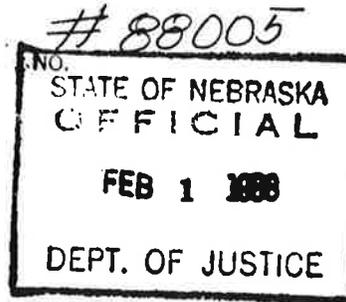


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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ROBERT M. SPIRE  
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DATE: January 29, 1988

SUBJECT: Constitutionality of LB 180 - Regulation of Automatic Dialing-Announcing Devices (ADAD's).

REQUESTED BY: Senator Don Wesely  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of LB 180. Generally, LB 180 would amend existing statutory provisions relating to the regulation of automatic dialing-announcing devices (ADAD's). The bill would prohibit sequential dialing or dialing emergency numbers when using ADAD's. In addition, the bill provides for an increase in the charge for a permit to operate such devices, and requires the renewal of permits every two years.

The principal issue to be addressed in assessing the constitutionality of LB 180 concerns whether the regulation of ADAD's in the manner proposed under the bill constitutes a valid exercise of the state's police power.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals and generally for the public welfare. Louis Finocchiaro, Inc. v. Nebraska Liquor Control Commission, 217 Neb. 487, 351 N.W.2d 701 (1984); Montgomery v. Blazek, 161 Neb. 349, 73 N.W.2d 402 (1955); State v. Geest, 118 Neb. 562, 225 N.W. 709 (1929); Union Pacific Railroad Co. v. City of Lincoln, 97 Neb. 198, 149 N.W. 419 (1914). The police power extends to all great needs of the state and may be invoked to sanction what is found to be greatly or immediately necessary to the public welfare. United States Brewers' Association v. State, 192 Neb. 328, 220 N.W.2d 544 (1974); Fitch v. State, 102 Neb. 361, 167 N.W. 417 (1918). The power is not stagnant but develops to meet the changing conditions of the state. Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N.W. 835 (1927).

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Within constitutional limits, the Legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people and when and how the police power should be exercised. By its very nature, the power has no set parameters. State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950); State v. Drayton, 82 Neb. 24, 117 N.W. 768 (1908).

The test for whether the power has been used constitutionally is whether the legislature has acted reasonably. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). The legislative enactment must bear a reasonable relationship to the purpose sought to be accomplished. Louis Finocchiaro, Inc. v. Nebraska Liquor Control Commission, supra; Eckstein v. City of Lincoln, 202 Neb. 741, 277 N.W.2d 91 (1979); Golden v. Bartholomew, 140 Neb. 65, 299 N.W. 356 (1941); State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N.W. 376 (1912); State ex rel. Baldwin v. Strain, supra.

Applying these principles to the provisions of LB 180, we cannot say the bill, on its face, represents an unconstitutional exercise of the state's power to enact legislation promoting the public welfare. The state has a legitimate interest in preventing potential abuses associated with the use of ADAD's, and may validly act to limit and regulate the use of such devices. Furthermore, the state has a valid interest in establishing appropriate limits and restrictions on the use of such devices in the public interest.

In Harriman v. City of Beverly Hills, 275 Cal.App.2d 918, 80 Cal.Rptr. 426 (1969), the court considered a constitutional challenge to a city ordinance regulating telephone answering services. The ordinance at issue required the obtaining of a permit prior to advertising or operating a telephone answering service, and further required the furnishing to the police department of detailed information about employees, including photographs and fingerprints. Id. at \_\_\_\_\_, 80 Cal.Rptr. at 428. The court upheld the constitutionality of the ordinance, determining the regulation of such businesses in the manner provided was a valid exercise of the city's police power. Id. at \_\_\_\_\_, 80 Cal.Rptr. at 431-32. While the decision in Harriman involved municipal regulation in an area different than that proposed under LB 180, we believe this decision demonstrates the regulation of telecommunications-related matters clearly falls within the scope of the exercise of the police power.

We note, however, that a recent amendment to LB 180 would increase from \$50.00 to \$500.00 the application fee for a permit to operate ADAD's. Legislative Journal, Ninetieth Session, p. 233. As a general rule, fees charged for licensing or permits

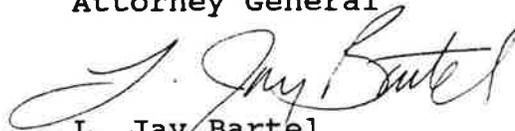
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must not be established at a level which is unreasonable or confiscatory. The amount of a regulatory license fee need not, however, be limited to the expense associated with the issuance of the license. The charge may properly take into consideration the cost of supervision and enforcement, including such matters as inspection and examination. 51 Am.Jur.2d Licenses and Permits §§114, 115 (1970); See also City of Ord v. Biemond, 175 Neb. 333, 122 N.W.2d 6 (1963). While the determination of what amount constitutes a reasonable fee under such circumstances is a matter to be determined initially by the Legislature, we believe the substantial increase in the application fee proposed under the bill as amended raises a question as to the reasonableness of the charge. We are not, however, able to definitively conclude the fee established is inherently unreasonable.

In conclusion, except for certain reservations we have with respect to the reasonableness of the application fee established in the bill as amended, it is our opinion that the regulatory provisions relating to ADAD's provided under LB 180 represent a valid and constitutional exercise of the state's police power.

Very truly yours,

ROBERT M. SPIRE  
Attorney General

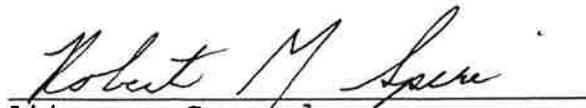


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cc: Patrick J. O'Donnell  
Clerk of the Legislature

APPROVED BY:

  
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