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DATE: April 27, 1992

SUBJECT: LB 1063 - Constitutionality of Legislation Containing Alternative Provisions, One of Which Will Operate Depending Upon the Approval or Rejection of a Constitutional Amendment.

REQUESTED BY: Senator Scott Moore
Nebraska State Legislature

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

You have requested our opinion regarding the constitutionality of LB 1063, enacted this year by the Nebraska Legislature and signed by Governor Nelson. LB 1063 contains various provisions pertaining to the subject of revenue and taxation, and includes several provisions relating to property taxation. In particular, the bill contains sections providing for two alternative means for the taxation of tangible personal property (other than motor vehicles), the operation of which will depend upon the adoption of "a constitutional amendment amending Article VIII of the Constitution of Nebraska" in 1992. Generally, the bill provides that, if a constitutional amendment to Article VIII of the Constitution is not adopted, tangible personal property (other than specified exempt property) shall be taxed at its actual value. LB 1063, §§ 52 and 53. Alternatively, the bill provides that, if "a constitutional amendment amending Article VIII of the Constitution of Nebraska is adopted in 1992," tangible personal property which constitutes "depreciable tangible personal property" will be taxed at its "net book value," as defined in the act, and other tangible personal property will be exempted from taxation. LB 1063, §§ 47-48, 52-53.

In your request, you note that LR 219CA, the proposed constitutional amendment to be placed on the May primary ballot as Amendment 1, includes a provision expressly declaring that, "Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary, amendments to Article VIII of this Constitution passed in 1992 shall be effective from and after January 1, 1992, . . ." LR 219CA, § CVIII-13. This portion of the proposed amendment further provides that "existing revenue laws and legislative acts passed in the regular legislative session of 1992, not inconsistent with this Constitution as amended, shall be considered ratified and confirmed by such amendment without the need for legislative reenactment of such laws." Id.

Your specific question, in view of the foregoing, is whether LR 219CA is "adequate to make the property tax provisions of LB 1063 constitutional and operative, or will the Legislature need to reconvene if the amendment is adopted and reenact the law?"

At the outset, we note that, as a general rule, we do not issue opinions to members of the Legislature on questions addressing the constitutionality of existing legislation. See Attorney General Opinion No. 157, December 20, 1985. In this instance, however, your question pertains to the possible need for the Legislature to reenact particular legislation in the event the voters approve the constitutional amendment proposed under LR 219CA. Thus, under these circumstances, your request does pertain to a matter relating to a legislative purpose, and, as such, we will respond to your request for our opinion.

In light of the scenario presented, it appears that two principal issues are raised by the Legislature's enactment of LB 1063, and the relationship which exists between the bill and the constitutional amendment proposed under LR 219CA. These issues are: (1) Whether LB 1063, by including alternative provisions for the taxation of personal property, one of which will operate depending upon the approval or rejection of a constitutional amendment, establishes an unconstitutional delegation of legislative power to the electorate; and (2) Whether the language of LR 219CA, providing that, if the amendment is adopted, legislation enacted "in the regular legislative session of 1992. . .shall be considered ratified and confirmed. . .without the need for legislative reenactment of such laws," is sufficient to remedy any constitutional deficiency associated with LB 1063.

I. UNLAWFUL DELEGATION OF LEGISLATIVE POWER TO THE ELECTORATE.

> It is the general rule that where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it shall become operative only on the happening of some specified contingency, contingencies, or succession of contingencies.

16 C.J.S. Constitutional Law § 166 (1984).

While "[t]he Legislature cannot delegate its powers to make a law,. . .it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend." Lennox v. Housing Authority of the City of Omaha, 137 Neb. 582, 590, 290 N.W. 451, 457 (1940). Accord State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981), rev'd on other grounds 458 U.S. 941 (1982); State v. Padley, 195 Neb. 358, 237 N.W.2d 883 (1976). See also Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956) (Legislature may postpone the operative date of legislation beyond three months after adjournment of legislative session to a later time designated by a specific date or the happening of an event that is certain to occur). In the early case of State ex rel. Pearman v. Liedtke, 9 Neb. 490, 497, 4 N.W. 75, 80 (1880), the Nebraska Supreme Court stated that "[i]t was competent for the Legislature to pass an act depending for its execution, either in whole or in part, upon the happening of. . .a contingency, ..." The court continued, however, by stating that "such an act is not to be confounded with those acts of legislation which have generally been held void by reason of their being made to depend for their vitality upon their ratification by the voters at a popular election." Id.

While it is generally proper for a legislative body to enact legislation which is to become operative upon the occurrence of a future event, an exception to this general rule is recognized where the effectiveness of legislation is made to depend upon the approval of the voters at a general election. Under the majority view, the Legislature may not, in the absence of constitutional authorization, delegate its legislative power by submitting to the voters of the entire state the question of whether an act shall become a law. E.g., In re Opinions of the Justices, 232 Ala. 56, 166 So. 706 (1936); People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N.E. 108 (1931); Barto v. Himrod, 8 N.Y. 483 (1853). See

generally Annot., 76 A.L.R. 1053, 1054-58 (1932); 16 C.J.S. Constitutional Law §§ 137, 166-167 (1984). A minority of jurisdictions, however, hold that the Legislature may leave the determination of whether or not a statute is to take effect to a vote of the people of the state. E.g., State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 52 N.W.2d 903 (1952); State v. Parker, 26 Vt. 357 (1854). See generally Annot., 76 A.L.R. 1053, supra, at 1058-1062. [1]

In State ex rel. Pearman v. Liedtke, supra, the Nebraska Supreme Court impliedly indicated its acceptance of the majority view by recognizing the proposition that an act of legislation, the vitality of which is dependent upon "ratification by the voters at a popular election," is invalid. 9 Neb. at 497, 4 N.W. at 80. Indeed, we specifically noted the import of this language in a prior opinion in which we concluded, in part, that proposed legislation which was to become operative upon the adoption of a constitutional amendment would likely be held to represent "an unlawful attempt to delegate legislative power from the Legislature to the electorate, contrary to Article III, Section 1 of the Nebraska Constitution." Report of Attorney General 1965-66, Opinion No. 61, p. 89. In reaching this conclusion, we stated that, "[e]ven though the electorate would not be voting directly upon the question of enacting [the] statutes, in effect the electorate (rather than the Legislature) would be exercising its judgment as to the expediency of the law just as certainly as though they were voting upon the statutes directly." Id. at 90.[2]

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[1] Generally, while it is held that, in the absence of constitutional authorization, the Legislature may not submit to the voters of the state the question of the adoption of a law, it may make the local application of a complete general law subject to local approval, or may make the operation of a special local law dependent upon approval of the voters of the locality in which the statute is to operate. 16 C.J.S. Constitutional Law § 167 (1984). In the instant case, of course, no such issue of local application of a general law, subject to voter approval, is raised.

[2] We also note that, on prior occasions, we have determined that the Legislature may not invoke the constitutional provisions relating to the powers of initiative and referendum to place questions relative to the adoption or referral of legislation before the electorate, as the Constitution limits the invocation of these powers to "the people" by a petition process. Attorney General Opinion No. 92056, April 6, 1992; Attorney General Opinion

As noted previously, LB 1063 contains provisions establishing two alternative means for the taxation of tangible personal property (other than motor vehicles), the operation of which will depend upon the adoption of "a constitutional amendment amending Article VIII of the Constitution of Nebraska" in 1992. Generally, if a constitutional amendment is not adopted, the bill provides that all tangible personal property (other than specified exempt property) shall be taxed at its actual value. LB 1063, §§ 52 and 53. Alternatively, if a constitutional amendment is adopted, tangible personal property which constitutes "depreciable tangible personal property" will be taxed at its "net book value," as defined in the bill, and other tangible personal property will be exempted from taxation. LB 1063, §§ 47-48, 52-53.

Unlike those situations where the operation and effect of legislation is made to be contingent upon the occurrence of a future event (including a vote of the people), LB 1063 does not provide that the bill itself will be operative and effective only upon the occurrence of such a contingency. The particular sections of the bill noted above are operative as of January 1, 1992 (LB 1063, § 210), and the bill, having been passed with the emergency clause and signed by the Governor, is presently in effect. LB 1063, § 215. Thus, while the bill itself is plainly in effect, and its provisions are either presently operative (or will become operative) as specified in section 210 of the bill, the manner in which various provisions relating to property taxation will actually operate is contingent upon whether an amendment to Article VIII of the Nebraska Constitution is adopted in 1992. In essence, as outlined above, the bill proposes two alternative means by which tangible personal property may be taxed, with the choice of which alternative is to be given effect made to depend upon whether the voters approve or reject an amendment to Article VIII of the Nebraska Constitution. Thus, while the bill by its terms appears to be complete and not dependent upon electoral approval in order for its provisions to be operative and effective, a question nevertheless exists as to whether the establishment of such alternative provisions creates an unconstitutional delegation of legislative power to the people, as the choice of which alternative

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No. 21, February 13, 1979.

is to be applied is dependent upon the results of a vote of the electorate to amend the Nebraska Constitution.[3]

