

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

NIOBRARA RIVER RANCH, L.L.C.,
Plaintiff(s),

vs.

NIOBRARA COUNCIL, an
intergovernmental agency,
Defendant(s).

Cases Nos. CI02-3 & CI02-4

JUDGMENT

DATE OF HEARING: June 24, 2002.

DATE OF RENDITION: August 22, 2002.

DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).

TYPE OF HEARING: In chambers at District Courtroom, Holt County Court-house, O'Neill, Nebraska.

APPEARANCES:

For plaintiff: Victor E. Covalt III, of Ballew, Schneider & Covalt, without plaintiff.

For defendant: Warren R. Arganbright, of Arganbright Law Office.

SUBJECT OF ORDER: CI02-3: petition for review under Administrative Procedure Act; CI02-4: order to show cause why petition in error should not be dismissed, and petition in error.

PROCEEDINGS: See journal entries made in each case contemporaneously with hearing.

FINDINGS: The court finds and concludes that:

1. The Attorney General opined that § 72-2011(2) applies to liquor license applications for premises located in the Niobrara scenic river corridor. The Nebraska Liquor Control Commission (the commission) had already granted plaintiff two liquor licenses concerning an establishment within that land area. The commission entered an

order declaring the licenses “void sixty (60) days from the date of this order unless approved by the Niobrara Council and the Governor.” Exhibit 1C at 245.

2. The Niobrara Council (the council) proceeded to hold a public hearing at which plaintiff’s counsel appeared. At the hearing’s conclusion, the council voted to determine that the licenses were not consistent with the purpose of the scenic river designation. The plaintiff filed Case No. CI02-3 as a petition for review of that action under the Administrative Procedure Act (APA). The plaintiff also filed Case No. CI02-4 challenge the decision by petition in error.

3. Meanwhile, the plaintiff appealed the commission’s order to the district court for Lancaster County, Nebraska, which reversed the commission’s order. On subsequent appeal of that decision to the Nebraska Court of Appeals, the Court of Appeals dismissed the appeal for lack of jurisdiction. The summary order of dismissal shows that the appeals court determined that the commission order did not perform “in praesenti” and therefore did not constitute a final, appealable order.

4. This court concludes that the council was not, at the time of the purported action, a state “agency” within the meaning of the APA. The definition of “agency” requires authorization by law to make rules and regulations. NEB. REV. STAT. § 84-901(1) (Reissue 1999). The statutes creating and governing the council failed to provide such authorization. NEB. REV. STAT. § 72-2005 *et seq.* (Cum. Supp. 2000 & Supp. 2001).

5. After the council’s hearing on the present issue, the Legislature amended § 72-2008, adding: “The council may promulgate its own rules and internal policies to carry out the purposes of the Niobrara Scenic River Act.” 2002 Neb. Laws, L.B. 1003, § 44. This amendment demonstrates the Legislature’s recognition that the applicable statutes did not previously authorize council rulemaking. This court need not consider whether the council now constitutes a state agency, as it clearly did not at the time of the council’s decision and the commencement of Case No. CI02-3.

6. Because the council was not a state agency, the APA did not apply and this court lacks jurisdiction to review the council's action under the APA. The petition for review in Case No. CI02-3 must be dismissed for lack of jurisdiction.

7. Obviously, the court's order to show cause in Case No. CI02-4 was premised upon the existence of a valid petition for review. As the court has determined that the council was not, at the relevant time, a state agency and dismissed the petition for review, the basis of the order to show cause has disappeared. The order to show cause should be set aside.

8. The parties nonetheless expressed their intention that the record produced in regard to Case No. CI02-3 should also be considered as the record of the council for purposes of the plaintiff's petition in error in Case No. CI02-4. This court next considers whether the plaintiff is entitled to any relief in Case No. CI02-4.

9. Obviously, the judicial review authorized by § 25-1901 applies only to a "tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court" NEB. REV. STAT. § 25-1901 (Cum. Supp. 2000). When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi judicial. *Nebraska Mid-State Reclamation Dist. v. Hall County*, 152 Neb. 410, 41 N.W.2d 397 (1950). Section 72-2011 does not specifically direct the way in which the council shall conduct its review. Thus, where the council conducts a review of the plaintiff's operation to make the general determination identified by § 72-2011(1), it acts quasi judicially.

10. In reviewing a decision based on a petition in error, this court must determine whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. *Luet, Inc. v. City of Omaha*, 247 Neb. 831, 530 N.W.2d 633 (1995).

11. A public corporation authorized by the Legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the

general welfare of the people is an arm or branch of the government for this purpose and under the plenary control of the Legislature. *Evans v. Metropolitan Utilities Dist.*, 187 Neb. 261, 188 N.W.2d 851 (1971). See also *Bliss v. Pathfinder Irrig. Dist.*, 122 Neb. 203, 240 N.W. 291 (1932); 18 C.J.S. *Corporations* §§ 5 to 7 (1990); 62 C.J.S. *Municipal Corporations* §§ 7 to 9 (1999). Public corporations possess only such lawful rights and powers as are clearly and expressly granted, together with such implied powers as are reasonably necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. *United Community Services v. Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). All rights and powers not thus granted are withheld. *Id.*

12. Section 72-2011, as it existed at the time of the decision prior to the 2002 amendment, defines the scope of the council's power on this matter:

(1) Any *state or state-assisted activity or undertaking* proposed within the Niobrara scenic river corridor shall be consistent with the purpose of the scenic river designation, including the scenic river's free-flowing condition and scenic, geological, biological, agricultural, historic, and prehistoric resources.

(2) The head of any state or local agency having direct or indirect jurisdiction over a *proposed state or state-assisted undertaking* within the Niobrara scenic river corridor and *the head of any agency having authority to license or permit any undertaking in such area* shall prepare a detailed proposal and submit it to the Niobrara Council for its review.

(3) The council shall review the proposal and consult with the agency. If, within thirty days after such review and consultation, the council finds that the *proposed action is not consistent* with the purposes of this section, the agency shall not proceed with the action until after a justification for the action has been submitted to the Governor and approved by the Governor in writing. The justification shall include the following elements: The anticipated current, future, and cumulative effects on the scenic and natural resources of the designated scenic river corridor; the social and economic necessity for the proposed action; all possible alternatives to the proposed action including a no-action alternative; the comparative benefits of proposed alternative actions; and the mitigation measures outlined in the proposed action.

NEB. REV. STAT. § 72-2011 (Cum. Supp. 2000) (emphasis supplied).

13. The question posed in construing § 72-2011 is whether the subsection (2) duty imposed upon “the head of any agency having authority to license or permit any undertaking in such area” is limited by the subsection (1) subject specification of “state or state-assisted activity or undertaking,” or whether the subsection (2) duty applies to any “undertaking” and is not limited to “state or state-assisted” undertakings.

14. Standing alone, the first clause of subsection (1) might be interpreted, because of the disjunctive, to modify only the word “activity” by “state or state-assisted,” and to construe “undertaking” as not limited by the modifier “state or state-assisted.” However, that interpretation is untenable in light of the subsection (2) reference to “proposed state or state-assisted undertaking.” The subsection (2) reference confirms that the Legislature intended “state or state-assisted” to modify “undertaking” in subsection (1).

15. A court should, when reasonably possible and consistent with constitutional rights, resolve all doubts as to the validity of a statute in favor of its constitutionality. *State v. Edmunds*, 211 Neb. 380, 318 N.W.2d 859 (1982). If possible, a statute should be construed in such a way as to negate any constitutional infirmity. *Id.* State laws are accorded a presumption of constitutionality. *Id.*

16. To construe the subsection (2) “license or permit” “undertaking” as independent from and in addition to the subsection (1) “state or state-assisted activity or undertaking” would eliminate specification of any standard to be applied by the council. The subsection (3) list of “elements” clearly applies only to the “justification” required to the Governor. It provides no ascertainable standard for application by the council. Thus, to the extent the statute provides any standard for application by the council, it appears in subsection (1). The unlimited construction removes the connection with the subsection (1) standard and provides no substitute standard. The Legislature cannot delegate its powers to make law to local governing bodies without imposing adequate standards to guide the discretion of those bodies. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226

(1988). See also *Terry Carpenter, Inc. v. Nebraska Liquor Control Comm.*, 175 Neb. 26, 120 N.W.2d 374 (1963) (Legislature may not lawfully delegate its legislative powers to an administrative agency). Thus, this court must reject the potentially unconstitutional construction and interpret subsection (2) review as limited to the subsection (1) subject, i.e., a “state or state-assisted activity or undertaking.”

17. Because the plaintiff’s liquor sales operation is not a “state or state-assisted” activity or undertaking, the council possessed no power or authority to conduct a review of the plaintiff’s liquor licenses under § 72-2011. The council does not purport to justify the action on any other basis, such as the zoning authority conferred by § 72-2010. Accordingly, the council lacked jurisdiction to make the determination regarding the plaintiff’s liquor licenses.

18. The council’s determination must be vacated for lack of jurisdiction pursuant to the petition in error in Case No. CI02-4.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. The petition for review in Case No. CI02-3 is dismissed for lack of jurisdiction. Costs in Case No. CI02-3 are taxed to plaintiff.

2. This court’s order to show cause why the petition in error in Case No. CI02-4 should not be stricken is vacated.

3. The petition in error in Case No. CI02-4 is granted, and the determination of the Niobrara Council on December 20, 2001, that the plaintiff’s liquor license application proposal is not consistent with the purpose of the scenic river designation, including the scenic river’s free-flowing condition and scenic, geological, biological, agricultural, historic, and prehistoric resources is vacated for lack of jurisdiction. Costs in Case No. CI02-4 are taxed to the defendant in the amount of \$77.90. The judgment for costs shall bear interest at 3.770% per annum from date of entry until paid.

4. The costs of the transcript and bill of exceptions are taxed to the defendant.

Signed in chambers at **Ainsworth**, Nebraska, on **August 22, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as:
CIO2-3: [date of filing] **Signed “Judgment” entered dismissing petition for review for lack of jurisdiction and taxing costs to plaintiff.”**
CIO2-4: [date of filing] **Signed “Judgment” entered vacating decision of tribunal for lack of jurisdiction and taxing costs to defendant.”**
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days:
CIO2-3: Judgment entered dismissing petition for review for lack of jurisdiction and taxing costs to plaintiff.
CIO2-4: Judgment entered vacating decision of tribunal for lack of jurisdiction and taxing costs to defendant of \$77.90.
Done on _____, 20____ by _____.
- Enter judgment on the judgment record (Case No. CIO2-4 only).
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: