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#94017

DATE: March 18, 1994

SUBJECT: Constitutionality of LB 1125; Can the Legislature prohibit public power districts and other similar entities from charging lot rental fees?

REQUESTED BY: Senator Jim D. Cudaback
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You are apparently considering a motion to pull LB 1125 from committee for consideration by the entire Legislature, but before doing so, you have requested our opinion as to two questions concerning the bill. First, you wish to know if LB 1125 can "be considered constitutional?" Second, you wish to know "under which section or provision, are the bodies named in the bill given the authority to levy, increase or request lot fees from homeowners?"

LB 1125 deals with the authority of public power districts, public irrigation districts and public power and irrigation districts to charge lot fees or rental fees to lake associations or private individuals who lease property owned by the districts from the districts. The bill provides, in its entirety:

> A public power district, public irrigation district, or public power and irrigation district which leases property to lake associations or individuals shall not require lot fees as part of a lease agreement unless the lot fees only apply to lots which have been transferred to a new owner on or after the effective date of this act. A district shall not terminate a lease in order to evade the provisions of this section.

From discussions with your staff, we understand that the "lot fees" referenced in LB 1125 are rental fees to be charged to associations and individuals who rent land around lakes owned by the districts in question. We also understand that, in many instances, such rental fees have not been charged in the past, and that lessees of land around such lakes have be able to lease lake-front property in exchange for maintaining the property or providing similar services.

I. CONSTITUTIONALITY OF LB 1125

You initially requested our opinion as to whether "if enacted will LB 1125 be considered constitutional?" As we have indicated frequently in the past, a question on the general constitutionality of a pending bill will necessarily result in a general response from this office since we obviously cannot address specific questions about a bill unless they are set out in the opinion request. Op. Att'y Gen. No. 89028 (April 5, 1989); Op. Att'y Gen. No. 85157 (December 20, 1985). However, in this instance we discussed your original opinion request with members of your staff, and we were subsequently provided with various materials which raised several potential constitutional questions concerning LB 1125. We understand that those materials form the basis for your concerns about the bill, and we will discuss each of those concerns in turn. For the reasons set out below, we believe that the bill is constitutional.

A. Article I, Section 16 of the Nebraska Constitution prohibiting an irrevocable grant of special privileges or immunities.

The first question concerning LB 1125 involves Article I, Section 16 of the Nebraska Constitution which prohibits the passage of any "bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any ***irrevocable grant of special privileges or immunities***." (emphasis added). The concern here is that LB 1125 creates a special privilege in favor of individuals or lake associations which currently lease property from power districts in that those persons cannot be charged lot or rental fees to lease property, while persons who lease property from other entities can be required to pay such fees. Alternatively, there is concern that the provisions of LB 1125 create a special privilege in favor of existing lessees of lake-front property in that those lessees cannot be required to pay a rental fee while new lessees can have such fees imposed. In both cases, the argument presumably is that LB 1125 would create special privileges or immunities for existing lessees of lake front property owned by public power districts or similar entities.

There is not a great deal of recent Nebraska case law which interprets the requirements of Article I, Section 16. However, Article III, Section 18 of the Nebraska Constitution also prohibits the passage of special laws which would grant special privileges or immunities in Nebraska, and the two sections of the constitution are often considered together. For example, in ***Wittler v. Baumgartner***, 180 Neb. 446, 144 N.W.2d 62 (1966), the court held that a grid system for electing directors of public power districts which was imposed on all Nebraska electors but the electors of two Nebraska counties violated Article III, Section 18 **and** Article I, Section 16 of the Nebraska Constitution. In that case, the court described the test for constitutionality of legislation under those constitutional provisions as follows:

> It is also fundamental that, although it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

Id at 456, 144 N.W.2d at 70. ***See Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991).

On the basis of the ***Wittler*** test noted above, we cannot say that there is no substantial difference of situation or circumstance involved in the classifications contained in LB 1125. In the first instance, lessees of public utilities, and particularly those of longstanding status, may well be so different from lessees of other public and private entities as to justify disparate treatment. Moreover, the bill would not prohibit all forms of rental payments by such lessees in that the power districts in question could still maintain the present practice of leasing the property in exchange for maintenance of the premises by the lessee. In the second instance, lessees of longstanding status may well be so different from new lessees as to justify disparate treatment. Indeed, the latter situation is not unlike the grandfathering provisions which are often inserted in new licensing procedures. Consequently, we do not believe that LB 1125 would create special privileges or immunities in contravention of Article I, Section 16 of the Nebraska Constitution.

B. <u>Article XIII, Section 3 of the Nebraska Constitution which prohibits lending the credit of the state in aid of any individual, association or corporation.</u>

The argument in this instance is that LB 1125 requires public power districts to donate the fair rental value of the property involved to the private individuals or associations who leased the

property prior to the effective date of the act. This, in turn, would allegedly give a benefit to those individuals or associations, and result in giving money or donating property in aid of those private individuals or associations in violation of Article XIII, Section 3 of the Nebraska Constitution.

At the outset, it should be noted that the provisions of LB 1125 do not require power and irrigation districts to donate the fair value of the rental for the property involved; the bill simply provides that the districts may not charge lot fees for the rentals in question. Consequently, power and irrigation districts may continue to recover their rental fees through agreements with the lessees to maintain the property or provide similar services, as we understand is the current practice. As a result, it can be argued that LB 1125 does not necessarily involve a situation where private lessees are given public monies or other benefits.

The most recent significant discussion of Article XIII, Section 3 of the Nebraska Constitution occurs in ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991). In that case, the court indicated that the purpose of Article XIII, Section 3 is to prevent the state or any of its governmental subdivisions from extending the state's credit to private entities. The court went on to state that,

> The key [to an analysis of a situation under Article XIII, Section 3] is whether the state stands as a creditor through the expenditure of public funds or as a debtor by the extension of the state's credit to private corporations, associations or individuals. The state is not empowered to become a surety or guarantor of another's debts.

Id. at 722, 467 N.W.2d at 852. It does not appear to us that prohibiting public power and irrigation districts from charging lot rental fees to lessees of lands around lakes and other property of the districts makes those districts either sureties or guarantors of another's debts.

The ***Haman*** case does indicate that the principle of law that public funds cannot be used for private purposes also emanates from Article XIII, Section 3, and it could argued that the prohibition on lot rental fees in LB 1125 involves such an impermissible use of public funds. However, it is for the Legislature to determine in the first instance what is and what is not a public purpose. ***State ex rel. Douglas v. Thone***, 204 Neb. 836, 286 N.W.2d 249 (1979); ***Chase v. County of Douglas***, 195 Neb. 838, 241 N.W.2d 334 (1976). That determination is not conclusive on the courts, but a lack of public purpose justifying a declaration that a particular statute is invalid must be so clear and palpable as to be immediately

perceptible to a reasonable mind. ***Id.*** We do not believe that the provisions in LB 1125 forbidding lot rental fees involve such a clear lack of public purpose as to create a violation of Article XIII, Section 3.

C. Fourteenth Amendment to the United States Constitution which provides that no state shall make any law which denies any person within its jurisdiction the equal protection of the laws.

The final constitutional problem with LB 1125 alleged in the materials which you provided to us involves the equal protection guarantee contained in the Fourteenth Amendment to the United States Constitution. Presumably, the argument in this case is that power and irrigation districts which are prohibited from charging lot rental fees under LB 1125 are denied equal protection under the law since other entities which rent such property may charge appropriate rentals. This argument may be dealt with rather summarily.

In ***Triplett v. Tiemann***, 302 F. Supp. 1239 (D. Neb. 1969), the United States District Court for the District of Nebraska stated:

> The plaintiff school districts are legally not subject to injury under the Equal Protection Clause. ***The Equal Protection Clause of the Fourteenth Amendment has no application to the acts of a State against its own political subdivisions.***

Id. at 1242 (emphasis added). ***See Ayers v. Allain***, 674 F. Supp. 1523 (D. Miss. 1987); ***County Department of Public Welfare of Lake County v. Stanton***, 545 F. Supp. 239 (D. Ind. 1982). Obviously, if the Equal Protection Clause has no application to the acts of a State against its own political subdivisions, then the Equal Protection Clause has no application in the present instance where, under LB 1125, the state would deny power and irrigation districts the right to charge certain forms of rent. Those districts, therefore, cannot maintain that they will be denied equal protection by the State under LB 1125.

D. Article I, Section 16 of the Nebraska Constitution which prohibits the impairment of the obligation of contracts.

Our final concern with the provisions of LB 1125, which again involves portions of Article I, Section 16 of the Nebraska Constitution, was not raised in the materials which you provided to us. Article I, Section 16 prohibits the passage of any "law impairing the obligation of contracts" in Nebraska, and is similar to the provision in Article I, Section 10 of the United States

Constitution which prohibits states from passing such laws. It is our understanding from discussions with your staff that some power districts in Nebraska currently have leases in place which provide for the payment of lot rental fees in connection with leases of property held by the districts. If LB 1125 is construed to affect the rights of those power districts to charge rental fees under existing leases, then an obvious question is raised as to whether the contract rights of those districts have been impaired by the bill. After reviewing this situation, however, we do not believe that LB 1125 violates Article 1, Section 16 in that regard.

It is clear under the pertinent state and federal constitutional provisions that the state may not pass legislation which impairs the obligations or rights contained in existing contracts. However, the obligations or rights which would be impaired by LB 1125 are contractual obligations or rights in favor of the power and irrigation districts affected by that bill, i.e. the contractual rights under any existing leases to receive rental or lot fees. Therefore, the contractual rights which arguably might be impaired by LB 1125 are the rights of governmental subdivisions of this state.

The general rule with respect to the impairment of the contractual obligations and rights of governmental subdivisions appears to be that neither the charter of the governmental subdivision nor any legislative act conferring power on or regulating the use of property held by the subdivision is a contract within the meaning of the constitutional provisions concerning impairment of contracts. ***Hunter v. City of Pittsburgh***, 207 U.S. 161 (1907); E. McQuillin, ***The Law of Municipal Corporations***, § 4.18 (Charles R.P. Keating & Stephen M. Flanagan eds., 3rd ed. 1988). Consequently, the governmental powers of governmental subdivisions may be changed or withdrawn at will without impairing the obligation of contracts. ***Id.*** There are some earlier cases which draw a distinction between governmental functions of governmental subdivisions and functions of those entities which are proprietary in nature. ***Hunter v. City of Pittsburgh, supra***; Comment Note, ***Right of municipality to invoke constitutional provisions against acts of state legislature***, 116 A.L.R. 1037 (1938); E.B. Schultz, ***The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations***, 36 Mich. L. Rev. 385 (1938). And, under those cases it might be possible to argue that the rights of the power districts at issue under LB 1125 are proprietary in nature and thus protected from impairment by the state. However, in ***City of Trenton v. State of New Jersey***, 262 U.S. 182 (1923), the United States Supreme Court denied the existence of the governmental/proprietary distinction, at least with respect to the Contracts Clause in the federal constitution, and stated:

> But such distinction [between governmental and proprietary powers and obligations] furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. They do not apply as against the state in favor of its own municipalities.

Id. at 192. Therefore, it does not appear to us that the provisions of LB 1125 would involve a violation of the Contracts Clause of the United States Constitution since any contractual rights impaired by that bill would involve the rights of power and irrigation districts which are governmental subdivisions in Nebraska.

There are no Nebraska cases which deal precisely with the issue of whether the state constitutional prohibition upon the impairment of contracts applies to impairments involving the proprietary functions of governmental subdivisions. However, in ***City of Fremont v. Dodge County***, 130 Neb. 856, 266 N.W. 771 (1936), a case dealing with retrospective legislation, the court cited the ***City of Trenton*** case with approval and stated,

> There is no ground here for the application of constitutional restraints by a municipality against the action of the state legislature. They do not apply as against the state in favor of its own municipalities unless there are clear constitutional provisions to that effect.

Id. at 869, 266 N.W. at 776. Accordingly, on the basis of the ***Dodge County*** case and the ***City of Trenton*** case, we do not believe that LB 1125 involves a violation of Article I, Section 16 of the Nebraska Constitution dealing with impairment of the obligations of contracts by the state.

II. AUTHORITY OF PUBLIC POWER DISTRICTS TO LEVY LOT FEES

Apart from your initial question concerning the constitutionality of LB 1125, you have also asked us, "under which section or provision, are the bodies named in the bill given the authority to levy, increase or request lot fees from homeowners?"

Obviously, there are no portions of LB 1125 which give public power or irrigation districts authority to charge lot fees from homeowners. However, ***Neb. Rev. Stat. §*** 70-625 (1990) provides, in pertinent part, "a public power district shall have all the usual powers of a corporation for public purposes and may purchase, hold, sell, and lease personal property and real estate reasonably necessary for the conduct of its business." We believe that this

statute gives the public bodies referenced in LB 1125 the authority to charge the fees in question.

Sincerely yours,

DON STENBERG
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cc. Patrick J. O'Donnell
Clerk of the Legislature

Approved by:

Attorney General