DEPARTMENT OF JUSTICE
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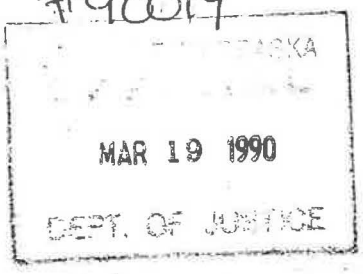

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DATE: March 16, 1990

SUBJECT: Constitutional Law. Construction of LB 870 in relation to Article XIII, Section 3, of the Nebraska Constitution

REQUESTED BY: Senator Don Wesely
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether the Nebraska Medical Student Assistance Act as amended by LB 870 would violate Article XIII, Section 3, of the Nebraska Constitution. We have concluded it would unless the loans are determined to be for a public purpose, as discussed below.

LB 870 amends the Nebraska Medical Student Assistance Act by including students studying osteopathic medicine in the class eligible for such loans. There are no osteopathic medical schools in Nebraska, so LB 870 deletes the requirement in the act that the school attended by the recipient of a loan must be in Nebraska.

Article XIII, Section 3, provides:

> The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.

Thus, there are one general rule and two exceptions to that general rule in that section of the constitution. The general rule has been interpreted as supporting "the fundamental principle that public monies may not be used for private purposes." State ex rel. Beck v. City of York, 164 Neb. 223, 225, 82 N.W.2d 269 (1957).

The Nebraska Medical Student Assistance Act comes within one of those exceptions now. If amended by LB 870 as proposed it will not. However, that fact alone will not make that act unconstitutional.

The Legislature may enact legislation consistent with the general rule in Article XIII, Section 3, even though it does not come within one of the exceptions in that section. See, State ex rel. Packard v. Nelson, 34 Neb. 162, 169-173, 51 N.W. 648 (1892), for a discussion of legislative powers. Thus, if the Nebraska Medical Student Assistance Act, as amended by LB 870, is consistent with the general rule in Article XIII, Section 3, it will not violate that section of the constitution.

To be consistent with the general rule, the low-interest long-term loans given to students by the state under the act must be for a public purpose. City of York, above.

> A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment and the general welfare of all the inhabitants.

Platte Valley Public Power & Irrigation District v. County of Lincoln, 144 Neb. 584, 589, 14 N.W.2d 202 (1944). A loan can be for a public purpose even though it is given to individuals.

> "[T]he vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.'. . ."

Quoted in United Community Services v. The Omaha National Bank, 162 Neb. 786, 800, 77 N.W.2d 576 (1956).

"What is a public purpose is primarily for the Legislature to determine." United Community Services, above, at 797. The weight is on the side of the Legislature in case of any doubt. Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 67, 105 N.W. 716 (1905). However, the court can and has substituted its judgment for that of the Legislature with regard to what is a public purpose. See, for example, City of York, above, at 230, and Oxnard Beet Sugar Co., above, at 68.

An amendment to the Constitution can change our fundamental law and validate acts which have been held to be invalid. See, State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 200, 202, 113 N.W.2d 63 (1962).

In this case the Legislature thought it had to change Article XIII, Section 3, in order to authorize loans from the state to Nebraska residents who are students at adult or post high school institutions in this state. State educators wanted such loans authorized so they could serve as matching funds for federal loan funds that would then be available to their students. See, Legislative History of Laws 1967, LB 823. The people adopted that amendment in 1968. Thus, if the sponsor of that legislation was correct, the Nebraska Medical Student Assistance Act cannot be constitutional if it no longer fits into the exception.

The Legislature which enacted the Nebraska Medical Student Assistance Act in 1978 not only fitted it into one of the exceptions in Article XIII, Section 3. It also stated the reasons for the loans: to make loans to medical students and to provide a financial incentive for such students to go into practice in a medical practice shortage area in this state. Neb.Rev.Stat. §71-5615 (Reissue 1986). LB 870 would not change those purposes except to include osteopathy students in the class eligible for such loans.

In conclusion, if LB 870 is enacted as proposed to delete the requirement that students receiving the loans must be attending institutions in this state, that fact will not make the resulting law unconstitutional unless the loans are not for a public purpose. We cannot predict whether the judgment of the court would agree with that of the Legislature on this point. Thus, by deleting the requirement that the institutions attended be in this state, you would put in question under Article XIII, Section 3, the constitutionality of the whole act.

Sincerely yours,

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

APPROVED:

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