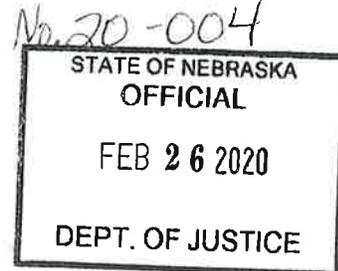




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ATTORNEY GENERAL



**SUBJECT:** LB 720 — Constitutionality of Delegating Authority to Approve a Request to Exceed the Base Authority for Tax Refunds and Credits Under the ImagiNE Nebraska Act to the Executive Board of the Legislative Council

**REQUESTED BY:** Senator Tom Brandt  
Senator Mark Kolterman  
Nebraska State Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Leslie S. Donley, Assistant Attorney General

Legislative Bill 720 creates the “ImagiNE Nebraska Act” (“Act”), the proposed successor to the Nebraska Advantage Act.<sup>1</sup> The new Act would provide, among other things, tax incentives to certain qualified businesses. The Department of Economic Development (“DED”) would administer the Act. You have each requested an opinion from this office with respect to the constitutionality of certain provisions in LB 720 that confer on the Executive Board of the Legislative Council the authority to approve an increase to the “base authority” for sales and use tax refunds and tax credits. Senator Kolterman seeks our opinion as to whether the language in the bill violates the separation of powers clause in Neb. Const. art. II, § 1. Senator Brandt has asked this office to consider whether this statutory scheme constitutes an unlawful delegation of legislative power to the Executive Board. Our conclusions on these questions are set forth below.

<sup>1</sup> Neb. Rev. Stat. §§ 77-5701 to 77-5735 (2018, Supp. 2019).

## PROPOSED LEGISLATION

The provisions at issue are currently found in section 4 of AM1975, adopted by the Legislature on select file on May 24, 2019. Almost identical language appears in section 39 of pending AM2207. The proposed language requires the DED to prepare an estimate of the amount of sales and use tax refunds to be paid and tax credits to be used under the Act for the upcoming three calendar years. DED must prepare the estimate on or before the fifteenth day of February and October of each year, and transmit the estimate to the Legislature. In preparing the estimate, DED shall use the most recent data available, including pending and approved applications, and updates required under section 28, subdivision (1)(f).<sup>2</sup> Sec. 39(2)(a).

The “base authority” for the estimated amount of tax refunds and credits is defined as an amount

equal to one hundred twenty-five million dollars for calendar years 2021 through 2024. Beginning with calendar year 2025 and every three years thereafter, the director shall adjust the base authority to an amount equal to three percent of the actual General Fund net receipts for the most recent fiscal year for which such information is available.

Sec. 39(2)(b). In the event the estimate in any given calendar year exceeds the base authority, DED must prepare an analysis explaining why the estimate exceeds the base authority and submit it to the Legislature. The DED director is prohibited from approving any additional applications which include refunds or credits for the particular calendar year in which the base authority is projected to be exceeded unless the DED director requests additional authority and the Executive Board approves the request. Sec. 39(2)(a)(i) and (ii).

Sec. 39(2)(c) sets out a process to be used by the Executive Board in making its determination, including holding a public meeting on the request. If the Executive Board fails to make a determination within forty-five days after receipt of the request, the request will be deemed approved. The Executive Board must also consider whether approval of the requested increase would achieve certain criteria contained in the bill, e.g., “[p]romot[ing] economic development in line with the state's economic development strategy” and “investment in distressed and rural areas[.]”

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<sup>2</sup> Subdivision (1)(f) requires the taxpayer to provide an updated timetable each year “showing the expected sales and use tax refunds and what year they are expected to be claimed . . . .”

## DISCUSSION

### I. *Executive Board of the Legislative Council*

Since the delegation in question is directed to the Executive Board of the Legislative Council, we will begin by examining the organization and duties of these entities.

#### A. Legislative Council

Neb. Rev. Stat. § 50-401 (2010) establishes

a Legislative Council, hereinafter referred to as council, which shall consist of all of the members of the Legislature. It shall be the function of the Legislative Council to consider legislative policies between sessions of the Legislature and carry out the duties imposed by section 50-402.

Neb. Rev. Stat. § 50-402 (2010) authorizes the Legislative Council to collect information about state government and the state's general welfare; examine the effect of statutes and recommend amendments; address important issues of public policy; prepare a program of legislative bills deemed necessary for the welfare of the state; study and advise the Legislature on federal aid to state and local governmental entities; establish and maintain a bill drafting service; provide for the publication of Nebraska statutes; and set up subcommittees within the Executive Board to carry out certain functions, including investigations, determined to be in the public interest.

#### B. Executive Board

Neb. Rev. Stat. § 50-401.01 (Cum. Supp. 2018) establishes the Executive Board of the Legislative Council, comprised of a chairperson, a vice-chairperson, six members of the Legislature and the Speaker of the Legislature. The members serve a two-year term, and are selected at the beginning of each regular session of the Legislature when the speaker is chosen. The chairperson of the Appropriations Committee serves as an ex officio member when the Executive Board considers fiscal matters. The duties of the Executive Board include supervising all services and personnel of the Legislature, and appointing the Legislative Fiscal Analyst, Director of Research, Revisor of Statutes, and Legislative Auditor. Section 50-401.01(3) authorizes the Executive Board— notwithstanding any other provision of law—to contract for “legal, auditing, accounting, actuarial, or other professional services or advice for or on behalf of the executive board, the Legislative Council, the Legislature, or any member of the Legislature.” Members of the Executive Board also serve as the Reference Committee. *Rules of the Nebraska Unicameral Legislature*, Rule 3, Sec. 4(e) (adopted January 23, 2019).

This office has previously indicated that the Legislative Council and the Executive Board are not separate entities. “[They] are creatures of the Legislature. Members serve in those capacities by virtue of the fact that they are members of the Legislature. These bodies are standing committees of the Legislature, created by law. As such they are not distinct and separate from the Legislature but merely a part of the Legislature itself.” Op. Att’y Gen. No. 50 (March 13, 1981) at 2; see also Op. Att’y Gen. No. 49 (March 16, 1981); Op. Att’y Gen. No. 92054 (April 1, 1992). Thus, the Executive Board “can perform investigatory and other functions for the Legislature so long as [it does] not perform duties specifically required of the Legislature itself in the Nebraska Constitution.” Op. Att’y Gen. No. 92054 at 3; Op. Att’y Gen. No. 96027 (April 1, 1996).

## II. *Separation of Powers Clause*

Neb. Const. art. II, § 1(1) provides that

[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

“The purpose of the clause is to establish the permanent framework of our system of government and to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted.” *State v. Phillips*, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994). “The powers of the three departments of government are derived from express grants in the Constitution and from the inherent right to accomplish all objects naturally within the orbit of each department, not expressly limited by the existence of a similar power elsewhere or express limitations in the Constitution.” *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 597, 894 N.W.2d 788, 799-800 (2017). “The language of article II prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.” *State ex rel. Spire v. Conway*, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991). “Our constitution, unlike the federal Constitution and those of several other states, contains an express separation of powers clause. So we have been less willing to find overlapping responsibilities among the three branches of government.” *In re Nebraska Community Corr. Council*, 274 Neb. 225, 229, 738 N.W.2d 850, 854 (2007); *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

This office has previously considered the propriety of legislation that purports to extend executive power to the legislative branch. In Opinion No. 22 (February 26, 1963),<sup>3</sup> the Attorney General assessed the constitutionality of legislation that would require state

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<sup>3</sup> 1963-64 Rep. Att’y Gen. No. 22 at 37.

agencies to obtain legislative approval and authorization prior to any construction, building and land purchases or expenditures from the State Institutional and Military Department Building Fund. Also at issue was legislation that would require the consent of the Legislature, rather than the governor, for the acquisition of real property by the Game, Forestation and Parks Commission. We stated that

[w]hile the Legislature has the power and authority to decide all of these matters **before** making any appropriation, or **before** granting any authority, yet if it seeks to retain control by inserting in its laws and bills the requirement that no action be taken or money spent until subsequent approval of the Legislature be granted, then it is in effect, both making the law and administering it, appropriating the money and spending it, and the constitutional system of separation of powers would be destroyed.

