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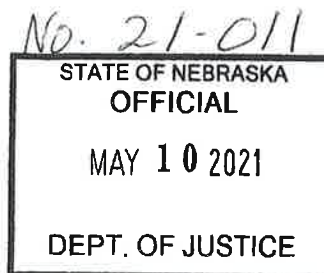

SUBJECT: Constitutionality of Legislation Delegating to Counties the Power to Authorize by Ordinance the Permitless Concealed Carry of Weapons (LB236).

REQUESTED BY: Senator Tom Brewer
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
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INTRODUCTION

You have requested an opinion from this office regarding the constitutionality of LB236, which would give counties the power to adopt ordinances authorizing the permitless carry of concealed weapons. Introducer's Statement of Intent for LB236, 107th Leg., 1st Sess. (February 24, 2021). Presently, the Government, Military and Veterans Affairs Committee has filed a General File amendment, AM438, to LB236 that replaces the bill. As modified by AM438, LB236 amends three statutes: (1) Neb. Rev. Stat. § 23-187, which grants counties discretionary authority to regulate enumerated subjects by ordinance; (2) Neb. Rev. Stat. § 28-1202, which defines the criminal offense of carrying a concealed weapon; and (3) Neb. Rev. Stat. § 69-2428, which provides that an individual may obtain a permit to carry a concealed handgun in accordance with the Concealed Handgun Permit Act, Neb. Rev. Stat. §§ 69-2427 through 69-2449 (2018). You have specifically asked whether "the Nebraska Legislature [has] authority under the Nebraska Constitution to delegate to counties the power to authorize by ordinance the permitless concealed carry of weapons as contemplated by Legislative Bill 236." The scope of our analysis is therefore limited to the question of delegation of legislative authority.

ANALYSIS

"The Legislature has plenary legislative authority except as limited by the state and federal Constitutions." *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996) (citing *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981)); *Dwyer v. Omaha–Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972). "The Nebraska Constitution is not a grant, but, rather is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution." *Id.* (citing *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962)). "The legislative authority of the Nebraska Unicameral is, therefore, extensive. However, it is not limitless." Op. Att'y Gen. No. 02012 (April 5, 2002) at 5.

The provisions of the Nebraska Constitution that may inhibit the Legislature from enacting legislation that delegates its authority are Article II, § 1 and Article III, § 1. The latter provision, which assigns the State's legislative power, states, in relevant part, "[t]he legislative authority of the state shall be vested in a Legislature consisting of one chamber." Neb. Const. art. III, § 1. Article II, § 1, which establishes the separation of governmental power, 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.

Neb. Const. art. II § 1(1). Article II, § 1 "prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, except as the Constitution itself otherwise directs or permits." *State v. Philipps*, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994); *Davio v. Nebraska Dep't of Health and Human Services*, 280 Neb. 263, 274, 786 N.W.2d 655, 665 (2010) ["*Davio*"]. With respect to a delegation of authority by the Nebraska Unicameral, the Nebraska Supreme Court has held that "[i]t is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority." *Bosselman, Inc. v. State*, 230 Neb. 471, 476, 432 N.W.2d 226, 229 (1988) ["*Bosselman*"] (citing *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 780, 104 N.W.2d 227, 230 (1960) ["*Lincoln Dairy*"]; *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492 (1935)).

As this office has previously explained, the Nebraska Supreme Court in *Bosselman* found that the constitutional prohibition against horizontal delegation of legislative power to the executive branch also prohibits a vertical delegation of power from the Nebraska Unicameral to "local governing bodies such as city councils and county boards." Op. Att'y Gen. No. 07012 (May 29, 2007) at 7. Citing the decision in *Lennox v. Housing Authority of Omaha*, which observed "that the Legislature could not delegate its powers to make law to the housing authority and council of the city of Omaha without imposing adequate standards to guide the discretion of those local bodies," the *Bosselman* court rejected the argument that the non-delegation rule expressed in *Lincoln Dairy* did not apply to

delegations by the Legislature to local governing bodies. *Bosselman*, 230 Neb. at 476, 432 N.W.2d at 230 (citing *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N.W. 451 (1940)).