In assessing whether LB 1063 potentially establishes an unconstitutional delegation of legislative power to the electorate, however, it is necessary to consider as well the provisions of LR 219CA, the proposed constitutional amendment to Article VIII, Sections 1, 2 and 5 of the Nebraska Constitution. In addition to amending these existing sections of Article VIII, LR 219CA proposes to add a new Section 13 to this article. This section would provide as follows:

> Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary, amendments to Article VIII of this Constitution passed in 1992 shall be effective from and after January 1, 1992, and existing revenue laws and legislative acts passed in the regular legislative session of 1992, not inconsistent with this Constitution as amended, shall be considered ratified and confirmed by such amendments without the need for legislative reenactment of such laws. (Emphasis added).

Pursuant to this broad language, providing that, "[n]otwithstanding. . .any . . .provision of this Constitution to the contrary," amendments to Article VIII "passed in 1992 shall be effective from and after January 1, 1992," and providing that existing revenue laws and legislation passed in the regular 1992 legislative session "not inconsistent with this Constitution as amended" are "ratified and confirmed. . .without the need for legislative reenactment," it could be argued that, by virtue of these terms, adoption of the amendment would foreclose a constitutional attack on the validity of LB 1063 based on any provision of the Nebraska Constitution. This could include a challenge based on alleged improper delegation of legislative power to the electorate, as such would be based on Article III, Section

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[3] We recognize that the United States Supreme Court has held that a referendum does not involve a delegation of legislative power. City of Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976). This holding is of no consequence, however, as the instant situation does not involve any effort by the Legislature to refer legislation to a vote of the electorate, even if the Legislature possessed the power to do so.

1, of the Nebraska Constitution. In our view, however, it is not clear that the above-quoted language would, if such a challenge were made, be construed to eliminate any constitutional objection on this basis.

II. RATIFICATION AND CONFIRMATION OF UNCONSTITUTIONAL LEGISLATION BY SUBSEQUENT CONSTITUTIONAL AMENDMENT.

An additional question raised by your request is whether, if LB 1063 was unconstitutional when enacted, the bill may be validated by the adoption of LR 219CA.

Initially, we note that your request includes the statement that LB 1063 "contains provisions related to the taxation of personal property which would clearly be unconstitutional if they were made operative under our present constitution." As stated previously, however, the personal property tax provisions to which you refer (i.e., those providing for the taxation of only "depreciable tangible personal property" at its "net book value") become operative under the bill only if an amendment to Article VIII of the Constitution is adopted in 1992 which would allow the taxation of personal property in this manner. Thus, it is not accurate to state that the bill's provisions relating to the taxation of tangible personal property are unconstitutional because they mandate the taxation of personal property in a manner contrary to the present Constitution. Nevertheless, the question remains as to whether, if the property tax provisions of LB 1063 are unconstitutional for the reason articulated in part I., supra, of this opinion, the bill may be successfully defended against a constitutional challenge if LR 219CA is adopted, by virtue of the express ratification clause contained in the constitutional amendment.

It is well-established that an unconstitutional statute is wholly void from the time of its enactment and is not validated by a subsequent constitutional change which would allow enactment of such a statute. E.g., Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); Matthews v. Quinton, 367 P.2d 932, (Alaska 1961); Banaz v. Smith, 133 Cal. 102, 65 P. 309 (1901). See generally Annot., 171 A.L.R. 1070, 1070-1072 (1947); 16 C.J.S. Constitutional Law § 44 (1984); 16 Am.Jur.2d Constitutional Law § 259 (1979). The Nebraska Supreme Court has followed this general principle, holding that "[a]n act of the Legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act." Whetstone v. Slonaker, 110 Neb. 343, 344,

193 N.W. 749, 749 (1923) (syllabus of the court). Accord State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974).

An exception to this general rule is recognized, however, where a constitutional amendment expressly or impliedly ratifies or confirms an unconstitutional statute. Under these circumstances, such ratification renders valid antecedent unconstitutional legislation, without reenactment by the legislature, unless such attempted validation would impair the obligation of contracts or divest vested rights. E.g., Bonds v. State Dept. of Revenue, 254 Ala. 553, 49 So.2d 280 (1950); Peck v. City of New Orleans, 199 La. 76, 5 So.2d 508 (1941); Peck v. Tugwell, 199 La. 125, 5 So.2d 524 (1941). See generally Annot., 171 A.L.R. 1070, 1072-1074 (1947); 16 C.J.S. Constitutional Law § 44 (1984); 16 Am.Jur.2d Constitutional Law § 259 (1979).

In a previous opinion (discussed in Part I., supra.), we concluded that legislation designed to become operative upon the adoption of a subsequent constitutional amendment would "rest upon infirm constitutional footing, on the ground that a statute which is contrary to the Constitution when enacted cannot be revitalized by a subsequent constitutional amendment, ..." Report of Attorney General 1965-66, Opinion No. 61, p. 89, 91. Discussing the principle articulated by the Nebraska Supreme Court in Whetstone v. Slonaker, supra, that an act contrary to the Constitution when enacted is void from its enactment and is not validated by a later amendment to the Constitution authorizing its passage, we stated the following:

> True, apparently the constitutional amendment involved in the Whetstone case contained no express provision purporting to ratify or confirm the statute in question. However, the Nebraska court has been so emphatic in its pronouncements to the effect that a statute which is contrary to the form of the Constitution when enacted is, for all purposes absolutely null and void and is as though the statute had never been passed in the first instance, that we are inclined to believe that the court would adopt the view that a statute which is in its terms contrary to the Constitution at the time of passage can never be validated by any constitutional amendment, even though such amendment might contain a ratification clause.

Report of Attorney General 1965-66, Opinion No. 61, supra, at 91.

In spite of the conclusion reached in this prior opinion, we cannot definitively conclude that our state supreme court would not give effect to the express ratification clause contained in LR 219CA in the event of a challenge to the constitutionality of

LB 1063. A substantial body of authority exists which recognizes the effectiveness of express ratification clauses validating prior unconstitutional legislation as part of subsequent constitutional amendments. Indeed, as a matter of policy, it would appear that the better view would be to recognize and allow the express ratification and confirmation provision contained in LR 219CA, in order to effectuate the intent of the people should they vote to adopt this amendment to the Constitution, to retroactively give effect to legislation enacted during the 1992 regular legislative session, including LB 1063.[4]

The difficulty in this case, however, arises by virtue of the fact that the potential constitutional defect noted in Part I. of this opinion involves whether the provisions of LB 1063 relating to property taxation may be unconstitutional as delegating legislative power to the electorate, in view of the alternative provisions established under the bill, the operation of which depend upon whether the people vote to amend Article VIII of the Constitution. If, for the reasons previously stated, LB 1063 were found to contain an unconstitutional delegation of legislative authority in this manner, it would be difficult to contend that the ratification provision of LR 219CA should be interpreted to validate such a defect, as the basis of unconstitutionality would be the very act of conditioning the manner of operation of these portions of the bill upon a vote of the electorate. We have not, however, concluded that the bill is necessarily unconstitutional as providing for an impermissible delegation of legislative power, in view of the language of LR 219CA providing that, "[n]otwithstanding. . .any. . .provision of this Constitution to the contrary," the amendments to Article VIII are deemed effective as of January 1, 1992. To the extent the ratification clause could be construed to validate any additional constitutional objections to LB 1063, we believe a reasonable argument could be advanced to sustain the effectiveness of this aspect of the constitutional amendment.

III. CONCLUSION

In light of the foregoing discussion, we conclude that, for the reasons outlined above, there are potential constitutional infirmities associated with the provisions of LB 1063. Specifically, a question exists as to whether the "alternative" provisions relating to property taxation, which seek to condition

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[4]The Nebraska Supreme Court has recognized that, while a constitutional amendment operates prospectively only, it may be given retrospective effect where the language employed expresses a clear intent for the amendment to operate retroactively. Luikert v. Higgins, 130 Neb. 395, 264 N.W. 903 (1936).

the manner in which tangible personal property is to be taxed on whether a constitutional amendment is adopted, may be held to establish an unconstitutional delegation of legislative authority to the electorate. In addition, while LR 219CA contains an express ratification clause purporting to validate legislation enacted during the 1992 regular legislative session, there is no guarantee that our state supreme court would uphold the effectiveness of such an attempt to revitalize LB 1063, should it be determined that the statute was contrary to the Constitution when enacted.

For these reasons it is our strong recommendation that if LR 219CA is approved by the voters, that the Legislature reconvene for the purpose of re-enacting LB 1063 or its equivalent. Any other course of action would be nothing more than a legal gamble, which if lost, could have very serious consequences for the people of Nebraska.

In making this recommendation, we are not saying that the provisions of LB 1063 are plainly unconstitutional. In the event the voters approve Amendment 1, we would certainly defend the bill against any challenge to its constitutionality. However, the prudent course of action would be for the Legislature to be convened in special session, should the electorate adopt Amendment 1, to permit the reenactment of LB 1063 or its equivalent. We strongly recommend that such action be taken.

Very truly yours,

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Clerk of the Legislature

APPROVED BY:

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