What would be the situation if amendment to the bills were made to allow the Legislative Council or a committee of the Legislature to exercise this power of approval when the Legislature is not in session? Such bodies would not have any authority to pass laws or to make resolutions as does the Legislature. Any exercise of this attempted delegated authority would clearly be executive in its nature, substituting the discretion of the council or a committee for that of the executive. That this may not be done is self-evident. If the Legislature may not do it, certainly any group or committee of the Legislature may not do it. . . .

*Id.* at 38 (emphasis in original).

In Op. Att'y Gen. No. 53 (March 24, 1977),<sup>4</sup> we considered legislation that would require the Game and Parks Commission to obtain the approval of the Legislature's Appropriations Committee for any planned expenditures from the Nebraska Outdoor Recreation Development Cash Fund. In finding the proposal to be constitutionally suspect to the extent it gave the Appropriations Committee veto power over executive decisions, we concluded:

If the [statutory] construction suggested above were adopted, it would be an attempt to administer an executive function by a committee of the Legislature. The committee would be empowered to review and reject executive decisions regarding particular expenditures. While the Legislature is fully authorized to limit executive choices by appropriate restrictions through enactment of statutes, once a statute is enacted or an appropriation made the Legislature has no further authority.

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<sup>4</sup> 1977-78 Rep. Att'y Gen. No. 53 at 77.

*Id.* at 1. In response to whether the proposed approval required the acquiescence of the entire Legislature, we indicated that it was irrelevant to the question of whether the separation of powers provision has been violated. “[I]f the bill is construed to reflect an intention by the Legislature to pass on each item of expenditure, either by the body as a whole or by a committee of the Legislature, Article II, Section 1 . . . is violated and the act would be unconstitutional.” *Id.* at 2.

In Op. Att’y Gen. No. 87114 (December 9, 1987), the Attorney General considered the propriety of a proposed plan for the disbursement of money from the Nebraska Energy Settlement Fund. The legislation required the governor to develop a plan in accordance with the court order awarding the funds, applicable federal guidelines, and legislative guidelines contained in the bill, and submit the plan to the Legislature. The Appropriations Committee was then required to hold a public hearing and consider appropriations based on the plan. No money could be disbursed or expended from the fund without a legislative appropriation and only when in compliance with the legislative guidelines.

We concluded that the proposed disbursement procedure violated art. II, § 1. We stated that

[t]he Legislature is, in essence, requiring legislative approval before expenditure of the funds. The fact that the bill is written in terms of legislative approval for the appropriation does not alter the clear intent of the act requiring legislative approval for the expenditure. The Legislature is in effect attempting to both make the law and administer it; appropriate money, and spend it. This is a violation of the separation of powers article of the Constitution of the State of Nebraska.

In short, LB 683 is unconstitutional because it impinges on the executive power of the Governor to administer the funds involved.

*Id.* at 3.

In Op. Att’y Gen. No. 92054 (April 1, 1992), we considered proposed legislation that would require the state building administrator to submit a detailed report to the Executive Board analyzing the estimated costs to renovate an office building at the Norfolk Regional Center. The language required the Executive Board to determine whether the project should be completed in the event the estimated costs exceeded the appropriation provided in the bill. Relying on previous opinions of this office, including Opinion No. 22 and Opinion No. 87114 discussed above, we concluded that the proposed amendment was constitutionally suspect. We stated:

AM3692 would appropriate money for renovation of the Stone Office Building. However, after the appropriation, the Executive Board of the Legislative Council would still retain some control over completion of the

project. In our view, this continued control impermissibly involves the Legislature in functions of the Executive branch of government. Any decision as to whether the renovation project should be completed if its costs overrun the appropriation should be left to the executive agency involved, since the determination if other funds are available or if there are other means to complete the project is really an executive function.

*Id.* at 3. See also Op. Att'y Gen. No. 96027 (April 1, 1996) (Proposed amendment that would require the Executive Board to approve any state contract relating to the sale of public records for a fee, when the fee contemplated is greater than allowed under state law or otherwise free, determined to violate the separation of powers provision).<sup>5</sup>

“[T]he Legislature exercises a power constitutionally committed to it by enacting statutes to declare what is the law and public policy.” *State ex rel. Veskrna*, 296 Neb. at 598, 894 N.W.2d at 800. “The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered.” Neb. Const. art. IV, § 6. AM2207 currently sets the base authority at one hundred twenty-five million dollars for calendar years 2021 through 2024, and “three percent of the actual General Fund net receipts for the most recent fiscal year for which such information is available” beginning in 2025, and every three years thereafter. The DED director is expressly prohibited from approving any applications involving refunds and credits when the estimate for a particular year exceeds the base authority unless the director requests and receives approval from the Executive Board to increase the authority. It seems to us that the continued presence and control of the Legislature in the administration of the Act constitutes an impermissible encroachment into executive power. While the Legislature is empowered to declare what the law is, it cannot reserve to itself the authority to administer the law as well.<sup>6</sup> Consequently, we conclude that the proposed legislation violates the separation of powers provision in art. II, § 1.

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<sup>5</sup> Contrary to the opinions discussed herein, in the course of our research we identified three statutes where the Executive Board has been improperly delegated authority to approve, if the Legislature is not in session, certain construction projects, financing plans, and expenditures in excess of five hundred thousand dollars pertaining to the University of Nebraska and the Nebraska State Colleges. See Neb. Rev. Stat. § 85-404 (2014); Neb. Rev. Stat. § 85-408 (2014); and Neb. Rev. Stat. § 85-426 (2014).

<sup>6</sup> See *State ex rel. Shepherd v. Nebraska Equal Opportunity Comm'n*, 251 Neb 517, 557 N.W.2d 684 (1997) (Provision in the Whistleblower Act, which required the State Personnel Board to stay or reverse personnel action taken against state employee based on Ombudsman's finding that a violation of the act has occurred, violated art. II, § 1.).

### III. *Delegation of Legislative Authority*

As a general rule, the Legislature cannot delegate legislative authority to an administrative body. *State v. Sprague*, 213 Neb. 581, 330 N.W.2d 739 (1983). The Legislature may, however, grant general powers to an official or agency and delegate the power to enact rules and regulations concerning the details of the legislative purpose. *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974). A delegation of legislative authority is not unconstitutional where the Legislature has provided reasonable limitations and standards for carrying out delegated duties. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988).

We are unaware of any Nebraska Supreme Court cases that consider the nondelegation doctrine in conjunction with the Executive Board. However, courts in other jurisdictions have addressed the constitutionality of statutes where the delegation in question was made to legislative committees. For example, in *New York Public Interest Research Group, Inc. v. Carey*, 86 Misc.2d 329, 383 N.Y.S.2d 197 (N.Y. Sup. Ct. 1976), a taxpayers' group sought to restrain the governor and comptroller from retaining and paying certain officeholders on the grounds that legislative committees had recommended that such positions and programs be abolished. The court noted that "the Constitutional function of legislating which belongs exclusively to the Legislature cannot be delegated even to its own committees or committee chairmen." *Id.* at 332, 383 N.Y.S.2d at 199. Since the appropriations bill funding the positions and programs was passed in lump sum form, and because the full Legislature had not specifically designated that the positions and programs be deleted in the bill, the court found that the recommendations of the legislative committees to abolish the positions and programs was ineffectual. *Id.* at 333-334, 383 N.Y.S.2d at 200.

In *Opinion of the Justices*, 121 N.H. 552, 431 A.2d 783 (N.H. 1981), the New Hampshire Supreme Court considered legislation that would authorize the Legislature to review and accept or reject administrative rules proposed by state agencies. The legislation required that the proposed rules be presented to standing committees of both houses for approval. However, the senate president and house speaker could agree to waive the committee approval requirement. The court found the statutory scheme unconstitutional, stating:

This wholesale shifting of legislative power to such small groups in either house cannot fairly be said to represent the "legislative will." . . . Left unstated, yet implicit in this constitutional scheme, is the requirement that the legislative authority of the government may be exercised only by a quorum of the two bodies of the General Court. Although the legislature may delegate a portion of the legislative authority to an administrative agency which is not subject to this requirement, it may not delegate its lawmaking authority to a smaller legislative body and thereby evade the requirement for action by a majority of a quorum of both legislative bodies.

*Id.* at 559-560, 431 A.2d at 788.

