STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

No. 20-005
STATE OF NEBRASKA
OFFICIAL
JUL 09 2020
DEPT. OF JUSTICE

SUBJECT: LB 45 – Constitutionality of the Notice and Payment Provisions of the Black-Tailed Prairie Dog Management Act

REQUESTED BY: Senator Ernie Chambers
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Joshua E. Dethlefsen, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office about the constitutionality of several provisions of the Black-Tailed Prairie Dog Management Act ("Act"), specifically (1) whether the Act violates the Due Process Clause of the Nebraska Constitution where it specifically states that failure to provide notice does not relieve landowners of the necessity of full compliance under the Act, and (2) whether the Act violates Article VII of the Nebraska Constitution when fines or penalties are directed to a fund other than for use in the common schools. Although we typically do not address the constitutionality of currently existing statutes, we will construe your question to relate to currently-pending LB 45, which calls for the repeal of the Black-Tailed Prairie Dog Management Act. Our conclusions are as follows:

1) The notice provisions do not violate the Due Process Clause of the Nebraska Constitution because the Act appears to require individual notice before enforcement or management actions can be taken by the county; and

2) The deposit of funds to a black-tailed prairie dog management fund or the county general fund if the county takes management actions does not violate the Nebraska Constitution because it is not penal in nature and, thus, is not a "fine, penalty, or license money" which must be used for support of the common schools. However, funds from an enforcement action do appear to be penal in nature and could not be deposited in the black-tail prairie dog management fund or the county

general fund and, therefore, does likely violate Article VII of the Nebraska Constitution. That provision appears to be severable from the remainder of the Act.

Our analysis supporting these conclusions is set forth below.

THE BLACK-TAILED PRAIRIE DOG MANAGEMENT ACT AND LB 45

The Black-Tailed Prairie Dog Management Act, Neb. Rev. Stat. § 23-3801 *et seq.*, was passed as LB 473 in 2012. The Act provides counties with the power to adopt "a coordinated program for the management of black-tailed prairie dogs on property within the county." Neb. Rev. Stat. § 23-3803. The Act also imposes an obligation on landowners in such counties to "effectively manage colonies present upon his, her, or its property to prevent the expansion of colonies to adjacent properties if the owner of the adjacent property objects to such expansion." Neb. Rev. Stat. § 23-3804.

If a county has adopted a coordinated management program, it is required to publish general notice in one or more newspapers of general circulation in the county on or before May 1 of each year or at other such times as the county board may determine. Neb. Rev. Stat. § 23-3806. If a county board of a county that has adopted a coordinated management program "has reason to believe, based upon information or through its own investigation," that a prairie dog colony "has expanded onto adjacent property and the owner of the adjacent property objects to such expansion" and the county board determines that management of the colony is necessary, then the county board shall serve individual notice upon the owner of record of recommended methods of when and how black-tailed prairie dogs are to be managed. *Id.* A landowner may request an informal hearing within fifteen days of the notice. *Id.*

If a landowner fails to comply with the notice and has not requested a hearing, after sixty days the county board may either "cause proper management methods to be used on such property," ("management") or shall notify the county attorney and the landowner, "shall, upon conviction, be guilty of an infraction" and shall be subject to a penalty of one hundred dollars per day for each day of violation, up to a total of one thousand five hundred dollars ("enforcement"). *Id.* If a county board elects to cause proper management methods to be used on such property, entry onto the land is authorized after forty-eight hours written notice and the cost is borne by the landowner. In such case, "the county board shall immediately cause notice to be filed of possible unpaid black-tailed prairie dog management assessments against the property upon which the management measures were used in the register of deeds office," and if the amount is unpaid for two months, "the county board shall certify to the county treasurer the amount of such expense and such expense shall become a lien on the property upon which the management measures were taken as a special assessment levied on the date of management." *Id.* Such expenses become a part of the taxes on the land and bear interest at the same rate as delinquent taxes. *Id.*

If a landowner is dissatisfied with the amount of any costs charged to him under the Act, such landowner may file a written protest within fifteen days after being advised of the amount and the county board shall hold a hearing to determine whether the charges were appropriate. Neb. Rev. Stat. § 23-3807.

Any amounts collected under the Act "shall be deposited to the black-tailed prairie dog management fund of the county board if such fund has been created by the county board or, if no such fund has been created, then to the county general fund." Neb. Rev. Stat. § 23-3806.

LB 45, introduced by you in 2019 and carried over to 2020, proposes the complete repeal of the Black-Tailed Prairie Dog Management Act.

DISCUSSION

I. Notice Provisions.

You have asked whether the Due Process Clause of the Nebraska Constitution is violated if a person can be subjected to civil and criminal punishment under a law that explicitly disavows the requirement of notice before subjecting such person to a civil and criminal punishment. You refer specifically to Neb. Rev. Stat. § 23-3806, which provides that, "[f]ailure to publish general notice or to serve individual notices as provided in this section shall not relieve any person from the necessity of full compliance with the Black-Tailed Prairie Dog Management Act."

Under Article I, section 3 of the Nebraska Constitution, "[n]o person shall be deprived of life, liberty, or property, without due process of law, nor be denied the equal protection of the laws." The Supreme Court has held that, "[i]f a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the case." *Am. Cent. City, Inc. v. Joint Antelope Valley Auth.*, 281 Neb. 742, 758, 807 N.W.2d 170, 183 (2011).

When interpreting a statute, "[c]omponents of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible." *Davio v. Neb. Dept. of Health and Human Servs.*, 280 Neb. 263, 274, 786 N.W.2d 655, 665 (2010). It is our opinion, reading the statute in pari materia, that notice is required before any management or enforcement actions can be taken under the Act.

Although your question presumes that individual notice is not necessary for the county to act, we do not read the Act that way. To the contrary, it appears that individual notice is required for the county to institute management or enforcement activities. All of the timelines for the management or enforcement options under the Act are predicated on a date contained in the notice given to the landowner. Neb. Rev. Stat. § 23-3806(3)(a), which provides for management methods to be used on the property, states that:

> If, upon expiration of the sixty-day period specified on the notice required by subdivision (1)(d)(i) of this section, the landowner has not complied with the notice and has not requested a hearing pursuant to subsection (2) of this section, the county board may cause proper management methods to be used on such property and shall advise the record landowner of the cost incurred in connection with such operation. (emphasis added).

The subdivision referenced by that provision, (1)(d)(i), describes the individual notice to be given to the landowner. So in order for the sixty-day period to begin, after which the county board may authorize management methods to be used on the property, individual notice has to be provided to the landowner specifying when that sixty-day period starts. In addition, Neb. Rev. Stat. § 23-3803, which authorizes entry onto land for purposes of the Act, states:

> The county board of a county that has adopted a coordinated program for the management of black-tailed prairie dogs under section 23-3803, or anyone authorized by the county board, may enter upon property in the county for purposes of performing the duties and exercising the powers under the Black-Tailed Prairie Dog Management Act without being subject to any action for trespass or damages, including damages for destruction of growing crops, if reasonable care is exercised and forty-eight hours' written advance notice of entrance is provided to the property owner or occupant. (emphasis added).

Thus, in addition to the individual notice, the county board is required to provide additional written notice forty-eight hours in advance of entry to an owner or occupant of such land.

Similarly, Neb. Rev. Stat. § 23-3806(3)(b), which provides for enforcement of the Act, states that:

> If, upon expiration of the sixty-day period specified in the notice required by subdivision (1)(d)(ii) of this section, the landowner has not complied with the notice and has not requested a hearing pursuant to subsection (2) of this section, the county board shall notify the county attorney who shall proceed against such landowner as prescribed in this subdivision. A person who is responsible for an unmanaged colony shall, upon conviction, be guilty of an infraction pursuant to sections 29-431 to 29-438, except that the penalty shall be a fine of one hundred dollars per day for each day of violation, up to a total of one thousand five hundred dollars for fifteen days of noncompliance. (emphasis added).

The subdivision referenced by that provision, (1)(d)(ii), also describes individual notice to be given to a landowner. So for the sixty-day period to begin, after which the matter may be referred to the county attorney, notice must be provided to the landowner of when that sixty-day period starts. In addition, if the county attorney proceeds with an action against the landowner, the county attorney would be required to serve the landowner with notice of that action.

Our reading of the statute is supported by a similar statute, the Noxious Weed Control Act, Neb. Rev. Stat. § 2-945.01 *et seq*. That act contains very similar notice requirements and contains a similar disclaimer regarding failure to provide notice: "Failure to publish general weed notices or to serve individual notices as provided in this section shall not relieve any person from the necessity of full compliance with the Noxious Weed Control Act and rules and regulations adopted and promulgated pursuant to the act." Neb. Rev. Stat. § 2-955. There are at least two instances in which the Nebraska Supreme Court overturned enforcement actions under the Noxious Weed Control Act because notice was insufficient despite that language. *See State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996) and *State v. Brozovsky*, 249 Neb. 723, 545 N.W.2d 98 (1996). In those cases, the Supreme Court addressed the sufficiency of notice when given by a deputy weed superintendent to whom the county board had not delegated authority. Although the Court did not address the language of § 2-955 directly, that provision was present in the Noxious Weed Control Act at that time and did not prevent the Court from finding that notice was insufficient.

Given that individual notice appears to be required before any management or enforcement action can proceed, we are left with how to interpret the language you cite from Neb. Rev. Stat. § 23-3806(1)(a) that states, "[f]ailure to publish general notice or to serve individual notices as provided in this section shall not relieve any person from the necessity of full compliance with the Black-Tailed Prairie Dog Management Act." We acknowledge that this language is not entirely clear. However, reading the statues in pari materia, we think the best reading of this language is that the obligations of the individual under the Act, rather than those of a county with a coordinated management plan—namely, to "effectively manage colonies present upon his, her, or its property to prevent the expansion of colonies to adjacent property if the owner of the adjacent property objects to such expansion,"—remain in effect whether notices were given or not. This does not mean that the county could institute management or enforcement actions without those notices because, as we have seen, the county's actions are all predicated upon timelines contained in such notices.

This conclusion is supported by the fact that a court, when facing a statute that can be read more than one way, will typically afford the statute a presumption of constitutionality. *See Thompson v. Heineman*, 289 Neb. 798, 831, 857 N.W.2d 731, 756 (2015) ("We presume that statutes are constitutional and will not strike down a statute unless its unconstitutionality is clearly established."); *Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S. Ct. 716, 724 (2005) ("In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail. . . ."). So to the extent the language you have quoted can be read more than one way, the court is likely to construe such language in a manner that does not cause constitutional concerns.

From the language of the Act, it would appear that a county board would not be authorized to institute either the management or enforcement options against a landowner until the required sixty-day period had expired. For the sixty-day period to

begin, individual notice must be provided to the landowner notifying them of that date. Therefore, we do not believe the notice provisions violate the Due Process Clause of the Nebraska Constitution.

II. Disposition of Funds.

You have also asked whether Article VII of the Nebraska Constitution is violated when fines or penalties are diverted from exclusive use for support of the common schools and, instead, are "deposited to" a management fund or to the county general fund. You reference specifically Neb. Rev. Stat. § 23-3806(4), which provides that, "[a]mounts collected under this section shall be deposited to the black-tailed prairie dog management fund of the county board if such fund has been created by the county board or, if no such fund has been created, then to the county general fund."

Article VII, § 5(1) of the Nebraska Constitution states that:

> Except as provided in subsections (2) and (3) of this section, all fines, penalties, and license money arising under the general laws of this state, except fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways of this state, shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all such fines, penalties, and license money arising under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, except that all fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways shall be placed as follows: Seventy-five per cent in a fund for state highways and twenty-five per cent to the county general fund where the fine or penalty is paid. (emphasis added).

The Nebraska Supreme Court has stated that, "[i]t must be conceded that this provision is self-executing and if the moneys involved are penalties within the meaning of this constitutional provision, a judgment awarding them to the [school district] would be required." *School Dist. of Omaha v. Adams*, 147 Neb. 1060, 1063, 26 N.W.2d 24, 26 (1947). The Court further stated that, "[t]he distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner. A remedial statute, of course, is for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged." *Id.*

The question, then, is whether the amounts exacted under the Act are remedial or penal within the meaning of the constitutional provision.

The Act provides for two separate monetary exactions. If the county board chooses to cause management methods to be used on the property, "the cost of any such

management shall be at the expense of the landowner." Neb. Rev. Stat. § 23-3806(3)(a). The Act gives the county board the ability to collect those funds through the county treasurer. If the county board chooses to refer the matter to the county attorney, however, the landowner can be found guilty of an infraction and "the penalty shall be a fine of one hundred dollars per day for each day of violation, up to a total of one thousand five hundred dollars for fifteen days of noncompliance." Neb. Rev. Stat. § 23-3806(3)(b).

It would appear that the cost of management methods used on the property of a landowner would not be penal in nature because the amount is specifically meant to make the county whole with regard to funds expended on that landowner's property. In effect, the county board is taking action that the landowner should have taken and the county is not expected to bear the cost of that action. So those funds would not fall within the constitutional provision and could legitimately be directed to the black-tail prairie dog management fund or to the county general fund.

However, if an action is brought by the county attorney and the landowner is fined as provided under the Act, that would more clearly be a penal exaction. The amount charged is not related to any amount expended by the county and looks more like a punishment for the landowner for noncompliance with the Act. Those funds would likely fall within the constitutional provision and must be used for support of the common schools.

The Noxious Weed Control Act again provides a useful parallel because it directs only funds collected for management activities to the noxious weed control fund or the county general fund, but not amounts collected if an infraction is charged. Under Neb. Rev. Stat. § 2-955(3), "[a]mounts collected under subdivision (3)(b) of this section shall be deposited to the noxious weed control fund of the control authority or, if no noxious weed control fund exists, to the county general fund." The referenced subdivision, (3)(b), is the subdivision providing for weed control on the landowner's property. Funds generated under subdivision (3)(a), which establishes an infraction and penalty for failing to control noxious weeds, are not included in that provision. We believe this is an example of a proper fund distribution under a very similar statutory framework.

Although the disposition of funds from an enforcement action appears to be unconstitutional, that provision is likely severable from the rest of the Act. "The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions." *Big John's Billiards, Inc. v. State*, 288 Neb. 938, 951, 852 N.W.2d 727, 739 (2014). "To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion." *Id.* A court weighs these factors in determining severability of an unconstitutional provision. *Id.* at 952, 740. The statute

does not contain a severability clause, but it appears clear that the other four factors of the test would cut in favor of severability. *Duggan v. Beermann*, 249 Neb. 411, 432, 544 N.W.2d 68, 81 (1996) ("Although the presence of a severability clause is a factor to be considered, it is not, in itself, determinative."). As to factors 1 and 2, it is clear that the remainder of the statute does not depend on where funds are directed from an enforcement action. In fact, because we have a clear constitutional provision dictating where those funds are to be directed that is superior to the statute, the workable remedy is clear: funds from those enforcement actions would simply be used for support of the common schools rather than being deposited in the black-tail prairie dog management fund or the county general fund. As to factors 3 and 4, there is no indication from a review of the legislative history that the Legislature was focused on disposition of those funds, as the vast majority of discussion was about the need to manage prairie dogs. As such, a court's consideration of the five factors would likely weigh in favor of severing the unconstitutional provision from the remainder of the Act.

CONCLUSION

In summary, we do not believe the Act violates the Due Process Clause of the Nebraska Constitution because individual notice is required before the county board can proceed with either the management or enforcement options provided under the Act. With regard to the disposition of money generated under the Act, to the extent the amounts help the county recoup money spent bringing the landowner into compliance, we do not believe it violates Article VII, Section 5 of the Nebraska Constitution. To the extent the Act directs money from penalties to a use other than the common schools in the county, it would violate the Nebraska Constitution. However, that provision can likely be severed from the remainder of the Act.

Very truly yours,

DOUGLAS J. PETERSON
Attorney General

Joshua E. Dethlefsen
Assistant Attorney General

Approved by:

Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature