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#95012

DATE: February 15, 1995

SUBJECT: Effect of Repeal of ***Neb. Rev. Stat.*** § 70-627.01 (1990), a Statutory Policy Statement Encouraging the Constructive Use of Radioactive Materials or Energy in Nebraska

REQUESTED BY: Senator Donald Preister
Nebraska State Legislature

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

Neb. Rev. Stat. § 70-627.01 (1990), which is a part of the Nebraska statutes dealing with public power and irrigation districts, states:

> It is hereby determined and declared to be the public policy of the State of Nebraska to encourage constructive use of radioactive material or the energy therefrom associated with facilities constructed in connection with the production of electrical energy, for industrial and other useful purposes, and to adapt its laws to meet new conditions in the developing field of industrial use of radioactive material or the energy therefrom in ways that will encourage the healthy development and progress of such industries.

LB 120 would repeal Section 70-627.01, and enact the following language into law:

> The Legislature finds that Nebraska should develop efficient and less-polluting energy sources which will make Nebraska more energy independent and will retain Nebraska dollars in the Nebraska economy, thereby generating additional jobs and tax income to the state rather than export Nebraska dollars. The Legislature further finds that the use of sustainable indigenous energy resources is in the public interest of the people of Nebraska.
>
> Consistent with this policy the public power districts in Nebraska shall:
>
> (1) Practice least cost integrated resource planning in the determination of future energy choices; and
>
> (2) Support research and development of a diverse energy supply that insulates Nebraska from the risks and uncertainties of fuel price volatility and future environmental liability.

You have now requested our opinion on a number of questions concerning the effects of a repeal of Section 70-627.01, and we will respond to each of your questions in turn. Before we address your specific questions, however, we will discuss some of the general rules pertaining to statutory interpretation and construction, for reasons that will become apparent below.

Statutes are not open to construction as a matter of course, and in the absence of any contrary indication, statutory language is generally to be given its plain and ordinary meaning. ***Weiner v. State ex rel. State Real Estate Commission***, 214 Neb. 404, 333 N.W.2d 915 (1983). In keeping with that premise, when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. ***Rosse v. Rosse***, 244 Neb. 967, 510 N.W.2d 73 (1994). On the other hand, statutes are open to construction when the language used requires interpretation or may reasonably be considered ambiguous. ***Coleman v. Chadron State College***, 237 Neb. 491, 466 N.W.2d 526 (1991). Under circumstances where the language used in a statute is ambiguous and must be construed, a fundamental principle of statutory construction is to attempt to ascertain legislative intent and to give it effect, and recourse may be had to the legislative history of the statute for the purpose of discovering the intent of the lawmakers. ***Lancaster County v. Maser***, 224 Neb. 566, 400 N.W.2d 238 (1987); ***North Star Lodge No. 227 v. City of Lincoln***, 212 Neb. 236, 322 N.W.2d 419 (1982). Where the language used in a statute is ambiguous, recourse may also be had to the legislative purposes or policy underlying the statute. ***Freese v. Douglas County***, 210 Neb. 521, 315 N.W.2d 638 (1982).

Section 70-627.01 is essentially a pronouncement by the Legislature of the public purposes or policy underlying certain portions of the statutes dealing with public power and irrigation districts. Such policy pronouncements are generally available for the clarification of ambiguous portions of a statute and are entitled to strong consideration in that process. 1A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, §20.12 (5th Ed. 1992); 82 C.J.S. ***Statutes*** § 323. However, such policy pronouncements are not a part of the substantive portion of the statute. SUTHERLAND ON STATUTORY CONSTRUCTION, ***supra***. This latter rule is illustrated in ***Hansen v. Gass***, 130 Neb. 685, 267 N.W. 403 (1936). That case involved the issue of whether the state's liquor laws in existence in 1936 allowed beer to be sold on the same premises as other alcoholic beverages. Section 3 of the pertinent statutes in that case contained a pronouncement by the Legislature that the public policy of Nebraska favored the separate sale of beer and other alcoholic beverages. ***Hansen*** at 687, 267 N.W. at 404. In contrast, various substantive portions of the same liquor statutes appeared to allow the sale of beer and other alcoholic beverages in the same location. Ultimately, the Nebraska Supreme Court ruled that the statement of public policy in Section 3 of the liquor statutes did not control over the other substantive provisions of the Act at issue. The Court stated:

> Section 3 [the public policy provision of the liquor statutes] is not legislative either in substance or form, but is merely a declaration of policy in the nature of a preamble. Although it appears as a section of the act, it does not change the provisions of the act. It declares that it is the public policy of the state to separate the sale at retail of beer and alcoholic liquors other than beer. It also provides that the same person may have a license to sell both if the sale is conducted as separate businesses and sold in separate and distinct places or premises. . . . However, it seems that what the Legislature does in positive and specific provisions of the law as enacted is not changed by a preliminary declaration as to public policy.
>
> . . . we conclude that the declaration of policy or purpose in section 3 of the act is not substantive law, and that it could only be of use to determine the intent of the Legislature in case sections 82 and 83 [other substantive liquor licensing provisions] were ambiguous with respect of the right of a holder of license C thereunder to sell alcoholic liquors, including beer regardless of alcoholic content, in the licensed premises.

Hansen at 693, 694, 267 N.W. at 407.

When the various authorities discussed above are taken into consideration, it becomes apparent that Section 70-627.01 is not substantive legislation, but only a statement of public policy or a description of the intent and purposes of the Legislature. Based upon those same authorities, if a given portion of the statutes dealing with public power and irrigation districts is clear and unambiguous, it is not open to construction, nor is it changed by the existence (or non-existence) of Section 70-627.01. On the other hand, portions of the statutes dealing with public power and irrigation districts which might be ambiguous will be construed with the assistance of the public policy pronouncement in Section 70-627.01 and any other relevant portions of the legislative history of those statutes. Repeal of the public policy pronouncement in Section 70-627.01 might also, in and of itself, form the basis for arguing that a particular construction should be given to an ambiguous portion of the statutes dealing with public power and irrigation districts since such a repeal might arguably evidence a change in the public policy of the State. With these conclusions in mind, we will turn to your specific questions in order in which you posed them.

1. Is 70-627.01 a state energy policy regarding nuclear energy?

We are not sure what you mean by "a state energy policy regarding nuclear energy." As noted above, Section 70-627.01 is a non-substantive statement of public policy and legislative intent which may be used, where appropriate in the case of statutory ambiguity, as an aid in the construction of pertinent statutes. Its repeal might also be used, in certain circumstances, as an aid in the construction of ambiguous statutes. Whether that makes it a "state energy policy regarding nuclear energy" depends upon your definition of such a policy and the application of such a policy in given circumstances.

2. Does repeal of 70-627.01 remove, affect or impair the rights, powers and authority of public power districts to operate or construct nuclear power plants, or to generate nuclear power?

As discussed at length above, Section 70-627.01 is not a substantive provision of law which changes other provisions of the statutes. Therefore, its repeal would not affect any specific and clearly enumerated powers or authority of public power districts regarding the generation of nuclear power. However, as a statement of public policy and legislative intent, it could be used, where appropriate, in the construction of any ambiguous statutes pertaining to those entities in those areas, and its repeal would affect that function. The repeal of Section 70-627.01 as a policy statement might also, in and of itself, form the basis

for arguing that certain constructions should be placed on particular ambiguous statutes in those areas.

3. Does repeal of the policy language contained in 70627.01 (sic) create ambiguities or call into question any of the power, authority or duties of public power and irrigation districts enumerated in Chapter 70?

Our answer to this question is essentially the same as our answer to question number 2 above. Since Section 70-627.01 is not a substantive statutory provision, its repeal would not affect any clearly stated powers or duties of public power and irrigation districts enumerated in Chapter 70. If it is repealed, it could no longer be used as an aid in the construction of any ambiguous statutes contained in Chapter 70, and its repeal as a policy statement could allow arguments for particular constructions of ambiguous portions of those statutes.

4. Does repeal of 70-627.01 affect or impair any person's rights to license, construct or operated a nuclear waste disposal facility in the State of Nebraska?

Our answer to this question is again essentially the same as our answer to question number 2 above. Since Section 70-627.01 is not a substantive statutory provision, its repeal would not directly impair any person's rights to license, construct or operate a nuclear waste disposal facility in Nebraska. If it is repealed, it could not longer be used as an aid in the construction of any ambiguous statutes pertaining to such rights, and its repeal could form the basis for arguing other constructions of ambiguous statutes in that area.

5. Does repeal of 70-627.01 affect, impair or remove the authority or ability of industry or medical/health care providers to use radioactive materials?

Since Section 70-627.01 is not a substantive statutory provision, its repeal would not directly affect or impair any authority or ability of industry or medical/health care providers to use radioactive materials. If it is repealed, it could no longer be used as an aid in the construction of any ambiguous statutes pertaining to such authority, and its repeal could form the basis for arguing other constructions of ambiguous statutes in that area.

6. If Section 1 of LB 120 is placed into law and 70-627.01 is not repealed, would the stated policy in 70-627.01 require that nuclear power be given greater consideration over other energy resources in the development of future energy supplies?

The bulk of Section 1 of LB 120 is a non-substantive public policy pronouncement concerning the development of efficient and less-polluting energy sources and the use of sustainable indigenous energy resources. Therefore, if Section 1 of LB 120 is placed into law and Section 70-627.01 is not repealed, there would simply be two statements of public policy concerning energy use and development available to aid in the construction of ambiguous statutes in that area. We see no language in Section 70-627.01 which would indicate a public policy to make nuclear energy the paramount energy resource in Nebraska. Moreover, statutes pertaining to the same subject matter are in pari materia, and must be construed together so as to give effect to every provision. ***Wahlers v. Frye***, 205 Neb. 399, 288 N.W.2d 29 (1980). As a result, we do not believe that leaving Section 70-627.01 in the statutes together with LB 120 would require that nuclear power be given greater consideration over other energy resources.

7. At least one of the public power districts argues that legislative repeal of 70-627.01 would be regarded as a significant act by a Court and would endanger the millions of dollars public power has invested in its nuclear plants. It has further stated that this argument could be waged successfully in a lawsuit to shut down a nuclear power plant. Is it your opinion that a Court would consider legislative repeal of 70-627.01 a significant act that could be successfully argued as a basis to shut down a nuclear plant or any (sic) way impair a public power district's ability to carry out its statutory duties and authority regarding the development, operation and construction of its facilities?

Once again, we must point out that Section 70-627.01 is a non-substantive statement of public policy and legislative intent which may be used, where appropriate in the case of statutory ambiguity, as an aid in the construction of pertinent statutes. Since it is not a substantive enactment, its repeal, standing alone, could not be used as a basis to shut down a nuclear power plant. However, its repeal could be cited as a change in the State's public policy concerning nuclear power, which might be used in support of a certain construction of the statutes affecting nuclear power plants. In that very limited sense, its repeal could be said to affect a public power district's ability to carry out its statutory

duties and authority regarding the development, operation and construction of its facilities.

Sincerely yours,

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

Approved by:

Attorney General