Various legal authorities have analyzed these local delegation issues under two rubrics. The first asks whether the power delegated to the county is a matter of local or statewide concern. The second asks whether the Legislature has provided sufficiently definite standards to guide the county in exercising the power delegated. The following sections consider both of these lines of analysis.

I. The Power Delegated To County Boards In LB236 Pertains To A Matter Of Statewide Concern.

This office has previously recognized that the Legislature can delegate to "political subdivisions the power to govern matters which are local in scope." Op. Att'y Gen. No. 89024 (March 24, 1989) at 1 (referencing *Peterson v. Cook*, 175 Neb. 296, 121 N.W.2d 399 (1963)) (emphasis added). The distinction between permissible delegation on matters of local concern and impermissible delegation on matters of statewide concern is recognized in multiple jurisdictions. As one leading treatise states: "[T]he legislature may expressly or implicitly delegate to appropriate local governmental entities such as municipal corporations, counties, and towns, as well as their proper officers and boards, all powers, whether legislative or otherwise, which are incident to municipal government and of purely local concern. . . . [M]atters which must be dealt with at the state level are not delegable[.]" 16 C.J.S. *Constitutional Law* § 366 (March 2021).

The delegation proposed in LB236, as amended b Section 1 of AM438, is for a county board to authorize by ordinance the "carrying of concealed weapons for all persons not otherwise prohibited from possessing or carrying such weapons under state or federal law." Sec. 1(2). The proposed grant of legislative authority to a county board is limited to counties that do not contain a city of the metropolitan class or primary class.[1] *Id.* Section 2 of AM438 creates an additional exemption to the criminal offense of carrying a concealed weapon in counties where the county board has authorized permitless concealed carry pursuant to Section 1. Sec. 2(3).

The authority of a county board necessarily involves a delegation of power from the Legislature, for "a county, like all political subdivisions, has only that power delegated to it by the Legislature[.]" *DLH, Inc. v. Lancaster County Bd. of Com'rs*, 264 Neb. 358, 362, 648 N.W.2d 277, 280 (2002) ["*DLH, Inc*"] (citing *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000)). "Nebraska statutes vest the powers of a county in a 'county board[.]'" *Butler County Dairy, L.L.C. v. Butler County*, 285 Neb. 408, 417, 827 N.W.2d 267, 278 (2013) (citing Neb. Rev. Stat. § 23-103 (2012)). A county, even though a body politic and corporate, is a creature of statute and has only such authority as conferred by the Legislature or necessarily implied to carry out its expressed

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1 This provision is presently subject to amendment by AM874, which would limit this grant of authority to counties that do "not contain more than one hundred thousand inhabitants."

powers. *Wetovick v. County of Nance*, 279 Neb. 773, 787, 782 N.W.2d 298, 311 (2010) ["*Wetovick*"]; *Lindburg v. Bennett*, 117 Neb. 66, 219 N.W.2d 851 (1928). Counties "are subdivisions of the state government upon which, for convenience, certain powers have been conferred, strictly limited, however, to the exercise of certain functions more easily carried out by subdivision." *Wilson v. Ulysses Twp. of Butler Cty.*, 72 Neb. 807, 812, 101 N.W. 986, 988 (1904) ["*Wilson*"] (emphasis added). "A grant of power to a county is strictly construed, and reasonable doubts regarding the existence of its power are resolved against it." *Wetovick*, 279 Neb. at 787, 782 N.W.2d at 311.

