

Case No. S-14-000158

NEBRASKA SUPREME COURT

**Randy Thompson
Susan Straka, f/k/a Susan Luebbe
Susan Dunavan**

Plaintiffs-Appellees,

v

**Dave Heineman, Governor of Nebraska
Patrick W. Rice, Acting Director, Department of Environmental Quality
Don Stenberg, State Treasurer of Nebraska**

Defendants-Appellants.

Proof

**Appeal from District Court, Lancaster County, Nebraska
Hon. Stephanie F. Stacy
Case No. CI 12-260**

Plaintiffs'-Appellees' Reply to Answer Brief on Cross Appeal

David A Domina, #11043
Brian E Jorde, #23613
Megan N Mikolajczyk #24821
DominaLaw Group pc llo
2425 S. 144th Street
Omaha, NE 68144
402-493-4100
ddomina@dominalaw.com
Appellees' Lawyers

FILED
JUL 17 2014
NEBRASKA SUPREME COURT
COURT OF APPEALS



000045367NSC

TABLE OF CONTENTS

Jurisdictional Statement. Statement of the Case. Scope of Review.....1
Assignments of Error On Cross-Appeal (Summarized).....1
Argument.....1
 #1. LB 1161 Does Not Provide for Judicial Review & Violates Due Process. . 1
 #2. The Governor Cannot Confer Eminent Domain Authority. 2
 #3. LB 1161 is Devoid of Standards..... 3
 #4. The State’s Credit is Unlawfully Pledged by LB 1161..... 4
Conclusion5

TABLE OF AUTHORITIES

Cases

<i>Appeal of Levos</i> , 214 Neb 507 (1983).....	1
<i>Banks v Heineman</i> , 286 Neb 390 (2013)	1
<i>Callan v Balka</i> , 248 Neb 469 (1995)	4
<i>Conroy v. Keith Co Bd of Equal.</i> , 288 Neb 196 (2014)	1
<i>Haman v Marsh</i> , 237 Neb 699 (1991)	4
<i>In Re Appraisement of Omaha Gas Plant</i> , 102 Neb 782 (1918).....	2
<i>Japp v Pappio-Missouri Riv NRD</i> , 273 Neb 779 (2007)	4, 5
<i>JK & J, Inc. v Nebraska Liq. Control Commn.</i> , 194 Neb 413 (1975).....	3
<i>Koepp v Jensen</i> , 230 Neb 489 (1988)	1
<i>Mathews v Eldridge</i> , 24 US 319 (1976).....	2
<i>Penry v Neth</i> , 20 NebApp 276 (2012).....	2
<i>Scott v Richardson County</i> , 280 Neb 694 (2010).....	2
<i>State ex rel Beck v City of York</i> , 164 Neb 223 (1957).....	5
<i>State ex rel Douglas v Nebraska Mortgage Fin. Fund</i> , 204 Neb 445 (1979).....	3
<i>State ex rel Stenberg v Moore</i> , 249 Neb 589 (1966).....	2
<i>Stoneman v United Nebraska Bank</i> , 254 Neb 477 (1998).	3
<i>United Community Services v The Omaha Nat. Bank</i> , 162 Neb. 786 (1956).	4

Statutes

<i>Neb Rev Stat</i> § 57-1503	3
-------------------------------------	---

Jurisdictional Statement. Statement of the Case. Scope of Review

1. The Scope of Review and Case Statement are not contested by Appellees. (Heineman). Whether a statute is constitutional is a question of law. *Banks v Heineman*, 286 Neb 390, 395 (2013). A statute is presumed valid, and all reasonable doubt is resolved in favor of its constitutionality. *Id.* If clear, the Supreme Court gives a constitutional provision the meaning that laypersons would obviously understand it to convey. *Conroy v Keith Co Bd of Equal.*, 288 Neb 196, 198 (2014). Jurisdictional questions not turning on a factual dispute present questions of law. *Id.*

Assignments of Error On Cross-Appeal (Summarized)

Error 1: No Judicial Review and Due Process Violation

Error 2: Improperly Permits Governor to Grant Eminent Domain Power

Error 3: Lacks Legal Standards to Test Applications

Error 4: Unlawful Pledge of State Credit

Argument

Error #1. LB 1161 Does Not Provide for Judicial Review & Violates Due Process.

