

SIXTY-SECOND DAY - APRIL 16, 2009**LEGISLATIVE JOURNAL****ONE HUNDRED FIRST LEGISLATURE
FIRST SESSION****SIXTY-SECOND DAY**

Legislative Chamber, Lincoln, Nebraska
Thursday, April 16, 2009

PRAYER

The prayer was offered by Pastor Bill Ritter, First United Methodist Church, Columbus.

ROLL CALL

Pursuant to adjournment, the Legislature met at 9:00 a.m., Speaker Flood presiding.

The roll was called and all members were present except Senator Loudon who was excused; and Senators Adams and Wallman who were excused until they arrive.

CORRECTIONS FOR THE JOURNAL

The Journal for the sixty-first day was approved.

COMMITTEE REPORTS

Enrollment and Review

LEGISLATIVE BILL 35. Placed on Select File with amendment. ER8067 is available in the Bill Room.

LEGISLATIVE BILL 35A. Placed on Select File.

LEGISLATIVE BILL 463A. Placed on Select File.

(Signed) Jeremy Nordquist, Chairperson

AMENDMENT - Print in Journal

Senator McGill filed the following amendment to LB84:
AM269

- 1 1. On page 2, strike beginning with the first "the" in
- 2 line 20 through the comma in line 21 and show as stricken.

ATTORNEY GENERAL'S OPINIONOpinion 09007

DATE: April 15, 2009

SUBJECT: Use of income from leases for electricity generation utilizing solar or wind energy and from the sale of carbon offset credits on unsold school lands under the management of the Board of Educational Lands and Funds to increase compensation paid to teachers

REQUESTED BY: Senator Ken Haar
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
Charles E. Lowe, Assistant Attorney General

Introduction

In a letter to this office you have asked for an Attorney General's opinion as to whether or not a proposed amendment to LB 235 would, if adopted, violate Neb. Const. art. VII, § 9.

The context of your request is as follows: LB 235, as introduced and as amended by the Education Committee (AM 681), would authorize the Board of Educational Lands and Funds to "issue leases for electricity generation utilizing solar or wind energy" on unsold school lands under its management; and it would also authorize the board to "enter into contracts for the sale of carbon offset credits" (which are also known as "carbon sequestration rights") in connection with the school lands. The proposed amendment to the bill (AM 700) would place the rental income from the leases and proceeds from the sale of the carbon offset credits into a newly-created Teacher Compensation Assistance Fund to be used "to increase the compensation paid to teachers in the State of Nebraska." Your question is whether or not the use of these funds for the purpose of increasing teacher compensation would violate Neb. Const. art. VII, § 9, which places limits on the use of income from unsold school lands.

Neb. Const. art. VII, § 9 and Historical Background

The specific provisions of Neb. Const. art. VII, § 9 that are at issue state:

"(1) The following funds shall be exclusively used for the support and maintenance of the common schools in each school district in the state . . . as the Legislature shall provide: . . . (b) The income from the unsold school lands, except that costs of administration shall be deducted from the income before it is so applied."

Thus, the Nebraska Constitution makes clear that net income derived from unsold school lands is to be used only to support and maintain the common (or public) schools in each school district.

This constitutional limitation on the use of income from the unsold school lands is reflective of the history of Nebraska's organization as a state and admission into the Union. That history has been discussed in *State ex rel. Ebke v. Board of Educational Lands and Funds of Nebraska*, 159 Neb. 79, 84-85, 65 N.W.2d 392, 396-97 (1954).

Nebraska came into the Union as a state by virtue of an Enabling Act of Congress approved April 19, 1864, 13 U.S.St. at Large, § 7, p. 49, which provided: 'And be it further enacted, That sections numbered sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools.'

A Constitution having been regularly approved within the territory in 1866, Nebraska was admitted into the Union on March 1, 1867. By its admission it assumed the privileges and duties of statehood, including those imposed by the congressional Enabling Act which included the acceptance of the lands and funds for the common schools of the state.

* * *

The provision of the Enabling Act making the grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant, and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants. See *State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist.*, 143 Neb. 153, 8 N.W.2d 841.

In *Propst v. Board of Educational Lands & Funds*, 156 Neb. 226, 55 N.W.2d 653, 657, this court said: 'The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.' The court also held: 'The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution.'

In short, as stated by the court in *Ebke*, by accepting these land grants from the United States made "for the support of the common schools" Nebraska obligated itself to use the income from these lands for that purpose only.

Nebraska's Constitution reinforces this obligation. See, Neb. Const. art. VII, §§ 6 through 9.

Discussion

Ultimately, the question to be answered is whether or not increasing teacher pay through use of some narrowly specified income from the unsold school lands would be deemed to be providing support and maintenance to the public schools. If increasing teacher pay with these funds is seen as an action which "supports" and "maintains" the public schools, then using these funds in that way would not necessarily run afoul of the limitation in art. VII, § 9. The answer to this question turns on the meaning of the words "support" and "maintain" as used in the Constitution.

"The terms of a Constitution should be construed according to their plain and ordinary acceptation, unless it is evident they were used in a legal or technical sense." *State ex rel. Tyrrell, Co. Atty. v. Lincoln Traction Co.*, 90 Neb. 535, 134 N.W. 278, 281 (1912). Accordingly, the words "support" and "maintenance" are to be given their plain and ordinary meaning.

Merriam-Webster Online Dictionary (<http://www.merriam-webster.com/dictionary>) offers several definitions for the word "support," three of which are useful in the context of art. VII, § 9. The first of these is "to promote the interests or cause of." The second is "to pay the costs of" as in "support a family." The last such possibly applicable definition of "support" is "to keep (something) going." "Maintenance" is defined in that same dictionary as "the act of maintaining." The applicable definitions of the word "maintain" are "to keep in an existing state (as of repair, efficiency, or validity)" and "to support or provide for" as in "has a family to maintain."

Given these definitions of "support" and "maintain," it appears to us that using the net income from wind and solar energy leases and the sale of carbon offset credits on the unsold school lands to increase the pay of public school teachers would not violate the provisions of art. VII, § 9. In reaching this conclusion we assume that the goal of such increased pay would be to improve the ability of the public schools to attract and retain talented and experienced teachers who might otherwise, for financial reasons, decide not to pursue or remain in a public teaching career. To that extent such use of the income contemplated in AM 700 would seem to "promote the interests or cause of" the public schools; and, in this manner, increased teacher pay would "support" the public schools and help "maintain" them as centers of capable and competent teaching. Moreover, since teacher compensation is, obviously, a large portion of any public school district's budget, using the specified income from the unsold school lands to provide increased teacher pay would also provide "support" and "maintenance" to the public schools in the financial and economic senses of those words.

Our conclusion that using the specified income from the unsold school lands to increase public school teacher compensation would not be

unconstitutional is supported by the fact that art. VII, § 9 states that income arising from the perpetual school funds and from the unsold school lands is to be used for the support and maintenance of the common schools "as the Legislature shall provide." This quoted language indicates that the Legislature has at least some discretion to determine in what manner that income is to be used to effectuate the overall purpose of supporting and maintaining the public schools in Nebraska. Therefore, a legislative decision to direct some of that income to increased public school teacher compensation would be permissible so long as there is a reasonable basis to conclude that, in fact, such increased compensation will support and maintain – i.e., benefit – the public schools in each school district.

While not directly applicable here, it is, nonetheless, noteworthy that Neb. Const. art. VII, § 1 uses language similar to that found in art. VII, § 9 in stating: "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." (Emphasis supplied.) In discussing this language of art. VII, § 1 the Nebraska Supreme Court has said: "'What methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the legislature.'" *Nebraska Coalition for Educational Equity and Adequacy (Coalition) v. Heineman*, 273 Neb. 531, 542, 731 N.W.2d 164, 173 (2007) (quoting *Affolder v. State*, 51 Neb. 91, 93, 70 N.W.544, 545 (1897)). In our view it is likely that the court would take a similar approach to art. VII, § 9 in leaving to the Legislature the determination of the methods and means for using the income from the perpetual school fund and from the unsold school lands to support and maintain the public schools.¹

It is important to understand that, in this opinion, we are addressing only the somewhat abstract question of whether or not using income from wind and solar energy leases and from the sale of carbon offset credits on unsold school lands to increase public school teacher compensation would necessarily violate art. VII, § 9. Assuming that increasing teacher pay can reasonably be expected to result in an actual benefit to the public schools and the students in those schools, we have concluded that such use of these funds would not, in and of itself, result in a violation of that constitutional provision.

Additional Points

In light of the statement in your letter to this office that the fund proposed to be created under AM 700 would be "a holding fund, and no distribution method has yet been decided" and some concerns we have about the language contained in the proposed amendment itself, we offer the following additional comments.

First, if the Legislature wishes to use the income from the leases and sales described in LB 235 exclusively to increase the compensation of teachers, there should be some evidence in the legislative record from which it can be

reasonably concluded that using the income for this particular purpose will, more likely than not, help to support and maintain the public schools. Having such a legislative record would assist in upholding the Legislature's decision as to such use of the income.

Second, any distribution method that is adopted should ensure that the income is used to support and maintain the "common schools in each school district in the state," as required by art. VII, § 9. To ensure this and avoid other possible constitutional problems, it would be best, in our view, to distribute the funds to the public school districts themselves for use to increase teacher compensation, rather than making payments directly to teachers from the fund.

Third, we note that proposed amendment AM 700, as presented to us, says that "[t]he [Teacher Compensation Assistance] fund shall be used to increase the compensation paid to teachers in the State of Nebraska." There is nothing in the proposed amendment limiting its scope to teachers in the public schools. Under art. VII, § 9, however, that income from the perpetual school funds and the unsold school lands may be used only to support and maintain "the common schools in each school district in the state." To the extent there are teachers in Nebraska who are employed by entities other than the public schools, no such income can be used to increase their compensation; and the newly-created fund cannot be used for that purpose. We suggest that AM 700 be amended to reflect that it is only the compensation of public school teachers which may be increased using these funds.

