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PER CURIAM.

Having reviewed the briefs and record and having heard oral argument, we conclude on further review that the decision of the Nebraska Court of Appeals in *In re Interest of David M. et al.*, 19 Neb. App. 399, 808 N.W.2d 357 (2012), is correct, and accordingly, we affirm the decision of the Nebraska Court of Appeals that reversed and remanded the ruling of the county court.

AFFIRMED.

HEAVICAN, C.J., not participating.

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## ANTHONY, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. CITY OF OMAHA, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE.

813 N.W.2d 467

Filed May 18, 2012. No. S-11-421.

1. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Municipal Corporations: Taxation: Statutes.** Municipal corporations have no power to impose taxes except such as is expressly conferred by or necessarily implied from statute.
4. **Taxation: Words and Phrases.** An occupation tax is a tax upon the privilege of doing business in a particular jurisdiction or upon the act of exercising, undertaking, or operating a given occupation, trade, or profession.
5. ____: ____. A sales tax is a tax upon the sale, lease, rental, use, storage, distribution, or other consumption of all tangible personal property in the chain of commerce.
6. **Taxation: Proof.** The legal incidence test requires a determination of who the law declares has the ultimate burden of the tax.
7. **Taxation.** The legal incidence of a sales tax falls upon the purchaser, because it is a tax upon the privilege of buying tangible personal property.
8. ____. The legal incidence of an occupation tax falls upon the retailer, because it is a tax upon the act or privilege of engaging in business activities.

9. ____. Both occupation taxes and sales taxes can be calculated upon gross receipts.
10. ____. It is not objectionable for there to be two or more occupation taxes imposed upon the same retailer.
11. ____. The same person or entity may engage in several different businesses or activities and be taxed on each.
12. **Statutes: Legislature: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
13. ____: ____: ____. When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which a court sees plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then the court may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.
14. **Taxation: Liquor Licenses.** The monetary limit for an occupation tax on the business of any person, firm, or corporation licensed under the Nebraska Liquor Control Act is a specific limitation on an occupation tax on the type of business or activity licensed under the act.
15. **Administrative Law: Taxation: Legislature.** A state legislature, in fixing a license tax on a certain subject, may limit taxes against the same subject by other branches of government.
16. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of an ordinance, an appellate court begins with a presumption of validity. Therefore, the burden of demonstrating the constitutional defect rests with the challenger.
17. **Constitutional Law: Statutes: Special Legislation.** When a law confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, then the law in question has resulted in the kind of improper "special favors" prohibited by the special legislation clause.
18. **Special Legislation.** 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.
19. **Municipal Corporations: Taxation: Ordinances.** To be valid, a municipal ordinance classifying an occupation for the purpose of levying a tax thereon must not be arbitrary in its classification.
20. **Taxation: Public Policy.** A classification for tax purposes must rest on some reason of public policy or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.
21. **Municipal Corporations: Taxation: Ordinances.** Municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

D.C. Bradford, Ryan J. Dougherty, and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellants.

Thomas Mumgaard, Deputy Omaha City Attorney, for appellee City of Omaha.

Rodney M. Confer, Lincoln City Attorney, and Jocelyn W. Golden for amicus curiae City of Lincoln.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and MOORE, Judges.

MCCORMACK, J.

## NATURE OF CASE

Anthony, Inc.; Anthony J. Fucinaro, Jr.; La Casa Pizzaria Inc.; and members of the Omaha Restaurant Association (collectively the Restaurants) operate restaurants in the City of Omaha (the City) subject to a municipal ordinance which became effective on October 1, 2010. The ordinance declares itself to be an "occupation tax" on restaurants and drinking places in the City in the amount of 2½ percent of gross receipts. The Restaurants argue that the tax is actually a "sales tax" which exceeds the sales tax limits authorized by law. Alternatively, the Restaurants argue that if the ordinance imposes an occupation tax, it violates limitations in the Nebraska Liquor Control Act (Liquor Control Act)[1] on the amount of occupation tax for liquor licensees. Finally, the Restaurants argue that the ordinance is unconstitutional special legislation. We find no merit to the Restaurants' challenges to the ordinance.

