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

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#91045

DATE: May 22, 1991

SUBJECT: LB 840 - Constitutionality of Including Various Local Government Revenues Within the Term "Local Sources of Revenue" Under the Local Option Municipal Economic Development Act.

REQUESTED BY: Senator Lowell C. Johnson
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of including two specific sources of revenues of cities and villages within the term "local sources of revenue" under LB 840, the "Local Option Municipal Economic Development Act." Generally, LB 840 constitutes the enabling legislation to permit cities and villages in Nebraska to exercise the authority granted by Constitutional Amendment 3 in November, 1990, which authorizes cities and villages to appropriate funds derived from local sources of revenue for economic or industrial development projects or programs, subject to approval by a majority of the registered voters of the city or village voting upon the question. The constitutional amendment (contained in Neb. Const. art. XIII, § 2), provides the term "local sources of revenue shall mean funds raised from general taxes levied by the city or village and shall not include any funds received by the city or village which are derived from state or federal sources." (emphasis added). Your specific question concerns whether either rent or rents paid for the use and benefit of municipal utilities under Neb.Rev.Stat. § 16-682 (Reissue 1987), or payments in lieu of taxes by public power or irrigation districts made pursuant to Neb. Const. art. VIII, § 11, and Neb.Rev.Stat. §§ 70-651.01 to 70-651.05 (Reissue 1990),

constitute "general taxes levied" by a city or village within the meaning of the term "local sources of revenue" as defined under Neb. Const. art. XIII, § 2.

The general rule regarding the characterization of a tax as a "general" tax, as opposed to a "special" tax, is stated in 71 Am. Jur. 2d State and Local Taxation § 21 (1973) as follows:

> Taxes, particularly property taxes, are occasionally classified as general or special. This classification is made most commonly with respect to the distinction between the imposition known as a `special assessment' and the customary annual tax imposed upon all property within the taxing district to provide revenue for the usual and ordinary day-to-day expenses of the government, the term `special tax' sometimes being used as synonymous with the term `special assessment.' With respect to general taxes, the government renders no return of special benefit to any property, but only secures to the citizen the general benefit which results from protection to his person and property and the promotion of various schemes which have for their object the welfare of all; on the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay the improvement.

Similarly, the distinction between "general" and "special" taxes is explained in 84 C.J.S. Taxation § 3a. (1954) as follows:

> `General' taxes are those imposed throughout the state or some civil division thereof for the purpose of raising revenue for the support of the government and for general purposes, and which are levied on the ground of general public benefits, while `special' taxes are those which are levied for a special or local purpose for the benefit of a part only of the body politic.

In Farnham v. City of Lincoln, 75 Neb. 502, 106 N.W. 666 (1906), the Nebraska Supreme Court recognized the difference between "general" and "special" taxes or assessments. In this respect, the court in Farnham stated:

> Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises

> nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it.

Id. at 506-507, 106 N.W. at 668.

Again, discussing the term "general" taxes, the court in Schulz v. Dixon County, 134 Neb. 549, 556, 279 N.W. 179, 183 (1938), stated:

> Taxes proper, or general taxes, it has been said, `proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all.'

Based on the foregoing, it is our opinion that neither of the impositions referred to in your request properly fit within the phrase "general taxes levied" by a city or village in Article XIII, Section 2, for purposes of determining the "local sources of revenue" which may be utilized by cities and villages to fund economic or industrial programs or projects. As to rents paid for the use and benefit of municipal utilities under Neb.Rev.Stat. § 16-682 (Reissue 1987), the charges imposed are directly related to a specific benefit received by the property owner or resident, as opposed to an exaction for the benefit of the public in general. Indeed, the statute specifically provides that delinquent water rentals remaining unpaid for three months may be assessed against the real estate as a "special assessment." We do not believe these impositions may be characterized as "general taxes levied" by a city or village within the meaning of Article XIII, Section 2.

As to the payments in lieu of taxes made by public power or irrigation districts pursuant to Neb. Const. art. VIII, § 11, and Neb.Rev.Stat. §§ 70-651.01 to 70-651.05 (Reissue 1990), it is our

opinion that these payments also do not fall within the term "general taxes levied" as used in Article XIII, Section 2. The precise language employed in Article XIII, Section 2, limits the term "local sources of revenue" to "general taxes levied by the city or village." Payments in lieu of taxes made by public power or irrigation districts do not constitute revenues from any "tax" levied by a city or village; rather, these payments are simply required by Nebraska constitutional and statutory provisions which compel these entities to make payments to local government bodies "in lieu of" other taxes. Therefore, we believe in lieu of tax payments received by cities or villages from public power or irrigation districts do not fit under the term "general taxes levied" by cities or villages in Article XIII, Section 2.

Very truly yours,

DON STENBERG
Attorney General

L. Jay Bartel
Assistant Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

7-70-7.4

APPROVED BY:

Don Stenberg, Attorney General