Finally, the proposed amendment states that "all rental income from leases" and "all proceeds from the sale of [carbon offset credits]" are to be credited to the Teacher Compensation Assistance Fund. (Emphasis supplied.) Art. VII, § 9(1)(b) makes it clear, however, that income from the unsold school lands is to have "the costs of administration" deducted before it is applied to the "support and maintenance of the common schools." Clarifying the proposed amendment to reflect this constitutional requirement that administrative costs be deducted would assist in avoiding confusion and possible conflict between what the Constitution requires and the language used by the Legislature.

Conclusion

It is our opinion that using the net income derived from wind and solar energy leases and the sale of carbon offset credits on unsold school lands to increase compensation paid to public school teachers in Nebraska would not, in and of itself, violate the provisions of Neb. Const. art. VII, § 9 limiting the use of income from the unsold school lands to the "support and maintenance of the common schools in each school district in the state." It is important, however, that any such use of this income be carefully structured so as to assure that it actually does provide "support and maintenance" to each school district and that it is directed only at the compensation of

teachers in the public schools.

¹ In Propst v. Board of Educational Lands and Funds, 156 Neb. 226, 233, 55 N.W.2d 653, 657 (1952), the supreme court stated that "[t]he school lands were received and are held in trust by the State of Nebraska for educational purposes." This use of the term "educational purposes" as synonymous with the constitutional language "support of the common schools" in describing the reason the school lands were granted to the state by the federal government also suggests that the term "support and maintenance of the common schools" in art. VII, § 9 would not be given an overly-narrow interpretation by the court were the issue to arise.

Sincerely,
JON BRUNING
Attorney General
(Signed) Charles E. Lowe
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature
17-055-20

RESOLUTIONS

Pursuant to Rule 4, Sec. 5(b), LR 80 and 81 were adopted.

SPEAKER SIGNED

While the Legislature was in session and capable of transacting business, the Speaker signed the following: LR 80 and 81.

GENERAL FILE

LEGISLATIVE BILL 432. Title read. Considered.

Committee AM177, found on page 372, was adopted with 42 ayes, 0 nays, 4 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 38 ayes, 0 nays, 8 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 137. Title read. Considered.

Advanced to Enrollment and Review Initial with 43 ayes, 0 nays, 4 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 152. Title read. Considered.

Advanced to Enrollment and Review Initial with 43 ayes, 0 nays, 4 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 302. Title read. Considered.

Advanced to Enrollment and Review Initial with 40 ayes, 0 nays, 7 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 299. Title read. Considered.

Committee AM70, found on page 396, was adopted with 37 ayes, 0 nays, 10 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 43 ayes, 0 nays, 4 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 343. Title read. Considered.

Advanced to Enrollment and Review Initial with 38 ayes, 0 nays, 9 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 84. Title read. Considered.

Advanced to Enrollment and Review Initial with 43 ayes, 0 nays, 4 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 394. Title read. Considered.

Advanced to Enrollment and Review Initial with 39 ayes, 0 nays, 7 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 131. Title read. Considered.

SENATOR LANGEMEIER PRESIDING

Advanced to Enrollment and Review Initial with 42 ayes, 0 nays, 4 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 133. Title read. Considered.

Advanced to Enrollment and Review Initial with 37 ayes, 0 nays, 8 present and not voting, and 4 excused and not voting.

LEGISLATIVE BILL 113. Title read. Considered.

Committee AM301, found on page 450, was adopted with 29 ayes, 0 nays, 15 present and not voting, and 5 excused and not voting.

Advanced to Enrollment and Review Initial with 31 ayes, 0 nays, 13 present and not voting, and 5 excused and not voting.

LEGISLATIVE BILL 163. Title read. Considered.

Committee AM298, found on page 459, was adopted with 28 ayes, 0 nays, 16 present and not voting, and 5 excused and not voting.

Advanced to Enrollment and Review Initial with 32 ayes, 0 nays, 12 present and not voting, and 5 excused and not voting.

LEGISLATIVE BILL 434. Title read. Considered.

Advanced to Enrollment and Review Initial with 27 ayes, 0 nays, 17 present and not voting, and 5 excused and not voting.

COMMITTEE REPORT
Health and Human Services

LEGISLATIVE BILL 195. Returned to General File with amendment. AM952 is available in the Bill Room.

(Signed) Tim Gay, Chairperson

AMENDMENTS - Print in Journal

Senator Haar filed the following amendment to LB436:
AM1065

(Amendments to Standing Committee amendments, AM708)

- 1 1. On page 1, line 18; page 2, lines 3 and 10; page 3,
- 2 line 25; and page 6, line 25, strike "generation unit" and insert
- 3 "facility".
- 4 2. On page 3, line 22, after the first comma insert "and
- 5 the".
- 6 3. On page 4, line 27; and page 5, line 18, strike
- 7 "service".
- 8 4. On page 6, line 12, strike "services"; and in line 13
- 9 after "units" insert "with a rated capacity".

Senator Coash filed the following amendment to LB498:
AM1085

- 1 1. Insert the following new section:
- 2 Sec. 2. Section 49-1499.02, Revised Statutes Cumulative
- 3 Supplement, 2008, is amended to read:
- 4 49-1499.02 (1) An official or employee of the executive
- 5 branch of state government or a member of the board of trustees of
- 6 Wyuka Cemetery who would be required to take any action or make
- 7 any decision in the discharge of his or her official duties that

8 may cause financial benefit or detriment to him or her, a member
 9 of his or her immediate family, or a business with which he or she
 10 is associated, which is distinguishable from the effects of such
 11 action on the public generally or a broad segment of the public,
 12 shall take the following actions as soon as he or she is aware
 13 of such potential conflict or should reasonably be aware of such
 14 potential conflict, whichever is sooner:

15 (a) Prepare a written statement describing the matter
 16 requiring action or decision and the nature of the potential
 17 conflict; and

18 (b) Deliver a copy of the statement to the commission
 19 and to his or her immediate superior, if any, who shall assign
 20 the matter to another. If the immediate superior does not assign
 21 the matter to another or if there is no immediate superior, the
 22 official, ~~or~~ employee, or member of the board of trustees of Wyuka
 23 Cemetery shall take such action as the commission shall advise
 1 or prescribe to remove himself or herself from influence over the
 2 action or decision on the matter.

3 (2) This section does not prevent such a person from (a)
 4 making or participating in the making of a governmental decision to
 5 the extent that the individual's participation is legally required
 6 for the action or decision to be made, (b) making or participating
 7 in the making of a decision to the extent that the individual's
 8 participation is legally required for the action or decision to
 9 be made, or ~~(b)~~(c) making or participating in the making of
 10 a governmental decision if the potential conflict of interest is
 11 based upon a business association and the business association
 12 exists only as the result of his or her position on a commodity
 13 board. A person acting pursuant to subdivision (a) or (b) of this
 14 subsection shall report the occurrence to the commission.

15 (3) For purposes of this section, commodity board means
 16 only the following:

17 (a) Corn Development, Utilization, and Marketing Board;

18 (b) Nebraska Dairy Industry Development Board;

19 (c) Grain Sorghum Development, Utilization, and Marketing
 20 Board;

21 (d) Nebraska Wheat Development, Utilization, and
 22 Marketing Board;

23 (e) Dry Bean Commission;

24 (f) Nebraska Potato Development Committee; and

25 (g) Nebraska Poultry and Egg Development, Utilization,
 26 and Marketing Committee.

27 2. On page 3, line 10, after the period insert "At
 1 least two of the five trustees shall have prior experience in
 2 funeral directing, managing a funeral establishment, or managing a
 3 cemetery.".

4 3. On page 5, line 21, strike "is" and insert "and"
 5 section 49-1499.02, Revised Statutes Cumulative Supplement, 2008,

6 are".

7 4. Renumber the remaining sections accordingly.

GENERAL FILE

LEGISLATIVE BILL 348. Title read. Considered.

Committee AM191, found on page 464, was adopted with 26 ayes, 0 nays, 19 present and not voting, and 4 excused and not voting.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 10 present and not voting, and 4 excused and not voting.

LEGISLATIVE BILL 540. Title read. Considered.

Committee AM115, found on page 475, was adopted with 34 ayes, 0 nays, 11 present and not voting, and 4 excused and not voting.

Advanced to Enrollment and Review Initial with 32 ayes, 0 nays, 13 present and not voting, and 4 excused and not voting.

LEGISLATIVE BILL 528. Title read. Considered.

Committee AM247, found on page 526, was adopted with 35 ayes, 0 nays, 11 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 10 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 450. Title read. Considered.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 11 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 274. Title read. Considered.

Advanced to Enrollment and Review Initial with 41 ayes, 0 nays, 6 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 339. Title read. Considered.

Committee AM197, found on page 544, was adopted with 40 ayes, 0 nays, 7 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 41 ayes, 0 nays, 6 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 412. Title read. Considered.

Committee AM134, found on page 547, was adopted with 36 ayes, 0 nays, 11 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 38 ayes, 0 nays, 9 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 27. Title read. Considered.

Committee AM321, found on page 550, was adopted with 39 ayes, 0 nays, 8 present and not voting, and 2 excused and not voting.

SPEAKER FLOOD PRESIDING

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 11 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 175. Title read. Considered.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 11 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 129. Title read. Considered.

Committee AM485, found on page 566, was adopted with 32 ayes, 0 nays, 15 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 32 ayes, 0 nays, 15 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 208. Title read. Considered.

Advanced to Enrollment and Review Initial with 30 ayes, 0 nays, 17 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 94. Title read. Considered.

Committee AM555, found on page 628, was adopted with 33 ayes, 0 nays, 14 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 12 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 389. Title read. Considered.

Committee AM355, found on page 632, was adopted with 35 ayes, 0 nays, 12 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 37 ayes, 0 nays, 10 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 209. Title read. Considered.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 11 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 422. Title read. Considered.

Committee AM327, found on page 652, was adopted with 44 ayes, 0 nays, 3 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 44 ayes, 0 nays, 3 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 488. Title read. Considered.

Committee AM504, found on page 652, was adopted with 43 ayes, 0 nays, 3 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 41 ayes, 0 nays, 5 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 501. Title read. Considered.

Committee AM551, found on page 652, was adopted with 36 ayes, 0 nays, 10 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 10 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 60. Title read. Considered.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 10 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 278. Title read. Considered.

Pending.

AMENDMENT - Print in Journal

Senator White filed the following amendment to LB551:
AM1039

- 1 1. Strike the original sections and all amendments
- 2 thereto and insert the following new sections:
- 3 Section 1. Section 44-710.01, Reissue Revised Statutes of
- 4 Nebraska, is amended to read:

5 44-710.01 No policy of sickness and accident insurance
6 shall be delivered or issued for delivery to any person in this
7 state unless (1) the entire money and other considerations therefor
8 are expressed therein, (2) the time at which the insurance takes
9 effect and terminates is expressed therein, (3) it purports to
10 insure only one person, except that a policy may insure, originally
11 or by subsequent amendment, upon the application of an adult
12 member of a family who shall be deemed the policyholder, any
13 two or more eligible members of that family, including husband,
14 wife, dependent children, any children enrolled on a full-time
15 basis in any college, university, or trade school, or any children
16 under a specified age which shall not exceed ~~twenty three~~ thirty
17 years and any other person dependent upon the policyholder; any
18 individual policy hereinafter delivered or issued for delivery
19 in this state which provides that coverage of a dependent child
20 shall terminate upon the attainment of the limiting age for
21 dependent children specified in the policy shall also provide in
22 substance that attainment of such limiting age shall not operate
23 to terminate the coverage of such child during the continuance
1 of such policy and while the child is and continues to be both
2 (a) incapable of self-sustaining employment by reason of mental
3 retardation or physical handicap and (b) chiefly dependent upon
4 the policyholder for support and maintenance, if proof of such
5 incapacity and dependency is furnished to the insurer by the
6 policyholder within thirty-one days of the child's attainment of
7 the limiting age and subsequently as may be required by the
8 insurer but not more frequently than annually after the two-year
9 period following the child's attainment of the limiting age; such
10 insurer may charge an additional premium for and with respect
11 to any such continuation of coverage beyond the limiting age of
12 the policy with respect to such child, which premium shall be
13 determined by the insurer on the basis of the class of risks
14 applicable to such child, (4) it contains a title on the face of
15 the policy correctly describing the policy, (5) the exceptions and
16 reductions of indemnity are set forth in the policy and, except
17 those which are set forth in sections 44-710.03 and 44-710.04,
18 are printed, at the insurer's option, either included with the
19 benefit provision to which they apply or under an appropriate
20 caption such as EXCEPTIONS, or EXCEPTIONS AND REDUCTIONS; if an
21 exception or reduction specifically applies only to a particular
22 benefit of the policy, a statement of such exception or reduction
23 shall be included with the benefit provision to which it applies,
24 (6) each such form, including riders and endorsements, shall be
25 identified by a form number in the lower left-hand corner of the
26 first page thereof, (7) it contains no provision purporting to make
27 any portion of the charter, rules, constitution, or bylaws of the
1 insurer a part of the policy unless such portion is set forth in
2 full in the policy, except in the case of the incorporation of, or
3 reference to, a statement of rates or classification of risks, or

4 short-rate table filed with the Director of Insurance, and (8) on
5 or after January 1, 1999, any restrictive rider contains a notice
6 of the existence of the Comprehensive Health Insurance Pool if the
7 policy provides health insurance as defined in section 44-4209.

8 Sec. 2. Section 44-761, Reissue Revised Statutes of
9 Nebraska, is amended to read:

10 44-761 Each group policy of sickness and accident
11 insurance shall contain in substance the following provisions:

12 (1) A provision that the policy, the application of the
13 policyholder if such application or copy thereof is attached to
14 such policy, and the individual applications, if any, submitted
15 in connection with such policy by the employees or members, shall
16 constitute the entire contract between the parties, that all
17 statements, in the absence of fraud, made by any applicant or
18 applicants shall be deemed representations and not warranties, and
19 that no such statement shall avoid the insurance or reduce benefits
20 thereunder unless contained in a written application of which a
21 copy is attached to the policy;

22 (2) A provision that the insurer will furnish to the
23 policyholder, for delivery to each employee or member of the
24 insured group, an individual certificate setting forth in summary
25 form a statement of the essential features of the insurance
26 coverage of such employee or member and to whom benefits thereunder
27 are payable. If dependents are included in the coverage, only one
1 certificate need be issued for each family unit;

2 (3) A provision that to the group originally insured may
3 be added from time to time eligible new employees or members or
4 dependents, as the case may be, in accordance with the terms of the
5 policy; and

6 (4) A provision that the insurance coverage of the
7 employee or member may include, originally or by subsequent
8 amendment, upon the application of the employee or member, any
9 two or more eligible members of his or her family, including
10 husband, wife, dependent children, any children enrolled on a
11 full-time basis in any college, university, or trade school,
12 or any children under a specified age which shall not exceed
13 ~~twenty-three~~ thirty years, and any other person dependent upon
14 the policyholder. Any policy which provides that coverage of an
15 unmarried dependent child shall terminate upon the attainment of
16 the limiting age for unmarried dependent children specified in the
17 policy shall also provide that attainment of such limiting age
18 shall not operate to terminate the coverage of such child during
19 the continuance of the insurance coverage of the employee or member
20 under such policy and while such child is and continues to be
21 (a) incapable of self-sustaining employment by reason of mental or
22 physical handicap and (b) chiefly dependent upon the policyholder
23 for support and maintenance, if proof of such incapacity and
24 dependency is furnished to the insurer by the policyholder within
25 thirty-one days of such child's attainment of the limiting age

26 and subsequently as may be required by the insurer but not more
 27 frequently than annually after the two-year period following such
 1 child's attainment of the limiting age. The insurer may charge an
 2 additional premium for and with respect to any such continuation of
 3 coverage beyond the limiting age of the policy, which premium shall
 4 be determined by the insurer on the basis of the class of risks
 5 applicable to such child. The provisions of this subdivision shall
 6 be contained in all new policies of group sickness and accident
 7 insurance delivered or issued for delivery to any person in this
 8 state. No group policy of sickness and accident insurance shall
 9 contain any provisions which are in conflict with sections 44-3,144
 10 to 44-3,150.

11 Sec. 3. (1) For purposes of this section, health benefit
 12 plan means any expense-incurred individual or group sickness
 13 and accident insurance policy, health maintenance organization
 14 contract, subscriber contract, or self-funded employee benefit
 15 plan to the extent not preempted by federal law, except for
 16 any policy or contract that provides coverage only for excepted
 17 benefits as defined in the federal Health Insurance Portability
 18 and Accountability Act of 1996, 29 U.S.C. 1191b, and regulations
 19 adopted pursuant to the act, as such act and regulations existed on
 20 January 1, 2009, or any policy or contract that provides coverage
 21 for a specified disease or other limited-benefit coverage.

22 (2) Notwithstanding section 44-3,131, any health benefit
 23 plan that provides coverage for children shall provide for
 24 continuing coverage for such children as follows:

25 (a) If coverage under the health benefit plan would
 26 otherwise terminate because a covered child ceases to be a
 27 dependent, ceases to be a full-time student, or attains an age
 1 which exceeds the specified age at which coverage ceases pursuant
 2 to the plan, the health benefit plan shall provide the option
 3 to the insured to continue coverage for such child through the
 4 end of the month in which the child (i) marries, (ii) ceases to
 5 be a resident of the state, unless the child is under nineteen
 6 years of age or is enrolled on a full-time basis in any college,
 7 university, or trade school, (iii) receives coverage under another
 8 health benefit plan or a self-funded employee benefit plan that
 9 is not included in the definition of a health benefit plan under
 10 subsection (1) of this section but provides similar coverage, or
 11 (iv) attains thirty years of age; and

12 (b) The health benefit plan may require:

13 (i) A written election from the insured; and

14 (ii) An additional premium for the child. Such premium
 15 shall not vary based upon the health status of the child and shall
 16 not exceed the amount the health benefit plan would receive for an
 17 identical individual for a single adult insured. No employer shall
 18 be required to contribute to any additional premium under this
 19 subdivision.

20 Sec. 4. This act becomes operative on January 1, 2010.

- 21 Sec. 5. Original sections 44-710.01 and 44-761, Reissue
 22 Revised Statutes of Nebraska, are repealed.

COMMITTEE REPORTS

Judiciary

LEGISLATIVE BILL 306. Placed on General File.

LEGISLATIVE BILL 675. Placed on General File with amendment.
 AM994

- 1 1. Strike the original sections and insert the following
 2 new sections:
 3 Section 1. Section 28-326, Reissue Revised Statutes of
 4 Nebraska, is amended to read:
 5 28-326 For purposes of sections 28-325 to 28-345, unless
 6 the context otherwise requires:
 7 (1) Abortion means the use or prescription of any
 8 instrument, medicine, drug, or other substance or device
 9 intentionally to terminate the pregnancy of a woman known to be
 10 pregnant with an intention other than to increase the probability
 11 of a live birth, to preserve the life or health of the child after
 12 live birth, or to remove a dead unborn child, and which causes the
 13 premature termination of the pregnancy;
 14 (2) Hospital means those institutions licensed by the
 15 Department of Health and Human Services pursuant to the Health Care
 16 Facility Licensure Act;
 17 (3) Physician means any person licensed to practice
 18 medicine in this state as provided in ~~sections 71-102 to 71-110;~~
 19 the Uniform Credentialing Act;
 20 (4) Pregnant means that condition of a woman who has
 21 unborn human life within her as the result of conception;
 22 (5) Conception means the fecundation of the ovum by the
 23 spermatozoa;
 1 (6) Viability means that stage of human development when
 2 the unborn child is potentially able to live more than merely
 3 momentarily outside the womb of the mother by natural or artificial
 4 means;
 5 (7) Emergency situation means that condition which, on
 6 the basis of the physician's good faith clinical judgment, so
 7 complicates the medical condition of a pregnant woman as to
 8 necessitate the immediate abortion of her pregnancy to avert her
 9 death or for which a delay will create serious risk of substantial
 10 impairment of a major bodily function;
 11 (8) Probable gestational age of the unborn child means
 12 what will with reasonable probability, in the judgment of the
 13 physician, be the gestational age of the unborn child at the time
 14 the abortion is planned to be performed; ~~and~~
 15 (9) Partial-birth abortion means an abortion procedure
 16 in which the person performing the abortion partially delivers

17 vaginally a living unborn child before killing the unborn child and
 18 completing the delivery. For purposes of this subdivision, the term
 19 partially delivers vaginally a living unborn child before killing
 20 the unborn child means deliberately and intentionally delivering
 21 into the vagina a living unborn child, or a substantial portion
 22 thereof, for the purpose of performing a procedure that the person
 23 performing such procedure knows will kill the unborn child and does
 24 kill the unborn child;:-

25 (10) Woman means any female human being whether or not
 26 she has reached the age of majority; and

27 (11) Ultrasound means the use of ultrasonic waves for
 1 diagnostic or therapeutic purposes, specifically to monitor an
 2 unborn child.

3 Sec. 2. Section 28-327, Reissue Revised Statutes of
 4 Nebraska, is amended to read:

5 28-327 No abortion shall be performed except with the
 6 voluntary and informed consent of the woman upon whom the abortion
 7 is to be performed. Except in the case of an emergency situation,
 8 consent to an abortion is voluntary and informed only if:

9 (1) The woman is told the following by the physician who
 10 is to perform the abortion, by the referring physician, or by a
 11 ~~licensed~~ physician assistant or registered nurse licensed under the
 12 Uniform Credentialing Act who is an agent of either physician, at
 13 least twenty-four hours before the abortion:

14 (a) The particular medical risks associated with
 15 the particular abortion procedure to be employed including,
 16 when medically accurate, the risks of infection, hemorrhage,
 17 ~~and perforated uterus,~~ danger to subsequent pregnancies, and
 18 infertility;

19 (b) The probable gestational age of the unborn child at
 20 the time the abortion is to be performed; ~~and~~

21 (c) The medical risks associated with carrying her child
 22 to term; ~~and~~:-

23 (d) That she cannot be forced or required by anyone to
 24 have an abortion and is free to withhold or withdraw her consent
 25 for an abortion without affecting her right to future care or
 26 treatment and without the loss of any state or federal benefits to
 27 which she might otherwise be entitled.

1 The person providing the information specified in this
 2 subdivision to the person upon whom the abortion is to be
 3 performed shall be deemed qualified to so advise and provide
 4 such information only if, at a minimum, he or she has had
 5 training in each of the following subjects: Sexual and reproductive
 6 health; abortion technology; contraceptive technology; short-term
 7 counseling skills; community resources and referral; and informed
 8 consent. The physician or the physician's agent may provide this
 9 information by telephone without conducting a physical examination
 10 or tests of the patient, in which case the information required
 11 to be supplied may be based on facts supplied by the patient and

12 whatever other relevant information is reasonably available to the
13 physician or the physician's agent;

14 (2) The woman is informed by telephone or in person, by
15 the physician who is to perform the abortion, by the referring
16 physician, or by an agent of either physician, at least twenty-four
17 hours before the abortion:

18 (a) The name of the physician who will perform the
19 abortion;

20 (b) That medical assistance benefits may be available for
21 prenatal care, childbirth, and neonatal care;

22 (c) That the father is liable to assist in the support of
23 her child, even in instances in which the father has offered to pay
24 for the abortion; ~~and~~

25 (d) That she has the right to review the printed
26 materials described in section 28-327.01. The physician or his
27 or her agent shall orally inform the woman that the materials
1 have been provided by the Department of Health and Human Services
2 and that they describe the unborn child and list agencies which
3 offer alternatives to abortion. If the woman chooses to review the
4 materials, they shall either be given to her at least twenty-four
5 hours before the abortion or mailed to her at least seventy-two
6 hours before the abortion by certified mail, restricted delivery
7 to addressee, which means the postal employee can only deliver
8 the mail to the addressee. The physician and his or her agent
9 may disassociate themselves from the materials and may comment or
10 refrain from commenting on them as they choose; ~~and~~

11 (e) That she has the right to request a comprehensive
12 list, compiled by the Department of Health and Human Services,
13 of health care providers, facilities, and clinics that offer to
14 perform ultrasounds, including and specifying those that offer to
15 perform ultrasounds free of charge. The list shall be arranged
16 geographically and shall include the name, address, hours of
17 operation, and telephone number of each entity. If requested by
18 the woman, the physician who is to perform the abortion, the
19 referring physician, or his or her agent shall provide such a list
20 as compiled by the department;

21 (3) If an ultrasound is used prior to the performance
22 of an abortion, the physician who is to perform the abortion,
23 the referring physician, or a physician assistant or registered
24 nurse licensed under the Uniform Credentialing Act who is an agent
25 of either physician, or any qualified agent of either physician,
26 shall:

27 (a) Perform an ultrasound of the woman's unborn child
1 of a quality consistent with standard medical practice in the
2 community at least one hour prior to the performance of the
3 abortion;

4 (b) Simultaneously display the ultrasound images so that
5 the woman may choose to view the ultrasound images or not view the
6 ultrasound images. The woman shall be informed that the ultrasound

7 images will be displayed so that she is able to view them. Nothing
 8 in this subsection shall be construed to require the woman to view
 9 the displayed ultrasound images; and

10 (c) If the woman requests information about the displayed
 11 ultrasound image, her questions shall be answered. If she requests
 12 a detailed, simultaneous, medical description of the ultrasound
 13 image, one shall be provided that includes the dimensions of the
 14 unborn child, the presence of cardiac activity, if present and
 15 viewable, and the presence of external members and internal organs,
 16 if present and viewable;

17 ~~(3)-(4)~~ The woman certifies in writing, prior to the
 18 abortion, that

19 ~~(a) The~~ the information described in subdivisions (1) and
 20 (2)(a), (b), and (c) of this section has been furnished her;

21 ~~(b) That~~ and that she has been informed of her right to
 22 review the information referred to in subdivision (2)(d) of this
 23 section; and

24 (c) That the requirements of subdivision (3) of this
 25 section have been performed, if an ultrasound is performed prior to
 26 the performance of the abortion; and

27 ~~(4)-(5)~~ Prior to the performance of the abortion,
 1 the physician who is to perform the abortion or his or her
 2 agent receives a copy of the written certification prescribed by
 3 subdivision ~~(3)-(4)~~ of this section. The physician or his or her
 4 agent shall retain a copy of the signed certification form in the
 5 woman's medical record.

6 Sec. 3. Section 28-327.01, Reissue Revised Statutes of
 7 Nebraska, is amended to read:

8 28-327.01 (1) The Department of Health and Human Services
 9 shall cause to be published, ~~within sixty days after September 9,~~
 10 ~~1993,~~ the following easily comprehensible printed materials:

11 (a) Geographically indexed materials designed to inform
 12 the woman of public and private agencies and services available to
 13 assist a woman through pregnancy, upon childbirth, and while the
 14 child is dependent, including adoption agencies and agencies and
 15 services for prevention of unintended pregnancies, which materials
 16 shall include a comprehensive list of the agencies available,
 17 a description of the services they offer, and a description of
 18 the manner, including telephone numbers and addresses in which
 19 such agencies may be contacted or printed materials including a
 20 toll-free, twenty-four-hour-a-day telephone number which may be
 21 called to orally obtain such a list and description of agencies in
 22 the locality of the caller and of the services they offer; ~~and~~

23 (b) Materials designed to inform the woman of the
 24 probable anatomical and physiological characteristics of the unborn
 25 child at two-week gestational increments from the time when a woman
 26 can be known to be pregnant to full term, including pictures or
 27 drawings representing the development of unborn children at the
 1 two-week gestational increments, and any relevant information on

2 the possibility of the unborn child's survival. Any such pictures
3 or drawings shall contain the dimensions of the unborn child and
4 shall be realistic and appropriate for the stage of pregnancy
5 depicted. The materials shall be objective, nonjudgmental, and
6 designed to convey only accurate scientific information about
7 the unborn child at the various gestational ages. The materials
8 shall also contain objective information describing the methods of
9 abortion procedures commonly employed, the medical risks commonly
10 associated with each such procedure, the possible detrimental
11 psychological effects of abortion, the medical risks commonly
12 associated with abortion, and the medical risks commonly associated
13 with carrying a child to term; ~~and-~~

14 (c) A comprehensive list of health care providers,
15 facilities, and clinics that offer to perform ultrasounds,
16 including and specifying those that offer to perform ultrasounds
17 free of charge. The list shall be arranged geographically and shall
18 include the name, address, hours of operation, and telephone number
19 of each entity.

20 (2) The materials shall be printed in a typeface large
21 enough to be clearly legible.

22 (3) The materials required under this section shall be
23 available from the department upon the request by any person,
24 facility, or hospital for an amount equal to the cost incurred by
25 the department to publish the materials.

26 Sec. 4. Section 28-327.03, Reissue Revised Statutes of
27 Nebraska, is amended to read:

1 28-327.03 No civil liability for failure to comply with
2 subdivision (2)(d) of section 28-327 or that portion of subdivision
3 ~~(3)-(4)~~ of such section requiring a written certification that the
4 woman has been informed of her right to review the information
5 referred to in subdivision (2)(d) of such section may be imposed
6 unless the Department of Health and Human Services has published
7 and made available the printed materials at the time the physician
8 or his or her agent is required to inform the woman of her right
9 to review them.

10 Sec. 5. Section 28-327.04, Reissue Revised Statutes of
11 Nebraska, is amended to read:

12 28-327.04 Any person upon whom an abortion has been
13 performed or attempted in violation of section 28-327 or the parent
14 or guardian of a minor upon whom an abortion has been performed
15 or attempted in violation of such section shall have a right to
16 maintain a civil cause of action against the person who performed
17 the abortion or attempted to perform the abortion. A violation
18 of such section shall be prima facie evidence of professional
19 negligence. The written certification prescribed by subdivision ~~(3)~~
20 ~~(4)~~ of section 28-327 signed by the person upon whom an abortion
21 has been performed or attempted shall constitute and create a
22 rebuttable presumption of full compliance with all provisions of
23 section 28-327 in favor of the physician who performed or attempted

24 to perform the abortion, the referring physician, or the agent
25 of either physician. The written certification shall be admissible
26 as evidence in the cause of action for professional negligence or
27 in any criminal action. If judgment is rendered in favor of the
1 plaintiff in any such action, the court shall also render judgment
2 for a reasonable attorney's fee in favor of the plaintiff against
3 the defendant.

4 Sec. 6. If any section in this act or any part of any
5 section is declared invalid or unconstitutional, the declaration
6 shall not affect the validity or constitutionality of the remaining
7 portions.

8 Sec. 7. Original sections 28-326, 28-327, 28-327.01,
9 28-327.03, and 28-327.04, Reissue Revised Statutes of Nebraska, are
10 repealed.

(Signed) Brad Ashford, Chairperson

UNANIMOUS CONSENT - Add Cointroducer

Senator Pirsch asked unanimous consent to add his name as cointroducer to LB113. No objections. So ordered.

VISITORS

Visitors to the Chamber were representatives of Midwest U.S.-Japan Association from Tokyo, Japan; 40 fourth-grade students from St. Gerald School, Ralston; 34 fourth-grade students from Fillmore Central, Geneva; 43 fourth-grade students from Prairie Lane Elementary, Omaha; members of the Dixon County Board of Supervisors; and members of the Blair Chamber of Commerce from Blair.

RECESS

At 12:03 p.m., on a motion by Senator Nordquist, the Legislature recessed until 1:30 p.m.

AFTER RECESS

The Legislature reconvened at 1:30 p.m., Senator Langemeier presiding.

ROLL CALL

The roll was called and all members were present except Senator Louden who was excused; and Senators Council, Haar, Pankonin, and Wallman who were excused until they arrive.

GENERAL FILE

LEGISLATIVE BILL 278. Considered.

Advanced to Enrollment and Review Initial with 34 ayes, 2 nays, 6 present and not voting, and 7 excused and not voting.

LEGISLATIVE BILL 447. Title read. Considered.

Advanced to Enrollment and Review Initial with 38 ayes, 0 nays, 5 present and not voting, and 6 excused and not voting.

LEGISLATIVE BILL 531. Title read. Considered.

Advanced to Enrollment and Review Initial with 27 ayes, 0 nays, 16 present and not voting, and 6 excused and not voting.

LEGISLATIVE BILL 445. Title read. Considered.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 8 present and not voting, and 6 excused and not voting.

LEGISLATIVE BILL 498. Title read. Considered.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 8 present and not voting, and 6 excused and not voting.

LEGISLATIVE BILL 604. Title read. Considered.

Advanced to Enrollment and Review Initial with 34 ayes, 0 nays, 9 present and not voting, and 6 excused and not voting.

LEGISLATIVE BILL 446. Title read. Considered.

Committee AM528, found on page 692, was adopted with 34 ayes, 0 nays, 9 present and not voting, and 6 excused and not voting.

Advanced to Enrollment and Review Initial with 32 ayes, 0 nays, 11 present and not voting, and 6 excused and not voting.

LEGISLATIVE BILL 372. Title read. Considered.

Committee AM648, found on page 693, was adopted with 30 ayes, 0 nays, 13 present and not voting, and 6 excused and not voting.

Advanced to Enrollment and Review Initial with 31 ayes, 0 nays, 13 present and not voting, and 5 excused and not voting.

LEGISLATIVE BILL 500. Title read. Considered.

Advanced to Enrollment and Review Initial with 32 ayes, 0 nays, 12 present and not voting, and 5 excused and not voting.

LEGISLATIVE BILL 627. Title read. Considered.

Committee AM230, found on page 732, was adopted with 32 ayes, 0 nays, 15 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 12 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 587. Title read. Considered.

Committee AM721, found on page 745, was adopted with 33 ayes, 0 nays, 14 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 12 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 122. Title read. Considered.

Advanced to Enrollment and Review Initial with 32 ayes, 1 nay, 13 present and not voting, and 3 excused and not voting.

AMENDMENT - Print in Journal

Senator Christensen filed the following amendment to LB63:
AM1088

(Amendments to E & R amendments, ER8031)

- 1 1. Insert the following new section:
- 2 Sec. 40. Section 83-183, Reissue Revised Statutes of
- 3 Nebraska, is amended to read:
- 4 83-183 (1) To establish good habits of work and
- 5 responsibility, to foster vocational training, and to reduce
- 6 the cost of operating the facilities, persons committed to
- 7 the department shall be employed, eight hours per day, so far
- 8 as possible in constructive and diversified activities in the
- 9 production of goods, services, and foodstuffs to maintain the
- 10 facilities, for state use, and for other purposes authorized by
- 11 law. To accomplish these purposes, the director may establish and
- 12 maintain industries and farms in appropriate facilities and may
- 13 enter into arrangements with any other board or agency of the
- 14 state, any natural resources district, or any other political
- 15 subdivision, except ~~for that any arrangements entered into with~~
- 16 school districts, educational service units, community colleges,
- 17 state colleges, or universities shall include supervision provided
- 18 by the department, for the employment of persons committed to the

19 department for state or governmental purposes. Nothing in this
20 subsection shall be construed to effect a reduction in the number
21 of work release positions.

22 (2) The director shall make rules and regulations
1 governing the hours, conditions of labor, and the rates of
2 compensation of persons committed to the department. In determining
3 the rates of compensation, such regulations may take into
4 consideration the quantity and quality of the work performed by
5 such person, whether or not such work was performed during regular
6 working hours, the skill required for its performance, and the
7 economic value of similar work outside of correctional facilities.

8 (3) Except as provided in section 83-183.01, wage
9 payments to a person committed to the department shall be set aside
10 by the chief executive officer of the facility in a separate fund.
11 The fund shall enable such person committed to the department to
12 contribute to the support of his or her dependents, if any, to make
13 necessary purchases from the commissary, and to set aside sums to
14 be paid to him or her at the time of his or her release from the
15 facility.

16 (4) The director may authorize the chief executive
17 officer to invest the earnings of a person committed to the
18 department. Any accrued interest thereon shall be credited to such
19 person's fund.

20 (5) The director may authorize the chief executive
21 officer to reimburse the state from the wage fund of a person
22 committed to the department for:

23 (a) The actual value of property belonging to the state
24 or any other person intentionally or recklessly destroyed by such
25 person committed to the department during his or her commitment;

26 (b) The actual value of the damage or loss incurred as a
27 result of unauthorized use of property belonging to the state or
1 any other person by such person committed to the department;

2 (c) The actual cost to the state for injuries or other
3 damages caused by intentional acts of such person committed to the
4 department; and

5 (d) The reasonable costs incurred in returning such
6 person committed to the department to the facility to which he or
7 she is committed in the event of his or her escape.

8 (6) No person committed to the department shall be
9 required to engage in excessive labor, and no such person shall be
10 required to perform any work for which he or she is declared unfit
11 by a physician designated by the director. No person who performs
12 labor or work pursuant to this section shall be required to wear
13 manacles, shackles, or other restraints.

14 (7) The director may authorize that a portion of the
15 earnings of a person committed to the department be retained by
16 that person for personal use.

17 2. On page 43, line 24, strike "and" and after the last

18 comma insert "and 83-183,".

19 3. Renumber the remaining sections accordingly.

BILL ON FIRST READING

The following bill was read for the first time by title:

LEGISLATIVE BILL 497A. Introduced by Fulton, 29.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 497, One Hundred First Legislature, First Session, 2009; and to declare an emergency.

COMMITTEE REPORTS

Enrollment and Review

LEGISLATIVE BILL 432. Placed on Select File with amendment.
ER8070

1 1. Strike the original sections and all amendments
2 thereto and insert the following new sections:
3 Section 1. Section 69-1317, Reissue Revised Statutes of
4 Nebraska, is amended to read:
5 69-1317 (a)(1) Except as otherwise provided in this
6 subdivision, all funds received under the Uniform Disposition of
7 Unclaimed Property Act, including the proceeds from the sale of
8 abandoned property under section 69-1316, shall be deposited by
9 the State Treasurer in a separate trust fund from which he or
10 she shall make prompt payment of claims allowed pursuant to the
11 act and payment of any auditing expenses associated with the
12 receipt of abandoned property. All funds received under section
13 69-1307.05 shall be deposited by the State Treasurer in a separate
14 life insurance corporation demutualization trust fund, which is
15 hereby created, from which he or she shall make prompt payment of
16 claims regarding such funds allowed pursuant to the act. Transfers
17 from the separate life insurance corporation demutualization trust
18 fund to the General Fund may be made at the direction of the
19 Legislature. Before making the deposit he or she shall record
20 the name and last-known address of each person appearing from the
21 holders' reports to be entitled to the abandoned property, the
22 name and last-known address of each insured person or annuitant,
23 and with respect to each policy or contract listed in the report
1 of a life insurance corporation, its number, the name of the
2 corporation, and the amount due. The record shall be available for
3 public inspection during business hours.
4 The record shall not be subject to public inspection or
5 available for copying, reproduction, or scrutiny by commercial or
6 professional locators of property presumed abandoned who charge
7 any service or finders' fee until twenty-four months after the
8 names from the holders' reports have been published or officially

9 disclosed. Records concerning the social security number, date of
10 birth, amount due, and last-known address of an owner shall be
11 treated as confidential and subject to the same confidentiality as
12 tax return information held by the Department of Revenue, except
13 that the Auditor of Public Accounts shall have unrestricted access
14 to such records.

15 A professional finders' fee shall be limited to ten
16 percent of the total amount of the ~~property presumed~~
17 or not yet abandoned property which is recovered or identified on
18 behalf of an owner. To claim any such fee, the nature and location
19 of the property, a notification of when such property was or will
20 be reported to the State Treasurer, and a notification that the
21 property can be claimed by the owner from the State Treasurer free
22 of charge must be disclosed to the claimant in writing by the
23 finder.

24 (2) The unclaimed property records of the State
25 Treasurer, the unclaimed property reports of holders, and the
26 information derived by an unclaimed property examination or audit
27 of the records of a person or otherwise obtained by or communicated
1 to the State Treasurer may be withheld from the public. Any record
2 or information that may be withheld under the laws of this state
3 or of the United States when in the possession of such a person
4 may be withheld when revealed or delivered to the State Treasurer.
5 Any record or information that is withheld under any law of
6 another state when in the possession of that other state may be
7 withheld when revealed or delivered by the other state to the State
8 Treasurer.

9 Information withheld from the general public concerning
10 any aspect of unclaimed property shall only be disclosed to an
11 apparent owner of the property; or to the escheat, unclaimed, or
12 abandoned property administrators or officials of another state if
13 that other state accords substantially reciprocal privileges to the
14 State Treasurer.

15 (b)(1) On or after October 6, 1992, the State Treasurer
16 shall periodically transfer any balance in excess of an amount not
17 to exceed five hundred thousand dollars from the separate trust
18 fund to the General Fund no less frequently than on or before
19 November 1 and May 1 of each year, except that the total amount of
20 all such transfers shall not exceed five million dollars.

21 (2)(i) On the next succeeding November 1 after five
22 million dollars has been transferred to the General Fund in the
23 manner described in subdivision (b)(1) of this section or (ii) on
24 November 1, 1996, whichever occurs first, and on or before November
25 1 of each year thereafter, the State Treasurer shall transfer any
26 balance in excess of an amount not to exceed five hundred thousand
27 dollars from the separate trust fund to the permanent school fund.

1 (3) On July 15, 2003, the State Treasurer shall transfer
2 two hundred thousand dollars from the separate trust fund to the
3 General Fund and one hundred thousand dollars from the separate

4 trust fund to the Treasury Management Cash Fund. On September 15,
5 2004, the State Treasurer shall transfer five hundred thousand
6 dollars from the separate trust fund to the General Fund.

7 (c) Before making any deposit to the credit of the
8 permanent school fund or the General Fund, the State Treasurer may
9 deduct (1) any costs in connection with sale of abandoned property,
10 (2) any costs of mailing and publication in connection with any
11 abandoned property, and (3) reasonable service charges and place
12 such funds in the Unclaimed Property Cash Fund which is hereby
13 created. Transfers from the fund to the General Fund may be made
14 at the direction of the Legislature. Any money in the Unclaimed
15 Property Cash Fund available for investment shall be invested
16 by the state investment officer pursuant to the Nebraska Capital
17 Expansion Act and the Nebraska State Funds Investment Act.

18 Sec. 2. Original section 69-1317, Reissue Revised
19 Statutes of Nebraska, is repealed.

20 2. On page 1, strike beginning with "state" in line 1
21 through line 5 and insert "the Uniform Disposition of Unclaimed
22 Property Act; to amend section 69-1317, Reissue Revised Statutes of
23 Nebraska; to change provisions relating to confidential information
24 and professional finders' fees; and to repeal the original
25 section."

LEGISLATIVE BILL 137. Placed on Select File with amendment.
ER8068

1 1. On page 9, line 7, strike "Tenth" and insert "10th".

LEGISLATIVE BILL 152. Placed on Select File.

LEGISLATIVE BILL 302. Placed on Select File.

LEGISLATIVE BILL 299. Placed on Select File.

LEGISLATIVE BILL 343. Placed on Select File with amendment.
ER8069

1 1. On page 2, line 7, strike "the State of" and show as
2 stricken.

LEGISLATIVE BILL 84. Placed on Select File.

LEGISLATIVE BILL 394. Placed on Select File.

(Signed) Jeremy Nordquist, Chairperson

GENERAL FILE

LEGISLATIVE BILL 533. Title read. Considered.

Committee AM873, found on page 862, was adopted with 36 ayes, 0 nays,
11 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 41 ayes, 0 nays, 6 present

and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 524. Title read. Considered.

Advanced to Enrollment and Review Initial with 39 ayes, 0 nays, 8 present and not voting, and 2 excused and not voting.

LEGISLATIVE BILL 562. Title read. Considered.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 12 present and not voting, and 2 excused and not voting.

COMMUNICATIONS

March 26, 2009

Mr. Patrick O'Donnell
Clerk of the Legislature
State Capitol Building
Room 2018
Lincoln, Nebraska 68509

Dear Mr. O'Donnell:

Pursuant to the Provisions of Section 85-404 and Section 85-408, R.R.S. of Nebraska, 1943, Legislative approval is required for the following University of Nebraska-Lincoln project:

University of Nebraska-Lincoln - 19th & Vine Parking Structure.

The University of Nebraska-Lincoln proposes to construct a multi-level parking garage with approximately 1,100 spaces north and west of the intersection of 19th and Vine Streets on the UNL City Campus. The project is estimated to cost \$16,800,000.

Request. The University requests the Legislature approve the 19th & Vine Parking Structure totaling \$16,800,000 contingent upon the recommendation of the Nebraska Coordinating Commission for Postsecondary Education at their April 16, 2009, meeting. The project will be financed from bonds issued under the Master Trust Indenture and parking surplus funds which will be repaid by auxiliaries and service funds (net parking revenues).

The Board of Regents authorized this expenditure for the 19th & Vine Parking Structure at its January 23, 2009, Board of Regents meeting. The Nebraska Coordinating Commission for Postsecondary Education Budget, Construction, and Financial Aid Committee will make its recommendation at their April 16, 2009, meeting. Attached for your reference is the agenda item as approved by the Board of Regents.

Thank you for your consideration of this project.

Respectfully submitted,
(Signed) Donal J. Burns
Corporation Secretary

April 16, 2009

Senator John Wightman
Chairperson, Executive Board
Room 2010
State Capitol
Lincoln, NE 68509

Dear Senator Wightman,

Enclosed is correspondence from Donal J. Burns, Corporation Secretary for the Office of the President of the University of Nebraska and correspondence from the Coordinating Commission for Postsecondary Education. The correspondence relates to expenditure of bond funds for the following:

University of Nebraska at Lincoln: 19th and Vine Parking Structure.

I am forwarding this correspondence to you for Executive Board action.

Sincerely,
(Signed) Patrick J. O'Donnell
Clerk of the Legislature

PJO:ck

Enclosure

REFERENCE COMMITTEE REPORT

The Executive Board referred the University of Nebraska's request to issue revenue bonds to the Appropriations Committee for further consideration.

(Signed) John Wightman, Chairperson
Executive Board

COMMITTEE REPORT
Judiciary

LEGISLATIVE BILL 36. Placed on General File with amendment.
AM828

- 1 1. On page 10, strike lines 14 through 24.
- 2 2. On page 12, strike beginning with "identities" in line
- 3 1 through the first "to" in line 7 and insert "identity of such
- 4 members, shall be confidential and exempt from"; in line 8 strike
- 5 the comma; and strike lines 12 through 19.
- 6 3. On page 14, line 2, after the period insert "At
- 7 least two persons designated by the director shall be professional
- 8 members of the Nebraska news media.".

(Signed) Brad Ashford, Chairperson

GENERAL FILE

LEGISLATIVE BILL 360. Title read. Considered.

Committee AM913, found on page 893, was adopted with 32 ayes, 0 nays, 15 present and not voting, and 2 excused and not voting.

Advanced to Enrollment and Review Initial with 34 ayes, 0 nays, 14 present and not voting, and 1 excused and not voting.

LEGISLATIVE BILL 441. Title read. Considered.

Committee AM392, found on page 894, was adopted with 36 ayes, 0 nays, 12 present and not voting, and 1 excused and not voting.

SPEAKER FLOOD PRESIDING

Advanced to Enrollment and Review Initial with 41 ayes, 0 nays, 7 present and not voting, and 1 excused and not voting.

LEGISLATIVE BILL 537. Title read. Considered.

Committee AM882, found on page 902, was adopted with 38 ayes, 0 nays, 8 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 37 ayes, 0 nays, 9 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 631. Title read. Considered.

Committee AM415, found on page 904, was adopted with 38 ayes, 0 nays, 7 present and not voting, and 4 excused and not voting.

Advanced to Enrollment and Review Initial with 41 ayes, 0 nays, 5 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 598. Title read. Considered.

Advanced to Enrollment and Review Initial with 40 ayes, 0 nays, 6 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 238. Title read. Considered.

Committee AM903, found on page 943, was adopted with 38 ayes, 0 nays, 7 present and not voting, and 4 excused and not voting.

Advanced to Enrollment and Review Initial with 34 ayes, 0 nays, 11 present and not voting, and 4 excused and not voting.

AMENDMENT - Print in Journal

Senator Flood filed the following amendment to LB285:
AM1076 is available in the Bill Room.

RESOLUTION

LEGISLATIVE RESOLUTION 88. Introduced by Giese, 17.

PURPOSE: The purpose of this interim study is to examine the issuance of LPD-learner's permits in Nebraska. The issues addressed by this interim study shall include, but not be limited to:

(1) A review of the number of LPD-learner's permits issued in Nebraska to individuals over eighteen years of age, with emphasis on the number of permits issued in each county;

(2) A review of the number of LPD-learner's permit renewals in Nebraska by individuals over eighteen years of age, with emphasis on the number of renewals in each county;

(3) An evaluation of the requirements set out in section 60-4,123 for issuance of a LPD-learner's permit; and

(4) A review of the number of LPD-learner's permit holders cited for driving without an operator's license, with emphasis on the number of violations by LPD-learner's permit holders over eighteen years of age.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED FIRST LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

ATTORNEY GENERAL'S OPINION

Opinion 09008

DATE: April 16, 2009

SUBJECT: LB 355; Constitutionality Of Exemption To The Nebraska Clean Indoor Air Act For Cigar Bars Under Special Legislation And Vagueness Analysis.

REQUESTED BY: Sen. Mike Gloor
Nebraska State Legislature

Sen. Bill Avery
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
Dale A. Comer, Assistant Attorney General

You have both requested our opinion as to the constitutionality of LB 355, a bill to create an exemption to the Nebraska Clean Indoor Air Act for "cigar bars." Since your questions regarding LB 355 are essentially the same, we will respond to your inquiries in the same opinion.

The Nebraska Clean Indoor Air Act (the "Clean Air Act") is currently codified at Neb. Rev. Stat. §§ 71-5716 through 71-5734 (Supp. 2008). Its purpose is "to protect the public health and welfare by prohibiting smoking in public places and places of employment," and it should "liberally construed to further its purpose." Neb. Rev. Stat. § 71-5717. The Clean Air Act generally makes it unlawful for any person to smoke in a place of employment or a public place in Nebraska. It also contains exemptions for certain guestrooms and suites, for indoor areas used in connection with research studies on the health effects of smoking, and for tobacco retail outlets. Neb. Rev. Stat. § 71-5730.