## BACKGROUND

### THE RESTAURANT ORDINANCE

In response to budget shortfalls, the Omaha City Council passed ordinance No. 38791 (the Restaurant Ordinance),[2]

[1] Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010).

[2] Omaha Mun. Code, ch. 19, art. XVI, §§ 19-800 through 19-813 (2010).

which imposes "an occupation tax on persons operating restaurants and drinking places within the City" (the Restaurant Tax). A restaurant is defined by the ordinance as "any place that is kept, used, maintained, advertised, or held out to the public as a place where food is prepared and sold for immediate consumption either on the premises or elsewhere."[3] A "drinking place" is defined as "any establishment or business offering the public on-premises consumption of alcoholic and/or nonalcoholic beverages."[4]

The amount of the Restaurant Ordinance is 2½ percent "of all gross receipts for each calendar month derived from the sale of food or beverages subject to this tax."[5] The Restaurant Ordinance provides that a taxable restaurant or drinking place "may itemize the tax levied on a bill, receipt, or other invoice provided to the purchaser but each person engaged in the restaurant or drinking place business shall remain liable for the tax imposed by this section."[6] The tax "is for revenue purposes to support the government of the city" and is "in addition to all other fees, taxes, excises, and licenses levied and imposed under any contract or any other provisions of this code or ordinances of the city and in addition to any fee, tax, excise, or license imposed by the state."[7]

The stated intent and purposes of the Restaurant Ordinance are as follows:

> (a) The city council determines that persons engaging in restaurant and drinking place businesses are benefited from tourism and recreational activity that places unique demands on the city's resources but which is activity that should be promoted and encouraged. Further, residents and non-residents who patronize these businesses are enjoying a discretionary activity that is dependent upon, and generating revenue from, the business's location

[3] *Id.*, § 19-800(h).

[4] *Id.*, § 19-800(c).

[5] *Id.*, § 19-802(a).

[6] *Id.*, § 19-802(b).

[7] *Id.*, § 19-803(a).

> within the city and the business's access to the services provided by the city. Subjecting the business's revenue to taxation for general city purposes is fair, reasonable, and just.
>
> (b) Pursuant to the authority of Neb. Rev. Stat. § 14-109, the city council finds, determines, and declares that restaurant and drinking place businesses form a discrete class of occupation engaged in within the city and it is appropriate that a tax be imposed on this class of businesses for the purpose of raising revenue to support and further general city activities and services. This determination is made with due recognition of the inherent value of business conducted within the city and the relation business has to the municipal welfare and the expenditures required of the city, and with consideration of the just, proper and equitable distribution of tax burdens within the city.[8]

The Restaurant Ordinance contains a severability clause stating that if any provision "or the application thereof to any person or circumstances" is held invalid, then "that invalidity shall not affect the other provisions of this article which can be given effect without the invalid provision or application."[9]

The City's finance department sent letters to restaurants, drinking places, and caterers identified as subject to the Restaurant Ordinance. Those letters informed the businesses as to various matters concerning the Restaurant Tax, including how it related to the calculation of state and city sales and use taxes.

The letter stated that the state and local sales and use taxes are "*calculated on the gross receipts **plus** the restaurant tax*." In the event restaurants chose to itemize the Restaurant Tax on their customers' bills, the City sent the following example as to how the sales tax would be calculated and listed:

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[8] *Id.*, § 19-801.

[9] *Id.*, § 19-813.

| | | |
|---|---|---|
| *Example:* | *Meal and beverage cost:* | *$100.00* |
| | *2.5% restaurant tax* | *2.50(a)* |
| | *Total cost of the meal* | *$102.50* |
| | *Total cost of the meal* | *$102.50* |
| | *7% sales tax* | *7.18(b)* |
| | ***Total cost to the customer*** | *$109.68* |
| ***Amount remitted to the State of Nebraska*** | | ***$7.18(b)*** |
| ***Calculation of amount sent to the City*** | | |
| | *2.5% food and beverage tax* | *$2.50(a)* |
| | *Less: collection fee of 2%* | *.05* |
| ***Amount remitted to the City of Omaha*** | | ***$2.45*** |

This method of calculation followed the recommended method by the Nebraska Department of Revenue, based on its interpretation of sales tax regulation 316 Neb. Admin. Code, ch. 1, § 007.01 (2010), and Neb. Rev. Stat. § 77-2701.35(3)(c) (Reissue 2009). The department considers occupation taxes as simply another cost of doing business, no different than income, property, or other business or license taxes and fees. As such, occupation taxes are considered part of the gross receipts upon which the sales tax is calculated.

## Proceedings Below

The Restaurants filed an action for declaratory judgment and injunctive relief against the City. The Restaurants alleged that the Restaurant Ordinance is invalid because it imposes an unauthorized sales tax, violates the provisions of § 53-132(4), and constitutes special legislation affording special or exclusive immunity to persons operating businesses other than restaurants and drinking places.

The Restaurants asked that the district court declare the Restaurant Ordinance unconstitutional, invalid, illegal, and unenforceable and that it enjoin the City from imposing and collecting the Restaurant Tax imposed by the ordinance. The Restaurants did not seek declaratory judgment or injunctive relief concerning the state or local sales tax calculations. In particular, they did not challenge regulation § 007.01 or § 77-2701.35(3)(c) and the recommended method of computing the total sales tax when the Restaurant Tax is itemized on the customers' bills.

At a hearing on cross-motions for summary judgment, Anthony, Inc., presented evidence that it had elected to itemize the Restaurant Tax on its customers' bills. La Casa Pizzaria, in contrast, apparently did not specifically itemize the Restaurant Tax, but charged a combined total of 9 percent tax to its customers' bills. La Casa Pizzaria paid the additional 0.68 percent of its Restaurant Tax obligation from its general revenue. Anthony, Inc., presented evidence that it paid $26,707.89 to the City under the Restaurant Ordinance in 2010. La Casa Pizzaria paid a total of $12,053.29 in 2010.

The district court denied the Restaurants' motion for summary judgment and granted summary judgment in favor of the City. The Restaurants appeal.

## ASSIGNMENTS OF ERROR

The Restaurants assign that the district court erred in granting summary judgment upon the determination that the Restaurant Ordinance (1) does not constitute an illegal sales tax, (2) does not constitute an illegal occupation tax, and (3) does not constitute unconstitutional special legislation.

## STANDARD OF REVIEW

[1] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.[10]

[2] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[11]

## ANALYSIS

[3] Municipal corporations have no power to impose taxes except such as is expressly conferred by or necessarily implied from statute.[12] Pursuant to Neb. Rev. Stat. § 14-109 (Reissue

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[10] *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

[11] *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009).

[12] See *Caldwell v. City of Lincoln*, 19 Neb. 569, 27 N.W. 647 (1886).

2007), city councils of cities of the metropolitan class have the power to "raise revenue by levying and collecting a tax on any occupation or business within the limits of the city," so long as they are "uniform in respect to the class upon which they are imposed." There are no statutory limits on the amount of such occupation taxes.

The Restaurants' principal argument is that the Restaurant Ordinance really imposes a sales tax instead of an occupation tax. The Restaurants argue that the Restaurant Ordinance is therefore invalid because it exceeds statutory limits on the amount of sales and use taxes that may be imposed. Alternatively, the Restaurants argue that if the Restaurant Ordinance imposes an occupation tax, it violates the Liquor Control Act.[13] Finally, the Restaurants argue that the Restaurant Tax is unconstitutional special legislation. We address each of these arguments in turn.

### The Restaurant Ordinance Does Not Impose Illegal Sales Tax

While there is no statutory limit on the amount of municipal occupation taxes, there are limits on the amount of municipal sales and use taxes. Neb. Rev. Stat. § 77-27,142 (Reissue 2009) authorizes any municipality to impose a sales and use tax, but currently imposes a limit of 1½ percent for such taxes. A municipal ordinance already imposes a sales tax of 1½ percent for City residents.[14] Thus, if the Restaurant Ordinance were a sales tax and not an occupation tax, it would violate § 77-27,142.

