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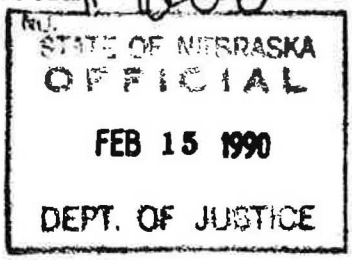

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DATE: February 15, 1990

SUBJECT: Constitutionality of LB 1219 - Amendment to Definition of Consummation of Sale Under Neb.Rev.Stat. §77-27,147 (Reissue 1986)

REQUESTED BY: Senator Lowell C. Johnson
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of LB 1219. Generally, LB 1219 would amend the provisions of Neb.Rev.Stat. §77-27,147 (Reissue 1986), establishing the definition of when a retail sale is "consummated" for purposes of determining the application of the Local Option Revenue Act. Currently, §77-27,147(1)(a) provides a retail sale is generally consummated "[a]t the place where title, possession, or segregation takes place, . . . regardless of the business location of the Nebraska retailer. . . ." LB 1219 proposes to amend §77-27,147 to provide that, in the case of retailers delivering live plants or floral arrangements to a place specified by the purchaser, the sale is deemed consummated at the business location of the retailer. The principal constitutional issue raised by this amendment concerns whether the proposed classification is reasonable and does not contravene the prohibition against special legislation in Article III, Section 18, of the Nebraska Constitution.

In State ex rel. Rogers v. Swanson, 192 Neb. 125, 136-37, 219 N.W.2d 726, 734 (1974), the Nebraska Supreme Court stated the following rules regarding the legislative power to classify and the effect of the prohibition against special legislation:

> The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.

> The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each.

(quoting United Community Services v. Omaha National Bank, 162 Neb. 786, 77 N.W.2d 576 (1956)).

LB 1219 would create a distinction between retailers engaged in the sale and delivery of live plants and floral arrangements and all other retailers by establishing a different rule as to when a retail sale is deemed consummated for purposes of determining the application of the Local Option Revenue Act. As you note in your letter, the intent of the amendment is to relieve floral retailers from the obligation of collecting and remitting local sales tax in situations where deliveries are made to municipalities located outside the place of the location of the retailer. As such, the bill clearly creates different classifications of retailers, each of which are subject to different rules with regard to the burdens and obligations imposed under the Local Option Revenue Act.

While a sufficient reasonable basis may underlie the establishment of the classification drawn by LB 1219, the existence of such is not readily apparent. The record-keeping requirements under the Act may impose a greater burden on retailers engaged in the floral industry than on other retailers who do not engage extensively in the sale of delivered goods. There may well be retailers, however, who are engaged in other businesses which face the same requirements who are not treated in the same manner by the special classification established under LB 1219. It is conceivable that a similarly situated retailer may be able to successfully argue the class created is unreasonable and violative of Article III, Section 18. Indeed, as you point out in your request, a classification under the Local Option Revenue Act creating a distinction in the point of consummation of sale between retailers who maintained a single business location and retailers who maintained more than one business location was declared unconstitutional as creating an unreasonable and improper classification. City of Lincoln v. McNeil, Docket 259, Page 228 (Dec. 31, 1969, Lancaster County District Court).

In conclusion, on the basis of the foregoing, it is our opinion that the classification in LB 1219 creating different treatment of retailers engaged in the delivery of live plants and floral arrangements and other retailers may well constitute

unreasonable class legislation in violation of Article III, Section 18, of the Nebraska Constitution.

Very truly yours,

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

APPROVED BY:

Attorney General