The relatively recent grant of legislative authority for county boards to enact ordinances, now codified in Neb. Rev. Stat. § 23-187 (Cum. Supp. 2020), exemplifies the type of limited, localized authority to which *Wilson* refers. Section 23-187 permits counties to enact ordinances addressing certain enumerated subjects: the operation of vehicles on a highway; parking and abandonment of motor vehicles; the operation of low-speed vehicles and golf carts; false alarms from security systems; registration of peddlers; graffiti; and disturbance of the peace specifically by disorderly conduct, lewd or lascivious behavior, or public nudity. "The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment." *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 445, 771 N.W.2d 103, 118 (2009). "[T]o ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Goolsby v. Anderson*, 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996). The legislative history of the first statute providing this authority, 2009 Neb. Laws LB532, indicates that an impetus for giving counties this authority was the Nebraska Supreme Court's decision in *DLH, Inc.*. Committee Records on LB532, 101st Leg.,1st Sess. 49 (February 20, 2009). In *DLH, Inc.*, the court found that the Lancaster County board lacked authority to revoke the liquor license of an establishment that permitted nude performances in violation of a county resolution, reasoning that a "resolution" is distinguishable from and of less force and effect than a "regulation." *DLH, Inc.*, 264 Neb. at 362-363, 648 N.W.2d at 280. The legislative history also indicates that questions were posed regarding the constitutionality of the Legislature delegating the authority to enact ordinances to county boards. That concern was apparently assuaged by testimony of the Sarpy County Attorney referring to the limited authority of counties on matters such as zoning, animal control, and traffic. Committee Records on LB532, 101st Leg.,1st Sess. 52-53 (February 20, 2009). It is reasonable to conclude from both the text and the legislative history of this statute that the subject matter for which county boards are permitted to enact ordinances is intended to be local in scope and strictly limited to certain functions more easily carried out by a county board. The question is whether the authority conferred by LB236 is consistent with this statutory scheme in that it is likewise local in scope.

The Nebraska Supreme Court has previously addressed whether a particular matter is of statewide or localized concern when assessing conflicts between state statute and local ordinance as part of preemption analysis. So far, the court has not established a bright-line rule. As it has explained, "[t]here is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation."

Jacobberger v. Terry, 211 Neb. 878, 883, 320 N.W.2d 903, 906 (1982) (quoting *Carlberg v. Metcalf*, 120 Neb. 481, 487, 234 N.W. 87, 90 (1930)).

This office has previously considered whether the carrying of concealed weapons is a matter of local or statewide concern when analyzing whether the Concealed Handgun Permit Act preempted certain local ordinances that could impede the otherwise lawful carrying of concealed weapons. In Op. Att'y Gen. No. 09001 (January 13, 2009), we stated:

> [T]he Legislature appears to have occupied the entire field with regard to the carrying of concealed handguns. On that subject, the Concealed Handgun Permit Act has set forth the overall policy of the state when it comes to the carrying of concealed handguns and the licensing of persons to do so and has set forth a comprehensive regulatory scheme for implementing that policy. Therefore, cities and villages lack authority to legislate for themselves with respect to this subject. This is true even for cities operating under a home rule charter.

Id. at 5. We noted that our analysis "would apply equally to any counties that might seek to bar the carrying of concealed handguns by permitholders under the act." *Id.* at 2. Similarly, in Op. Att'y Gen. No. 10008 (March 26, 2010), we observed that the Legislature had enacted legislation, 2009 Neb. Laws LB430, which contained a provision that "was clearly designed to remove any authority cities and villages might otherwise have to regulate the ownership or possession of concealed handguns by permitholders under the act." *Id.* at 2; *see* Neb. Rev. Stat. § 18-1703 (2012). The Nebraska Supreme Court has not established whether carrying concealed handguns is a matter of statewide or local concern. However, we think that a court would likely conclude that the regulation of concealed handguns under the Concealed Handgun Permit Act's shall issue statutory scheme is a matter of statewide concern. Such conclusion has been made more likely through the enactment of additional legislation intended to both cement the state's field preemption and remove regulatory authority of political subdivisions.