1. Central to assigned Error 1 is the utter failure of LB 1161 to provide for judicial review of decisions made under its auspices. Heineman's Reply Brief (Br8) takes no direct issue with this proposition. Heineman concedes that judicial review is not provided for in LB 1161, but claims this is of no importance. Heineman suggests lack of judicial review "does not, in and of itself, constitute a violation" of due process rights. But, "appellate examination of procedural due process...is required...." *Appeal of Levos*, 214 Neb 507, 514 (1983).

2. Heineman fails to deal with the persistent appellate expressions that judicial review is the foundation for due process. *Koeppe v Jensen*, 230 Neb 489, 493 (1988). See

especially, *Penry v Neth*, 20 Neb App 276, 287 (2012), citing and quoting *Mathews v Eldridge*, 24 US 319 (1976). Appellate review of agency determinations, or those made by the Governor as an agency's surrogate, is an indispensable part of due process. Without it, there is no due process. This is why the district court, in an Administrative Procedures Act appeal, must make a decision *de novo*. *Scott v Richardson County*, 280 Neb 694 (2010). Reduced to its essence, Heineman's argument on this assigned error amounts to a concession that the error exists.

Error #2. The Governor Cannot Confer Eminent Domain Authority.

3. Heineman's response to this assigned error is a single paragraph (Br9). That paragraph cites only cases identified in Thompson's brief, and includes no analysis. The assertion is that under appellees' "proposed legal theory, the county judge overseeing condemnations proceedings would have 'legislative decision making powers'" This is not accurate and demonstrates Heineman's lack of understanding of the law on this issue.

4. A county judge acts administratively at condemnation proceedings. She swears in appraisers who determine the compensation to be paid by the condemning authority. The judge's function is to appoint appraisers. Legislative decision making occurs before this stage. Lawmaking decisions are made when the condemning authority is empowered to condemn.

5. Heineman's brief's response to this second assigned error fails to join issue with the assigned error's logic, legal authority, or principled reasoning. Heineman essentially concedes this assigned error. The Legislature has plenary authority over eminent domain and is restricted in its ability to delegate that authority. But, it cannot delegate the authority to delegate eminent domain. *In Re Appraisalment of Omaha Gas Plant*, 102 Neb 782 (1918); *State ex rel Stenberg v Moore*, 249 Neb 589, 595 (1966). LB 1161 does not delegate authority over eminent domain directly; it unlawfully delegates *the authority to delegate eminent domain by allowing*

the Governor to perform the Legislature's duties. This constitutional infirmity is not addressed by Heineman's responsive brief.

Error #3. LB 1161 is Devoid of Standards.

6. Unlike assigned errors 1 & 2, Heineman does respond on the merits to Assigned Error 3. He asserts LB 1161 "guides the NDEQ in the development of a thorough and detailed analysis to be conducted for any pipeline..." citing *Neb Rev Stat* § 57-1503(1)(a)(i). (Br11.) However, Heineman concedes that the Governor's review is limited to approval or disapproval of routes reviewed in a supplemental environmental impact statement. The Governor is not required to apply any standard during his review. In fact, he/she is not required to read, or consider, or even receive, the NDEQ's analysis. While there is some guidance for the NDEQ's work, it is advisory. The statute provides no direction for the decision maker, *i.e.*, the Governor.

7. This Court's decision in *State ex rel. Douglas v Nebraska Mortgage Fin. Fund*, 204 Neb 445, 465 (1979) establishes the governing rule. When the legislature confers an authority it must supply standards for the delegated authority that are sufficient for the delegee to do its work in accord with the law. "Such standards ... must be reasonably adequate, sufficient, and definite for the guidance of the agency and the exercise of the power conferred ... and must also be sufficient to enable those affected to know their rights and obligations." *Id.*

8. Under LB 1161, the Governor can permit a private organization to exercise eminent domain; the Governor is authorized to grant route approval, and permission to operate as a common carrier. This is a quasi-judicial function. *JK & J, Inc. v Nebraska Liq. Control Commn.*, 194 Neb 413 (1975); *Stoneman v United Nebraska Bank*, 254 Neb 477, 484 (1998).

9. The Governor's actions under LB 1161 are quasi-judicial. They must be governed by standards, and must be subject to appellate review. Both standards and appellate

review are lacking from LB 1161. Thompson's cross appeal's Assigned Errors 1 and 3 have merit for this reason, and LB 1161 suffers fatal constitutional infirmities as a result.

Error #4. The State's Credit is Unlawfully Pledged by LB 1161.

10. Heineman's one-paragraph response to the 4th assigned error (Br11) fails to deal with the merits of the pledge in LB 1161 of the state's credit. Heineman cites only one case, *Haman v Marsh*, 237 Neb 699 (1991). Decided in 1991, *Haman* does not constitute authority adverse to Thompson. Thompson cited *Haman* and noted that it is one of a host of cases inconsistent *Japp v Papio-Missouri Riv NRD*, 273 Neb 779 (2007) dicta.

[T]he purpose of article XIII, § 3, of Nebraska's Constitution is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise.

United Community Services v The Omaha Nat. Bank, 162 Neb. 786... (1956).

Haman v Marsh, 237 Neb 699, 718 (1991). LB 1161 does exactly what *Haman* says Art VIII, § 3 is designed to prevent. In other words, *Haman* supports Thompson, not Heineman.

11. To prevail on this assigned error Thompson:

must prove three elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation. We also stated that the purpose of [A]rticle XIII, § 3, is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise...

Callan v Balka, 248 Neb 469, 476 (1995). All elements are established.

12. Thompson suggests, respectfully, that Heineman's failure to join issue is tantamount to a concession of the 4th assigned error. LB 1161 requires the state to be responsible for, initially, and then to advance payment for, up to \$2 million to finance efforts solely for a private purpose and eventually to be repaid by the private pipeline applicant.

13. The repayment provision in LB 1161 provides a financial advance of credit, then funds, for the benefit of a private party. This is a classic pledge of credit, and then a classic extension of state funds to pay a private debt. This Court has condemned unlawful extensions of credit and agreements by the state to obtain property for a private project financed by issuing revenue bonds in its name with the hope they will be repaid. *State ex rel. Beck v City of York*, 164 Neb 223 (1957).

14. *Neb Const* Art VIII § 3's constitutional prohibition against lending credit reaches circumstances where the state might ultimately be required to pay the entity's obligations, regardless of the form. *Japp v Pappio-Missouri*, 273 Neb 779, 788 (2007). Under LB 1161, the state pledges its state's credit with the statutory commitment made to advance payments for private debts. This commitment, in advance of cash payment, is a classic promise, commitment or pledge to pay a future bill for a private party. After this occurs, LB 1161 commands use of the state's capital to fulfill the pledge. This involves payments made for the exclusive benefit of a private party. Later, the state hopes to be repaid. Each of these steps within LB 1161 compromises the public treasury... by committing it in advance, advancing from its coffers, and investing effort and energy to get repayment back later. . This pledge of credit and funds is unconstitutional and void. So is the statute. LB 1161 has no severability clause.

Conclusion

15. Heineman's response to Thompson's cross appeal fails to join issue with three of Thompson's four assigned errors. It engages one assignment but only modestly. Each of those assigned errors has merit. Each justifies the conclusion that LB 1161 is unconstitutional.

16. If this Court determines (and it should not do so) that the trial court's rationale for declaring LB 1161 was wrong, then this Court is urged to decide separately that the statute is

constitutionally infirm for each, and all, the reasons set forth in Thompson's cross appeal. An award of costs to Thompson is also requested.

Randy Thompson, Susan Straka, & Susan
Dunavan, Appellees

By: 

David A Domina # 11043
Brian E Jorde # 23613
Megan N Mikolajczyk #24821
DOMINALAW Group pc llc
2425 S 144th St,
Omaha NE 68144-3267
402-493-4100 ddomina@dominalaw.com

Appellees' Lawyers

Nebraska Supreme Court

Randy Thompson
Susan Straka, fna Susan Luebbe
Susan Dunavan,

Case No. S-14-000158

Plaintiffs-Appellees,

v.

Affidavit of Service

Dave Heineman, Governor Nebraska,
Patrick W. Rice, Acting Director,
Department of Environmental Quality, and
Don Stenberg, State Treasurer of Nebraska,

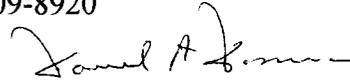
Defendants-Appellants.

Nebraska)
)ss.
Douglas County)

On July 16, 2014, David A. Domina served the original and one (1) copy of Appellees' Reply to Answer Brief on Cross-Appeal by First Class United States Mail, postage prepaid, on the Clerk of the Supreme Court.

On July 16, 2014, David A. Domina served a copy of Appellees' Reply to Answer Brief on Cross-Appeal and this Affidavit of Service, by First Class United States Mail, postage prepaid, to:

Katherine J. Spohn, Deputy Attorney General
Ryan S. Post, Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920



David A. Domina, #11043

Subscribed and acknowledged before me this 16th day of July 2014 by David A. Domina.


Notary Public