LB 355, in its Final Reading form, would create an additional exemption to application of the Clean Air Act with respect to "cigar bars." The bill would amend the Nebraska Liquor Control Act so as to define "cigar bars" as establishments operated by a holder of a Class C Liquor License which: 1. do not sell food, 2. in addition to selling alcohol, annually receive ten percent or more of their gross revenue from the sale of cigars and other tobacco-related products, except the sale of cigarettes, 3. have a walk-in humidor on the premises, and 4. do not permit the smoking of cigarettes.

Senator Gloor asked for our opinion as to the general "constitutionality" of LB 355, but then went on to reference art. III, § 18 of the Nebraska Constitution and unconstitutional vagueness as his specific areas of concern.

Sen. Avery joined in Sen. Gloor's request, and again listed art. III, § 18 of the Nebraska Constitution as a potential constitutional infirmity with respect to LB 355.

ANALYSIS

With respect to opinion requests from state legislators, we have frequently stated in the past that a general question on the constitutionality of proposed legislation will necessarily result in a general response from this office. Op. Att'y Gen. No. 04015 (April 7, 2004); Op. Att'y Gen. No. 98040 (September 11, 1998); Op. Att'y Gen. No. 94023 (March 23, 1994). In light of that principle, we prefer to focus our response to your opinion requests in the present instance upon the specific constitutional concerns referenced in your letters rather than engaging in a general discussion of the constitutionality of LB 355. As a result, we will discuss whether, in our view, LB 355 constitutes impermissible special legislation under art. III, § 18 of the Nebraska Constitution, and whether it is unconstitutionally vague.

Special Legislation under Art. III, § 18 of the Nebraska Constitution

Article III, § 18 of the Nebraska Constitution contains the prohibition on special legislation. That section provides, as is pertinent:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

* * *

Granting to any corporation, association, or individual any special or exclusive privileges, immunity or franchise whatever. . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

The focus of art. III, § 18 "is the prevention of legislation which arbitrarily benefits or grants 'special favors' to a specific class." *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 938, 663 N.W.2d 43, 65 (2003). A legislative act "is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary." *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844-45 (1991). A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification, or (2) it creates a permanently closed class. *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *Bergan Mercy Health System v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844-45 (1991).

1. Arbitrary or unreasonable method of classification.

The first part of the two-part test for special legislation requires consideration of whether the statute at issue creates an arbitrary or unreasonable method of classification. In regard to that question, the Nebraska Supreme Court has stated:

A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.... Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.

Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 938, 663 N.W.2d 43, 65 (2003)(citations omitted). In making a special legislation analysis, "all reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature." *Id.* at 943, 663 N.W.2d at 68. Moreover, "[i]f the Legislature had any evidence to justify its reasons for passing [an] act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified." *Id.* And, courts give deference to legislative factfinding, presume statutes to be constitutional, and do not second-guess the Legislature's reasoning behind passing an Act. *Id.* Ultimately, "the analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation." *Id.* at 939, 663 N.W.2d at 67.

Consequently, in the present case, we must first focus on the Legislature's purpose in creating the class of cigar bars set out in LB 355 and exempting that class of businesses from the provisions of the Clean Air Act. To do so, we will review the legislative history of that bill to date.¹

Testimony during the committee hearings on LB 355 indicated that existent cigar bars in Nebraska have an economic impact on their communities, and that they employ individuals, purchase supplies from multiple vendors, and pay taxes. Committee Records on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 41-46 (February 9, 2009). Testimony during those same hearings also indicated that the exemption in LB 355 is needed to keep cigar bars in business. For example, one witness testified that:

Cigarros, its employees, and vendors have suffered the immediate,

drastic economic impact of not having a cigar bar exemption included in nonsmoking laws. Total revenues are substantially down, to the tune of \$168,000 over a six-month period. Please, if you would, refer to the total revenue graph, in the presentation material provided to you, on the last page. The negative economic impact of the removal of the smoking exemption [in Omaha] to Cigarros is clearly represented. . . . Obvious is the consistent drop in revenues which began concurrent with the removal of the [smoking] exemption in May 2008. . . . Accordingly, our contribution to jurisdictional tax revenues has also been substantially reduced. As all of you can understand, a small business cannot sustain these types of continual losses and expect to remain in business. If the cigar bar exemption is not passed, Cigarros and businesses like it will fail in short order.

Committee Records on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 45 (February 9, 2009). Senator Lautenbaugh, the Principal Introducer of LB 355, was aware of that need for an exemption, and stated during Floor Debate on the bill that "[w]e're [currently] putting these places [cigar bars] out of business." Floor Debate on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 12 (April 6, 2009)(Statement of Sen. Lautenbaugh). He also stated during Committee hearings on the bill that "we're just trying [with LB 355] to save these other businesses [cigar bars] too." Committee Records on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 72 (February 9, 2009)(Statement of Senator Lautenbaugh). From such comments, other Senators concluded that Sen. Lautenbaugh was trying, through LB 355, "to keep a few businesses still in business." Floor Debate on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 43 (March 23, 2009)(Statement of Sen. Karpisek). That purpose coincides with the Introducer's Statement of Intent for LB 355 which provides:

The purpose of LB 355 is to provide protection for businesses currently operating in the state as "cigar bars." The bill would allow such establishments to operate outside the restrictions of the Nebraska Clean Indoor Air Act, provided they meet the requirements set forth in this bill, and recertify that they are meeting the requirements yearly when renewing their Class C liquor licenses.

Introducer's Statement of Intent for LB 355, 101st Neb. Leg., 1st Sess. (February 9, 2009). Therefore, it appears to us, from its legislative history, that LB 355 seeks to protect the businesses known as cigar bars, to prevent them from going out of business, and to preserve their economic benefits for the Nebraska communities where they are located. Whether LB 355 constitutes special legislation should be measured in light of that legislative purpose.²

Having determined the purpose of the exemption contained in LB 355, we must next ask under the cases cited above if there is a substantial difference of circumstances which suggests the expediency of diverse legislation in relation to that purpose. In the context of this specific case, we must ask if

there is a substantial difference of circumstances between cigar bars and other entities subject to the Clean Air Act which would suggest the expediency of an exemption from that Act for cigar bars so as to keep cigar bars in business. In particular, it appears to us that, in this case, we must compare cigar bars with other bars, restaurants and recreational businesses which have a Class C Liquor License and which might gain some economic advantage from allowing smoking indoors.

The legislative history of LB 355 seems to provide evidence of differences between cigar bars and other bars, restaurants and the like which do support separate treatment for cigar bars. First of all, as noted above, there is testimony that compliance with the Clean Air Act will put cigar bars out of business. In contrast, other bars and restaurants don't seem to be similarly affected. For example, Senator Avery related the following anecdote during Floor Debate:

I have a constituent who owns several bars both here and in Lincoln and he called me to express his concern that this bill [LB 355] would require him to split his bars in two, and somehow create a cigar bar in one part and a noncigar bar in the other. This would be a great expense. He did not like the statewide smoking ban and I heard a lot about that at the time. He was one of the most vociferous opponents of the statewide smoking ban but he adapted to it. His business has flourished since then.

Floor Debate on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 8 (April 6, 2009)(Statement of Sen. Avery)(emphasis added). Senator Avery also indicated that "studies have shown either no effect, or no effect and or slight improvements in restaurant business and bar business with smoking bans. Floor Debate on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 23 (March 24, 2009)(Statement of Sen. Avery).

In addition, cigar bars are in the business of selling smoking itself rather than simply allowing smoking as an incident to the sale of alcohol, food or other recreational activities. As noted by Senator Lautenbaugh:

I would submit to you that cigar bars are different than any other entity that was affected by the smoking ban in that they exist for smoking. I don't believe that restaurants can make that claim. These entities [cigar bars] are for the purpose of smoking; much like smoke shops, but somehow they were not part of the exemption.

Committee Records on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 35 (February 9, 2009)(Statement of Senator Lautenbaugh). And, those comments by Sen. Lautenbaugh raise another demarcation between cigar bars and other entities affected by the statewide smoking ban. That is, individuals who purchase cigars in cigar bars likely may find it advantageous to smoke a certain cigar to determine if they want to purchase others like it. That is not the case with smoking in other bars and restaurants.

Indeed, the need to try a product before purchasing it formed part of the basis for the current exemption in the Clean Air Act for tobacco retail outlets. Floor Debate on LB 395, 100th Neb. Leg. 1st Sess. 4-5 (February 13, 2007)(Statement of Sen. Johnson).

In sum, it appears to us that the purpose of LB 355 is to protect cigar bars and to keep them from going out of business, thereby preventing an adverse economic impact upon the communities where they are located. It also appears to us that cigar bars are substantially different from other bars, restaurants and similar entities because they will be forced out of business without an exemption to the smoking ban, because they are primarily in the business of selling smoking itself and not food, alcohol, etc., and finally, because individuals purchasing their products need to sample those products on occasion prior to purchase. Those various differences suggest that it is expedient to create diverse legislation to exempt cigar bars from the statewide smoking ban in order to carry out the purpose of LB 355.³

We are aware of *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008). In that case, the Nebraska Supreme Court held that certain exemptions to a city ordinance passed by the City of Omaha which prohibited smoking in most public places or places of employment within the city constituted special legislation in contravention of art. III. § 18 of the Nebraska Constitution. However, we believe that the *Hug* case is distinguishable from the present circumstances.

In *Hug*, the court considered the constitutionality of the smoking ban exemptions at issue under the same test as set out above, i.e., the court looked at the purpose of the exemptions and determined if there was a substantial difference of circumstances between the exempted and nonexempted facilities which would suggest the expediency of diverse legislation. However, because of evidentiary issues, the only record which the court had before it to determine the purpose of the exemptions at issue was the record stating the purpose of the non-smoking ordinance itself. In other words, the court had nothing before it which set out the purpose of the exemptions. On that record, the court found that there were no substantial differences of circumstances to suggest the expediency of diverse legislation exempting certain business entities from the smoking ban when the purpose of the ban was to protect the public health and welfare and guarantee the right to breathe smoke-free air. In doing so, the court specifically stated "[w]e do not hold that similar exemptions could not be constitutionally justified – just that, given the record in this instance, the exemptions in this particular case are not." *Hug* at 827, 749 N.W.2d at 891.

As is discussed at length above, there is ample evidence in the legislative history in the present case which establishes the legislative purpose underlying the exemptions set out in LB 355, and that purpose is different that the purposes underlying the Clean Air Act. Therefore, *Hug* does not require a determination that the exemptions in LB 355 constitute improper special legislation.

We also recognize that the concurrence in Hug, authored by Justice Connolly, sets out a somewhat more stringent standard for application of the special legislation prohibition in the context of legislation which bestows economic favors. Hug at 830, 831, 749 N.W.2d at 893. Nevertheless, it seems to us that LB 355 satisfies that more demanding three-part test: 1. there is a valid public purpose supporting the exemptions in LB 355 – to prevent cigar bars from going out of business, 2. as discussed above, there appear to be real and substantial differences between cigar bars and other bars, restaurants and entities subject to the Clean Air Act, and 3. the classifications created by LB 355 seem to form a proper and legitimate class relative to the act's purpose.

2. Permanently Closed Class.

A determination as to whether a particular statute constitutes special legislation also requires consideration of whether that statute creates a permanently closed class. In considering whether a class established by legislation is closed, the courts are not limited to the face of the legislation, but may consider the act's application. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). In such a consideration, courts must consider the actual probability that others will come under the act's operation. *Id.* If the prospect that others may come under the act's operation is merely theoretical, and not probable, the act is special legislation. *Id.* The conditions of entry into the class must not only be possible, but reasonably probable of attainment. *Id.*

There is nothing on the face of LB 355 which would prevent the establishment of new cigar bars or which closes the class of cigar bars created by that bill. We understand that courts may look behind the face of the legislation as noted above. However, we believe the prospect that other cigar bars may be established in Nebraska is not merely theoretical, but reasonably probable of attainment. In fact, the bill's Introducer took that prospect into account, as is illustrated by the following exchange from the Floor Debate:

SENATOR GAY: . . . So what would prevent them from putting in walk-in humidors (sic) and all of a sudden we got more bars popping up. Your 10 is now 100. I mean, I don't know, it's a big state. There's . . . what's to prevent someone from doing that?

SENATOR LAUTENBAUGH: Well, honestly, the short answer is there's nothing that's an absolute prevention, that's the point. This is not supposed to be a closed class because then you get into constitutionality issues.

Floor Debate on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 3-4 (March 24, 2009). The exemption from the Clean Air Act contained in LB 355 was designed to be narrow, and the number of the cigar bars in Nebraska is likely limited by the requirements for establishing such a business.

However, we do not believe that LB 355 creates a permanently closed class.

For all the reasons discussed at length above, it does not appear to us that LB 355 creates an arbitrary and unreasonable method of classification or a permanently closed class. As a result, we cannot say that LB 355 constitutes special legislation in violation of art. III, § 18 of the Nebraska Constitution.

Unconstitutional Vagueness

Apart from issues involving special legislation, Senator Gloor also requested our "opinion regarding whether the definition of 'cigar bar' created within the bill is so vague as to be unconstitutional."

We have discussed the vagueness doctrine in previous opinions, and we will quote from one such opinion at length. In our Op. Atty Gen. No. 07012 (May 29, 2007), we stated:

The void for vagueness doctrine, which involves issues of substantive due process, is based on the due process requirements contained in the Fifth and Fourteenth Amendments to the United States Constitution. *U.S. v. Articles of Drug*, 825 F.2d 1238 (8th Cir. 1987). Similar requirements are contained in art I, § 3 of the Nebraska Constitution. In order to pass constitutional muster with respect to vagueness, a statute must be sufficiently specific so that persons of ordinary intelligence do not have to guess at its meaning, and the statute must contain ascertainable standards by which it may be applied. *Id.* The void for vagueness doctrine applies to both criminal and civil statutes. *Id.* However, greater vagueness is tolerated in civil statutes than in criminal statutes. *Id.* In the context of civil statutes, the United States Supreme Court has indicated that a statute will not be deemed to be impermissibly vague unless it is so "vague and indefinite as to really be no rule or standard at all." *Boutilier v. Immigration Service*, 387 U.S. 118, 123 (1967). The Nebraska Supreme Court has also indicated that a civil statute which is otherwise valid will not be held void for vagueness unless it is so deficient in its terms as to render it impossible to enforce. *Neeman v. Nebraska Natural Resources Comm'n*, 191 Neb. 672, 217 N.W.2d 166 (1974). In *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980), the court said that the established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

Op. Att'y Gen. No. 07012 at 3 (May 29, 2007).

The Final Reading version of LB 355 sets out the following definition of "cigar bar:"

Cigar bar means an establishment operated by a holder of a Class C liquor license which:

- (a) Does not sell food;
- (b) In addition to selling alcohol, annually receives ten percent or more of its gross revenue from the sale of cigars and other tobacco products and tobacco-related products, except from the sale of cigarettes as defined in section 69-2702. A cigar bar shall not discount alcohol if sold in combination with cigars or other tobacco products and tobacco-related products;
- (c) Has a walk-in humidor on the premises; and
- (d) Does not permit the smoking of cigarettes.

Upon review, it appears to us that the definition of "cigar bar" contained in LB 355 is far from being so vague and indefinite as to really be no rule or standard at all. Nor does it forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Instead, we believe that it is sufficiently specific so that persons of ordinary intelligence do not have to guess at its meaning, and that it contains ascertainable standards by which it may be applied. On that basis, we must conclude that that definition of "cigar bar" contained in LB 355 is not unconstitutionally vague.

CONCLUSION

Your opinion requests regarding LB 355 focused on your concerns pertaining to special legislation under art. III, § 18 of the Nebraska Constitution and unconstitutional vagueness. Based upon the lengthy discussion above, we do not believe that LB 355 contravenes either of those constitutional principles.

¹ Outside of the plain language of a statute, a legislative body's purpose in enacting legislation can be determined by examining the legislative history of the enactment. The Nebraska Supreme Court has previously considered such legislative history when determining whether particular enactments are unconstitutional as special legislation. *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008); *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006).

² We understand that the purpose of the Clean Air Act is to protect the public health and welfare by prohibiting smoking in public places and places of employment. However, LB 355 is a separate bill which creates an exemption to the Act, and we believe its propriety as special legislation should be determined by its purpose, and not the more general purpose of the Clean Air Act.

³ It is interesting to note that the narrowness of the exemption created by LB 355 may actually comport with the original and broader purpose of the

Clean Air Act. As Senator Wightman stated during Floor Debate on the bill:

. . . if we limited it [the exemption in LB 355] that much [to five or six cigar bars] then it appears to me that anybody who's going to work in this cigar bar probably has an option to work somewhere else. There are hundreds of other bars, if not thousands of other bars across the state of Nebraska. And if they want to work in any bar that does not qualify as a cigar bar they're free to work there. So I think that it does narrow the exception such that we have still have kept intact the original purpose of the bill, which is to create smoke-free workplaces.

Floor Debate on LB 355, Rough Draft, 101st Neb. Leg. 1st Sess. 26-27 (March 23, 2009)(Statement of Sen. Wightman).

Sincerely,
 JON BRUNING
 Attorney General
 (Signed) Dale A. Comer
 Assistant Attorney General

cc. Patrick J. O'Donnell
 Clerk of the Legislature
 05-108-20

GENERAL FILE

LEGISLATIVE BILL 294. Title read. Considered.

Advanced to Enrollment and Review Initial with 39 ayes, 0 nays, 6 present and not voting, and 4 excused and not voting.

LEGISLATIVE BILL 347. Title read. Considered.

Committee AM985, found on page 965, was adopted with 37 ayes, 0 nays, 9 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 39 ayes, 0 nays, 7 present and not voting, and 3 excused and not voting.

LEGISLATIVE BILL 571. Title read. Considered.

Committee AM983, found on page 994, was adopted with 34 ayes, 0 nays, 12 present and not voting, and 3 excused and not voting.

Advanced to Enrollment and Review Initial with 35 ayes, 0 nays, 11 present and not voting, and 3 excused and not voting.

BILL ON FIRST READING

The following bill was read for the first time by title:

LEGISLATIVE BILL 237A. Introduced by Lathrop, 12.

A BILL FOR AN ACT relating to appropriations; to appropriate funds to aid in carrying out the provisions of Legislative Bill 237, One Hundred First Legislature, First Session, 2009.

AMENDMENT - Print in Journal

Senator Ashford filed the following amendment to LB598:
AM954

- 1 1. Insert the following new section:
- 2 Sec. 15. Section 81-1839, Reissue Revised Statutes of
- 3 Nebraska, is amended to read:
- 4 81-1839 Notwithstanding the provisions of sections
- 5 81-1836 to 81-1838, the committee shall make payments from the ~~fund~~
- 6 Victim's Compensation Fund to any person accused of crime upon the
- 7 order of a court of competent jurisdiction after a showing by such
- 8 person that such money shall be used for the exclusive purpose
- 9 of retaining legal representation at any stage of the proceedings
- 10 against such person, including the appeals process.
- 11 2. On page 2, strike beginning with "under" in line 13
- 12 through "139" in line 14 and insert "to the extent allowed under
- 13 applicable sections"; in line 17 strike the second "of" and insert
- 14 "after"; and in line 19 strike "of" and insert "after".
- 15 3. On page 8, line 14, strike "Subsection" and insert
- 16 "Subdivision".
- 17 4. On page 11, line 23, after "81-1835," insert
- 18 "81-1839,".
- 19 5. Renumber the remaining sections accordingly.

VISITORS

Visitors to the Chamber were Bob and Mary Escamilla from Scottsbluff; 42 fourth-grade students from Cedar Hollow School, Grand Island; Hank and Diane Thieman from Petersburg; Josh Midgett from Lincoln; and 19 fourth-grade students from Southwest Public School, Indianola.

The Doctor of the Day was Dr. Preston Renshaw from O'Neill.

ADJOURNMENT

At 4:27 p.m., on a motion by Senator Lathrop, the Legislature adjourned until 9:00 a.m., Friday, April 17, 2009.

Patrick J. O'Donnell
Clerk of the Legislature