II. The Power Delegated By LB236 Is Likely Impermissible Under The Nebraska Constitution.

As stated above, this office has previously explained that the Nebraska Supreme Court in *Bosselman* applies the non-delegation rule expressed in *Lincoln Dairy* to delegations of power from the Nebraska Unicameral to "local governing bodies such as city councils and county boards." Op. Att'y Gen. No. 07012 (May 29, 2007). In *Lincoln Dairy*, the Nebraska Supreme Court stated that "[t]he Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations," so long as the power granted is "limited to the expressed legislative purpose and administered in accordance with standards prescribed in the legislative act." *Lincoln Dairy*, 170 Neb. at 780, 104 N.W.2d at 230 (citing *Board of Regents of University of Nebraska v. Lancaster County*, 154 Neb.

398, 403, 48 N.W.2d 221, 224 (1951)). "[C]learly and definitively stated" standards in the enabling legislative act must "provide[ ] the local governing bodies with adequate, sufficient, and definite standards within which they are to exercise their discretion"; "standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available." *Bosselman*, 230 Neb. at 476-77, 432 N.W.2d at 229-30; *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 951, 554 N.W.2d 151, 157 (1996); *Yant v. City of Grand Island*, 279 Neb. 935, 945, 784 N.W.2d 101, 109 (2010); *Davio*, 280 Neb. at 274, 786 N.W.2d at 665. Thus, ""[w]here the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority."" *Bosselman*, 230 Neb. at 476-77, 432 N.W.2d at 230 (quoting *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 805, 420 N.W.2d 685, 690 (1988)); *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987)). However, where the violation of an administrative rule constitutes a criminal act, the Legislature's delegation of authority to an administrative body may still be impermissible as "[i]t is axiomatic that the power to define crimes and criminal offenses is in the Legislature and it may not delegate such power to an administrative agency." *Lincoln Dairy*, 170 Neb. at 783, 104 N.W.2d at 231.

In Op. Att'y Gen. No. 07012 (May 29, 2007), this office analyzed the then Final Reading version of 2007 Neb. Laws LB395, which provided for a statewide smoking ban that included a local "opt out" provision authorizing local governmental bodies, including counties, to adopt a nonsmoking ordinance that was less stringent than the state standard included in the bill. We stated:

> [T]he bill . . . establishes limits as to how less stringent a particular ordinance or resolution may be, i.e., it provides that the ordinance or resolution cannot be less stringent than the Sections 71-5707 to 71-5709 as they existed prior to September 1, 2007. Those sections, in turn, contain detailed provisions regarding where individuals may smoke, how smoking areas may be designated and how persons in charge of public places should make efforts to prevent smoking and minimize the presence of environmental tobacco smoke. We believe that those sections provide clear standards which establish the limits for nonsmoking bans by local government, and by which the powers granted to local government under LB 395 can be administered. On that basis, we do not believe that the fact that LB 395 allows local governmental subdivisions to adopt nonsmoking bans less stringent than that set out in LB 395 constitutes an improper delegation of legislative authority.

Id. at 7.[2]

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[2] LB395 was carried over into the second session of the 100th Legislature and was approved by the Governor on February 26, 2008. The Nebraska Clean Indoor Air Act then became operable on June 1, 2009, after the bill was amended and the local governmental body "opt out" provision was removed.

Applying the same analysis to LB236, we are concerned that the grant of authority to county boards to effectively "opt out" of the Concealed Handgun Permit Act's statewide licensing scheme might constitute an improper delegation of legislative authority. The statutory scheme proposed in 2007 Neb. Laws LB395 provided detailed standards for local ordinances, thus providing local governing bodies "with adequate, sufficient, and definite standards within which they are to exercise their discretion." *Bosselman*, 230 Neb. at 477, 432 N.W.2d at 230. LB236, in contrast, appears to lack adequate, sufficient, and definite statutory standards necessary for a county board to consider before enacting such an ordinance. The standards defining the exercise of county boards' discretion in LB236 are limited to the existing statutory requirements found in §§ 23-187 to 23-193 for enacting any county ordinance. These sections pertain solely to procedural requirements for notice, public hearing, and formal adoption of a properly formatted ordinance; they provide no relevant standard for the subject matter at issue. Sec. 1(2). The only additional standard found in AM438 is that a county board must first receive "advice and counsel from the county sheriff" before enacting an opt-out ordinance. Sec. 1(2). This advice-and-counsel requirement is vague and provides no uniform standard from which any county sheriff may base his or her input. Moreover, because LB236 authorizes county boards to create exemptions to the criminal offense of carrying a concealed weapon, the bill raises the additional concern that the Legislature is impermissibly delegating its exclusive power to define criminal offenses. *Lincoln Dairy*, 170 Neb. at 783, 104 N.W.2d at 231.

In light of precedent in other jurisdictions regarding delegation of legislative authority to counties, it is unclear whether further amendment to LB236 providing more definite standards would necessarily cure the delegation concerns explained above. For example, the Supreme Court of Michigan, when construing a provision of the Michigan state constitution that is substantially equivalent to art. III § 1, concluded that its legislature improperly delegated its power to counties over a matter of statewide concern by enacting legislation that allowed counties to permit conduct otherwise prohibited by the act. *Arlan's Dept. Stores, Inc. v. Kelley*, 374 Mich. 70, 130 N.W.2d 892 (1964). Unlike Nebraska law, which requires that the powers conferred to counties be strictly construed, the Michigan Constitution expressly provided that laws concerning the delegation of powers are to be liberally construed in favor of counties. *Id.* at 76-77, 130 N.W.2d at 895. Even so, the court determined that the constitution did "not permit counties to determine legislative polices of *Statewide* concern, nor does it permit the State legislature to delegate such power." *Id.* at 77, 130 N.W.2d at 895 (emphasis in original). The court ultimately reasoned that the legislative act violated "the principle of legislative delegation of power because, while purporting to be a State law, it permit[ted] each county to change the State law to suit its own purposes. This is not delegation of authority to a county to enact a local county ordinance. . . . A county cannot, by action which affects only that county, be permitted to alter the Statewide policy." *Id.* This case thus suggests that even if LB236 included more definite standards, the bill might still be unconstitutional if a court concludes that it addresses a matter of statewide (rather than local) concern.

Rather than amending LB236 to include concrete standards, we note an alternative means of alleviating concern regarding impermissible legislative delegation. That is for the Legislature to amend LB236 to allow permitless concealed carry of handguns statewide, even while retaining the state's existing permit structure for purposes of state reciprocity or conformity with federal law, as has been enacted in at least eighteen states as of the date of this opinion.[3]

CONCLUSION

LB236's delegation of authority to certain county boards to enact ordinances that allow the permitless concealed carry of weapons presents significant constitutional concerns under art. II, § 1 and art. III, § 1 of the Nebraska Constitution. LB236 addresses a topic—the carrying of concealed weapons—that is a matter of statewide (rather than local) concern not delegable to counties. LB236 also does not provide adequate, significant, and definite standards to guide county boards in exercising their discretion to enact ordinances that would effectively alter this statewide policy.

Very truly yours,

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[3] *See, e.g.*, Alaska Stat. § 11.61.220(a); Ariz. Rev. Stat. § 13-3102; Idaho Code § 18-3302; 2021 IA HB 756, amending Iowa Code § 724.5; Kan. Stat. Ann. § 21-6302(4); 2019 KY SB 150. Ky. Rev. Stat. Ann. §§ 237.110, 527.020; Me. Rev. Stat. tit. 25, § 2001-A et seq.; Miss. Code Ann. § 97-37-7(24); Mo. Rev. Stat. § 571.030; Mont. Code Ann. § 45-8-316; 2017 NH SB 12; N.D. Cent. Code §§ 62.1-02-04 – 62.1-02-05, 62.1-04-01 – 62.1-04-05; Okla. Stat. tit. 21, §§ 1277, 1290.1 – 1290.26; S.D. Codified Laws §§ 23-7-7 – 23-7-8.6, 22-14-23, 13-32-7; Tenn. Code Ann. § 39-17-1307; Utah Code Ann. § 76-10-523; W. Va. Code § 61-7-3; Wyo. Stat. Ann. § 6-8-104.