activity. You point out that § 18-2714(2) allows a city to amend its ordinance "to conform to the provisions of any existing or future state or federal law." You suggest that this provision might allow the city to act without voter approval if the Legislature later amends the Act to add a qualifying business or eligible activity. However, it appears to us that subsection (3) is the more specific provision with regard to changing the qualifying businesses that are eligible to participate. Furthermore, even if the language of § 18-2714 requires construction, requiring voter approval is consistent with the overall intent of the Legislature that the voters approve a specific plan and that the city then adopt that plan approved by the voters. Therefore, while the language of subsection (2) may result in some confusion, we conclude that the better answer to your first question is that, under the current statutory scheme, the voters must approve a change in the eligible businesses and activities of an economic development plan. If you wish to clarify that the city may amend the plan without voter approval, you may then wish to consider introducing legislation to that effect.

Question 2. Does Neb. Const. art. XIII, art. 2 prohibit amendment of the Act to clearly authorize the city to amend the economic development plan with regard to the description of eligible businesses and activities without first obtaining voter approval?

Neb.Const. art. XIII, § 2 provides, in pertinent part, that "the Legislature may also authorize any incorporated city or village, including cities operating under home rule charters, to appropriate such funds as may be deemed necessary for an economic or industrial development project or program subject to approval by a vote of a majority of the registered voters of such city or village voting upon the question." "Constitutional provisions are not open to construction as a matter of course; construction is

appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary." *Conroy v. Keith County Board of Equalization,* 288 Neb. 196, 204, 846 N.W.2d 634, 641 (2014).

While the constitutional provision does provide that the Legislature may enact enabling legislation to authorize cities to appropriate funds for a project or program "subject to approval by a vote of a majority of the registered voters," there is no language in art. XIII, § 2 with regard to amendment of an economic development plan. The details of the enabling legislation are left to the Legislature and the current requirements for the content of the plan, the eligibility of businesses, and the amendment of the plan are found in the statutes enacted by the Legislature. An argument could thus be made that the general language of art. XIII, § 2 does not preclude the Legislature from changing the current statutory requirements for amendment of an economic development plan. On the other hand, the one constitutional limitation on a city's authority to appropriate funds for an economic development plan is the approval of the voters. As it is not clear whether this pertains to amendment of a plan as well as the original adoption of a plan, an argument could be made that legislation allowing the city to amend the plan without voter approval is contrary to the constitutional grant of authority to the Legislature.

Conclusion

In our opinion, for the reasons stated above, the current statutes require voter approval before a city may amend its economic development plan to include a new qualifying business or activity. You may wish to consider introducing legislation to clarify that a city may amend its plan without voter approval. However, while a plausible argument can be made that Neb. Const. art. XIII, § 2 does not preclude such legislation, it is unclear whether such legislation would be found constitutional.

Sincerely,

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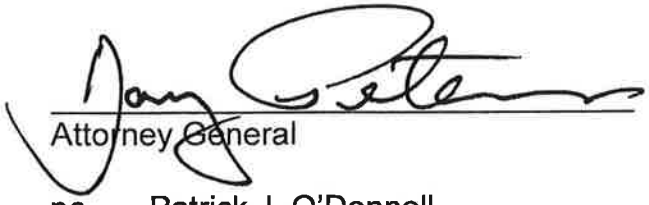
Approved by:



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Clerk of the Nebraska Legislature

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