In *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (N.C. 1982), the North Carolina Supreme Court considered the constitutionality of legislation establishing two joint legislative committees—one committee to control budget transfers and another to oversee all aspects of the acceptance and use of federal block grant funds, specifically when the General Assembly was not in session. Noting that the North Carolina Constitution vested the legislative power of the state in the General Assembly, the court found that the purported power given to the budget committee, comprised of twelve members of the house and senate, plus the senate president, “exceeds that given to the legislative branch by Article II of the Constitution.” *Id.* at 775, 295 S.E.2d at 594. The court further found the statute creating the budget committee violated the separation of powers clause by encroaching on the constitutional duties and responsibilities imposed on the governor. *Id.* at 775-776, 295 S.E.2d at 594. While the court declined to address whether the General Assembly had the authority to determine whether the state would accept certain block grants and, if received, how to spend the funds, it made it clear that the committee had no power to do so:

[I]t is our considered opinion that the General Assembly may not delegate to a legislative committee the power to make those decisions.

In several of the instances set forth in G.S. 120-84.5 the committee would be exercising legislative functions. In those instances there would be an unlawful delegation of legislative power. In the other instances the committee would be exercising authority that is executive or administrative in character. In those instances there would be a violation of the separation of powers provisions of the Constitution and an encroachment upon the constitutional power of the Governor.

*Id.* at 779, 295 S.E.2d at 596.

Finally, in *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907 (Ky. 1984), the Kentucky Supreme Court considered the constitutionality of statutes conferring powers on the Legislation Research Commission (“LRC”), a group comprised of six members of the Kentucky General Assembly. The court noted the provisions in the Kentucky Constitution vesting and restricting legislative power solely to the General Assembly. It further noted that “[i]n *Bloemer v. Turner*, . . . we declared that the Kentucky Constitution ‘. . . made sure that the legislature may not in any degree abdicate its power.’” *Id.* at 915. Moreover, “[i]t is an accepted principle that ‘the legislative department has no right to deputize to others the power to perform its governing functions.’” *Id.*, quoting *Bloemer*, 137 S.W.2d at 391. In finding that the General Assembly could not delegate its authority to legislate to the LRC, the court stated:

It is clear from the aforementioned cases that delegation, of legislative power, to be lawful, must not include the exercise of discretion as to what the law shall be. In addition, such delegation must have standards controlling the exercise of administrative discretion. Finally, the delegating authority must have the right to withdraw the delegation.

Therefore, we conclude that the General Assembly, which constitutionally holds legislative power, cannot delegate that power to the LRC.

664 S.W.2d at 915.

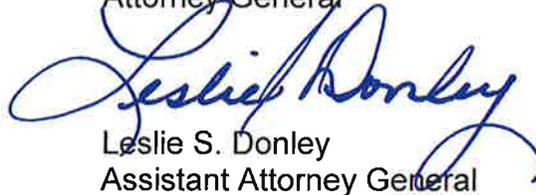
In Nebraska, “[t]he legislative authority of the state shall be vested in a Legislature consisting of one chamber.” Neb. Const. art. III, § 1. “[N]o law shall be enacted except by bill. No bill shall be passed by the Legislature unless by the assent of a majority of all members elected and the yeas and nays on the question of final passage of any bill shall be entered upon the journal.” Neb. Const. art. III, § 13. As currently drafted, AM2207 requires the approval of the Executive Board to exceed the amount of the base authority otherwise prescribed in the Act. In light of the constitutional provisions and the authority discussed above, we believe this legislation constitutes an unconstitutional attempt by the Legislature to delegate legislative authority to the Executive Board. If the Legislature believes the base authority should be increased annually to accommodate the tax refunds and credits allowed under the Act, it may do so by appropriate legislation. Alternatively, the Legislature may delegate the power to adjust the base authority to executive officials, provided that reasonable limitations and standards for carrying out the delegated duties are stated in the authorizing act.

## CONCLUSION

Based on the foregoing analysis, it is our opinion that any proposed legislation that would require the DED director to obtain approval of the Executive Board to increase the base authority necessary to administer certain provisions of the ImagiNE Nebraska Act would constitute an impermissible encroachment on executive power in violation of the separation of powers provision in Neb. Const. art. II, § 1. We also conclude that any attempts by the Legislature to delegate its legislative function to a subset of the full Legislature would be an unlawful delegation of the authority vested in the Legislature under Neb. Const. art. III, § 1.

Sincerely,

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Approved by:



Attorney General

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