The Nebraska statutes do not define the terms "sales tax" or "occupation tax." Municipal occupation taxes are not described by statute other than the requirements of uniformity as stated in § 14-109.

The state sales tax is described in more detail. Neb. Rev. Stat. § 77-2701.02(4) (Reissue 2009) sets the current state sales tax rate at 5½ percent. Under Neb. Rev. Stat. § 77-2703(1) (Reissue 2009), the sales and use tax is imposed "upon the

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[13] §§ 53-101 to 53-1,122.

[14] Omaha Mun. Code, ch. 35, art. II, § 35-21 (1995).

gross receipts from all sales of tangible personal property sold at retail in this state."

Section 77-2703(1) states further as follows:

> (a) The tax imposed by this section shall be collected by the retailer from the consumer. It shall constitute a part of the purchase price and until collected shall be a debt from the consumer to the retailer and shall be recoverable at law in the same manner as other debts. The tax required to be collected by the retailer from the consumer constitutes a debt owed by the retailer to this state.
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> (b) It is unlawful for any retailer to advertise, hold out, or state to the public or to any customer, directly or indirectly, that the tax or part thereof will be assumed or absorbed by the retailer, that it will not be added to the selling, renting, or leasing price of the property sold, rented, or leased, or that, if added, it or any part thereof will be refunded. The provisions of this subdivision shall not apply to a public utility.
>
> (c) The tax required to be collected by the retailer from the purchaser, unless otherwise provided by statute or by rule and regulation of the Tax Commissioner, shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales, rentals, or leases.

The Restaurants believe that because the Restaurant Tax shares some of the attributes of the sales tax, as described by § 77-2703(1), it is also a sales tax. We disagree.

Both occupation taxes and sales taxes are "excise taxes" for the purpose of raising revenue.[15] An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation

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[15] See *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011). See, also, *Town of Eagle v. Scheibe*, 10 P.3d 648 (Colo. 2000); *Callaway v. City of Overland Park*, 211 Kan. 646, 508 P.2d 902 (1973); *Reed v. City of New Orleans*, 593 So. 2d 368 (La. 1992); *Eugene Theatre et al. v. Eugene et al.*, 194 Or. 603, 243 P.2d 1060 (1952); *Ford Motor Co. v. City of Seattle*, 160 Wash. 2d 32, 156 P.3d 185 (2007).

or activity,[16] and is measured by the extent to which a privilege is exercised by the taxpayer, without regard to the nature or value of the taxpayer's assets.[17] An excise tax is imposed upon the performance of an act.[18]

[4,5] But sales taxes and occupation taxes tax different kinds of acts.[19] An occupation tax is a tax upon the privilege of doing business in a particular jurisdiction[20] or upon the act of exercising, undertaking, or operating a given occupation, trade, or profession.[21] A sales tax, on the other hand, is a tax upon the sale, lease, rental, use, storage, distribution, or other consumption of all tangible personal property in the chain of commerce.[22]

[6-8] The most fundamental distinction between a sales tax and an occupation tax is the "legal incidence" of the tax. The legal incidence test requires a determination of who the law declares has the ultimate burden of the tax.[23] The legal incidence of a sales tax falls upon the purchaser, because it is a tax upon the privilege of buying tangible personal property.[24] The legal incidence of an occupation tax falls upon the

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[16] *Waste Connections of Neb. v. City of Lincoln, supra* note 10.

[17] 71 Am. Jur. 2d *State and Local Taxation* § 22 (2001).

[18] See *Kiplinger v. Nebraska Dept. of Nat. Resources, supra* note 15.

[19] *Ford Motor Co. v. City of Seattle, supra* note 15. See, also, *Archer Daniels Midland Co. v. Chicago*, 294 Ill. App. 3d 186, 689 N.E.2d 392, 228 Ill. Dec. 520 (1997).

[20] See *Ford Motor Co. v. City of Seattle, supra* note 15.

[21] See *Wellington v. City of Chicago*, 144 Ill. App. 3d 774, 494 N.E.2d 603, 98 Ill. Dec. 481 (1986).

[22] *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008).

[23] See, *American Beverage Ass'n v. City of Chicago*, 404 Ill. App. 3d 682, 937 N.E.2d 261, 344 Ill. Dec. 555 (2010); *Marcum v. City of Louisville Municipal Housing Com'n*, 374 S.W.2d 865 (Ky. 1963); *Keystone Auto Leasing, Inc. v. Norberg*, 486 A.2d 613 (R.I. 1985); *South Cent. Bell Telephone Co. v. Olsen*, 669 S.W.2d 649 (Tenn. 1984).

[24] See *id.* See, also, *P & S Grain, LLC v. County of Williamson*, 399 Ill. App. 3d 836, 926 N.E.2d 466, 339 Ill. Dec. 234 (2010); *Ford Motor Co. v. City of Seattle, supra* note 15.

retailer, because it is a tax upon the act or privilege of engaging in business activities.[25] While sales taxes and occupation taxes often have "a similar appearance and effect," they are "substantively distinct," because of the distinct identities of the taxpayers upon whom the tax is levied.[26]

[9] Both occupation taxes and sales taxes can be "gross receipts taxes."[27] A "gross receipts tax" is any tax law that provides for calculation or computation of the amount of taxes due with reference to total revenues arising out of the subject matter taxed.[28] The method of computation of a tax is generally considered to be "of no significance in determining the nature of the exaction imposed in any particular tax legislation."[29]

Several other jurisdictions have accordingly rejected arguments that a tax must be a sales tax rather than an occupation tax because it is calculated on gross receipts. In *Short Bros. v. Arlington County*,[30] for instance, the court rejected the plaintiff's argument that an occupation tax calculated based on revenue generated by the sale or lease of property was thereby transformed into a tax *on* the sale or lease of property. The court explained that "revenue is merely an element in the formula used to determine the taxpayer's liability for the tax at issue, just as it also may serve to determine the taxpayer's

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[25] See, *American Beverage Ass'n v. City of Chicago, supra* note 23; *Ford Motor Co. v. City of Seattle, supra* note 15. See, also, e.g., *Governors of Ak-Sar-Ben v. Department of Rev.*, 217 Neb. 518, 349 N.W.2d 385 (1984).

[26] See *Southern Pacific Transp. Co. v. State*, 202 Ariz. 326, 333, 44 P.3d 1006, 1013 (Ariz. App. 2002). See, also, *Ryder Truck Rental, Inc. v. Bryant*, 170 So. 2d 822 (Fla. 1964).

[27] 16 Eugene McQuillin, The Law of Municipal Corporations § 44.192 (rev. 3d ed. 2003).

[28] *Id.*

[29] *Town of Fenwick Island v. Sussex Sands, Inc.*, No. Civ. A. 89C-MY14, 1990 WL 161177 at *3 (Del. Super. Sept. 18, 1990) (unpublished opinion). See, also, *American Beverage Ass'n v. City of Chicago, supra* note 23; *Eugene Theatre et al. v. Eugene et al., supra* note 15. But see *Town of Eagle v. Scheibe, supra* note 15.

[30] *Short Bros. v. Arlington County*, 244 Va. 520, 423 S.E.2d 172 (1992).

liability for income taxes, sales taxes, use taxes, or value-added taxes."[31]

The court explained that although gross receipts may form the same basis of calculation for all these kinds of taxes, "the taxes are different taxes, based upon different underlying philosophies, different taxing jurisdictions, and different taxpayers."[32] Similarly, in *Eugene Theatre et al. v. Eugene et al.*,[33] the court said that a true occupation tax "is no less an occupation tax because the amount thereof is measured by the gross receipts from sales or services."

Nebraska has a history of occupation taxes calculated on gross receipts. In *Lincoln Traction Co. v. City of Lincoln*,[34] for example, we recognized the authority and right of the city to impose an occupation tax for the use and occupation of its streets by street railway companies and the authority and right to measure the amount of such occupation tax by the gross earnings of the corporation enjoying and making use of that privilege. And, in *Nebraska Telephone Co. v. City of Lincoln*,[35] we said, "A business tax measured by gross earnings is a tax upon the business which is actually performed, and is not a tax upon property in any sense . . . ."

Currently, several statutes expressly contemplate occupation taxes calculated upon gross receipts. Neb. Rev. Stat. § 15-202 (Reissue 2007) provides that a city of the primary class may impose an occupation tax on public service property

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[31] *Id.* at 523, 423 S.E.2d at 174.

[32] *Id.*

[33] *Eugene Theatre et al. v. Eugene et al., supra* note 15, 194 Or. at 630, 243 P.2d at 1072. See, *Acme Brick & Supply v. Dep't of Revenue*, 133 Ill. App. 3d 757, 478 N.E.2d 1380, 88 Ill. Dec. 654 (1985); *Ford Motor Co. v. City of Seattle, supra* note 15. See, also, *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So. 2d 833 (1972). But see, *Bd. of Trustees v. Foster Lumber*, 190 Colo. 479, 548 P.2d 1276 (1976); *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 44 N.E.2d 904 (1942).

[34] *Lincoln Traction Co. v. City of Lincoln*, 84 Neb. 327, 121 N.W. 435 (1909).

[35] *Nebraska Telephone Co. v. City of Lincoln*, 82 Neb. 59, 63, 117 N.W. 284, 286 (1908).

or corporations "based upon a certain percentage of the gross receipts . . . or upon such other basis as may be determined upon by the mayor and council." Neb. Rev. Stat. § 86-704 (Reissue 2009) allows municipalities to impose an occupation tax on telecommunications businesses based on a percentage of customer sales receipts. Neb. Rev. Stat. § 77-27,223 (Reissue 2009) allows counties to impose an occupation tax on businesses engaged in the sale of admissions to recreational, cultural, entertainment, or concert events and states that such tax "shall be based upon a certain percentage of gross receipts from sales." We are not persuaded by the Restaurants' arguments that the Restaurant Tax must be a sales tax because it is calculated upon gross receipts.

The option to itemize the tax on the bill only reinforces its nature as an occupation tax.[36] It is significant that instead of listing the tax on a customer's bill, a restaurant or "drinking place" may choose to absorb the cost of the Restaurant Tax. Alternatively, the restaurant or drinking places may indirectly pass the tax on to the consumer through an increase in prices. This is notably distinguishable from sales taxes under § 77-2703. Section 77-2703(1)(c) mandates the sales tax "shall be displayed separately from the list price." And § 77-2703(1)(b) expressly prohibits that the retailer "advertise, hold out, or state to the public or to any customer, directly or indirectly, that the tax or part thereof will be assumed or absorbed by the retailer." The Restaurants, by taking advantage of a discretionary act created for the sole purpose of making the tax less onerous for them, have not thereby invalidated the Restaurant Tax.

Occupation taxes such as the Restaurant Tax are not unprecedented. It might be "contrary to common sense and practical business procedure" not to consider passing on the expense of

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[36] See, *Watkins Cigarette Serv., Inc. v. Arizona St. Tax Com'n*, 111 Ariz. 169, 526 P.2d 708 (1974); *Southern Pacific Transp. Co. v. State, supra* note 26; *Pac. Coast Eng. Co. v. State of California*, 111 Cal. App. 2d 31, 244 P.2d 21 (1952); *Waukegan School Dist. v. City of Waukegan*, 95 Ill. 2d 244, 447 N.E.2d 345, 69 Ill. Dec. 128 (1983); *Town of Fenwick Island v. Sussex Sands, Inc., supra* note 29.

an occupation tax to the customers.[37] But that does not make the tax a sales tax. Ordinances that give businesses the option of listing the tax on the customers' bills simply give businesses an "out" to explain to the customer precisely why the cost has increased.[38]

Ultimately, the legal incidence of the Restaurant Tax is upon the restaurants and drinking places, and not upon the customers. In *Governors of Ak-Sar-Ben v. Department of Rev.*,[39] we were called upon to determine upon whom the legal incidence of the state sales tax really fell. The statute mandates that the business owner collect and remit the tax to the Tax Commissioner. Nevertheless, we observed that the statute[40] "clearly states that *the purchaser must pay the tax* on the cost of his purchase to the retailer."[41] Thus, we concluded that "the purchaser . . . is the taxpayer," not the business.[42] The business is simply the tax collector[43] under the state sales tax statute.

Conversely, here, the Restaurant Tax is "imposed . . . upon each and every person conducting business as a restaurant or drinking place."[44] The Restaurant Ordinance specifically states that no matter whether the business chooses to itemize the tax levied on a bill receipt, or other invoice provided to the purchaser, the "business shall remain liable for the tax."[45] Pursuant to the provisions of the Restaurant Ordinance, if the tax is not remitted to the City, it is the business that can incur penalties, not the purchaser.[46] If the customer refuses to pay the

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[37] *Town of Fenwick Island v. Sussex Sands, Inc., supra* note 29, 1990 WL 161177 at *3.

[38] See *id.*

[39] *Governors of Ak-Sar-Ben v. Department of Rev., supra* note 25.

[40] See § 77-2703 (Reissue 1981).

[41] *Governors of Ak-Sar-Ben v. Department of Rev., supra* note 25, 217 Neb. at 520, 349 N.W.2d at 386 (emphasis supplied).

[42] *Id.* at 520, 349 N.W.2d at 387.

[43] See *Wiseman v. Phillips*, 191 Ark. 63, 84 S.W.2d 91 (1935).

[44] Omaha Mun. Code, ch. 19, art. XVI, § 19-802(a).

[45] *Id.*, § 19-802(b).

[46] See *id.*, § 19-812.

occupation tax when itemized on his or her bill, action by the City will be taken against the restaurant, not against the consumer. Because the legal incidence of the tax falls on the business and not the customer, the Restaurant Tax is an occupation tax, not a sales tax.

The Restaurants briefly refer in their arguments to the manner in which they have been directed, in the City's letter, to calculate the state and city sales and use taxes when the Restaurant Tax is listed on a customer's bill. The Restaurants claim that when restaurants choose to itemize the Restaurant Tax on the customer's bill and the restaurant then calculates that tax on the bill as directed, the combined state and local sales tax rate upon the consumer is illegally increased from 7 percent to 7.18 percent. They appear to argue that this supports their theory that the Restaurant Tax is really a sales tax. We fail to see how the directed method of calculating sales taxes, which are imposed by an entirely different local sales tax ordinance and by state laws concerning the state sales tax, is pertinent to whether the Restaurant Tax is a sales tax versus an occupation tax.

Nor can the threatened application of the sales and use taxes upon the Restaurant Tax render the Restaurant Tax inapplicable to the Restaurants in any other way. The method of calculating sales and use taxes when the Restaurant Tax is itemized in the bill is not a matter expressly provided for in the Restaurant Ordinance. Even if it were, such provision would be severable from the Restaurant Ordinance, under both the severability clause of the ordinance and principles of common law.[47] An abuse in application or enforcement of an ordinance does not render the ordinance itself invalid.[48]

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[47] See *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009).

[48] See, *Batt v. City and County of San Francisco*, 184 Cal. App. 4th 163, 109 Cal. Rptr. 3d 129 (2010); *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000); *Kew Gardens Assoc v Tyburski*, 70 N.Y.2d 325, 514 N.E.2d 1114, 520 N.Y.S.2d 544 (1987); *Tempo Holding Co. v. Oxford City Council*, 78 Ohio App. 3d 1, 603 N.E.2d 414 (1992).

In their petition below, the Restaurants did not challenge the method of calculating the customer's state or local sales and use taxes. The Restaurants did not challenge the Department of Revenue regulation concerning sales tax calculations.[49] The Restaurants did not challenge the statutes upon which the sales tax regulation is based.[50] In sum, the Restaurants did not express concern over the 0.18-percent increase in their obligation as sales tax collectors when they chose to pass the Restaurant Tax onto their customers' bills. And they did not purport to have standing to challenge the alleged sales tax increase on behalf of their customers.

The purpose of the Restaurants' action was to invalidate the Restaurant Tax and thereby avoid the 2½-percent tax obligation imposed upon the Restaurants. Because the method of computing the sales and use taxes on a customer's bill does not affect the validity of the Restaurant Ordinance, we do not address that issue in this appeal.

### The Restaurant Ordinance Does Not Violate Liquor Control Act or Omaha Mun. Code § 19-62

The Restaurants next argue that insofar as the Restaurant Ordinance applies to restaurants and "drinking places" which have liquor licenses, it violates § 53-132(4) of the Liquor Control Act[51] and Omaha Mun. Code, ch. 19, art. II, § 19-62 (2005). They argue that those laws prohibit the City from imposing any occupation taxes upon liquor licensees which exceed two times the liquor license fee. For the Restaurants, two times the liquor license fee would be $600 per year. We disagree with the Restaurants' reading of § 53-132(4) and Omaha Mun. Code § 19-62, and find that the limit to two times the license fee pertains only to taxes on the occupation of selling alcohol. The limit has no bearing on occupation taxes designed to target activities other than selling alcoholic beverages.

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[49] 316 Neb. Admin. Code, ch. 1, § 007.

[50] See Neb. Rev. Stat. § 77-2701.16 (Reissue 2009) and § 77-2701.35.

[51] §§ 53-101 to 53-1,122.

[10,11] It is not objectionable for there to be two or more occupation taxes imposed upon the same retailer.[52] The same person or entity may engage in several different businesses or activities and be taxed on each.[53] There is no "double taxation" unless both taxes are of the same kind and have been imposed by the same taxing entity, for the same taxing period, for the same taxing purpose, and upon the same property or the same activity, incident, or subject matter.[54] Furthermore, unless it is unreasonable, confiscatory, or discriminatory, double taxation is not unconstitutional or prohibited, although it is our policy to guard against it.[55]

Nevertheless, the Restaurants argue that § 53-132(4) of the Liquor Control Act and Omaha Mun. Code § 19-62 place special limits on all occupation taxes for entities licensed under the Liquor Control Act. Section 53-132(4) principally concerns delivery of a liquor license to the licensee and the prerequisites to such delivery. It states that a liquor license shall not be delivered unless the licensee demonstrates it has paid the "occupation taxes, if any, imposed by such city, village, or county." Section 53-132(4) then sets forth the language upon which the Restaurants rely:

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[52] See 14A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 6952 (perm. ed., rev. vol. 2008).

[53] See, *Bullock v. Pioneer Corp.*, 774 S.W.2d 302 (Tex. App. 1989); *VEPCO v. Haden*, 157 W. Va. 298, 200 S.E.2d 848 (1973).

[54] See, *Fox etc. Corp. v. City of Bakersfield*, 36 Cal. 2d 136, 222 P.2d 879 (1950); 71 Am. Jur. 2d, *supra* note 17, § 26. See, also, e.g., *Lake Havasu City v. Mohave County*, 138 Ariz. 552, 675 P.2d 1371 (Ariz. App. 1983); *Hirschfeld Press v. Denver*, 806 P.2d 917 (Colo. 1991); *Cedar Valley Leasing v. Iowa Dept. of Revenue*, 274 N.W.2d 357 (Iowa 1979); *Cooksey Bros. Disp. Co. v. Boyd County*, 973 S.W.2d 64 (Ky. App. 1997); *Bullock v. Pioneer Corp., supra* note 53.

[55] See, *Abernathy v. City of Omaha*, 183 Neb. 660, 163 N.W.2d 579 (1968); *Stephenson School Supply Co. v. County of Lancaster*, 172 Neb. 453, 110 N.W.2d 41 (1961). See, also, *Scott & Scott, Inc. v. City of Mount. Brook*, 844 So. 2d 577 (Ala. 2002); *Waste Connections of Neb. v. City of Lincoln, supra* note 10; *Village of Utica v. Rumelin*, 134 Neb. 232, 278 N.W. 372 (1938); *Speier's Laundry Co. v. City of Wilber*, 131 Neb. 606, 269 N.W. 119 (1936); 84 C.J.S. *Taxation* § 59 (2010).

> Notwithstanding any ordinance or charter power to the contrary, no city, village, or county shall impose an occupation tax on the business of any person, firm, or corporation licensed under the [Liquor Control A]ct and doing business within the corporate limits of such city or village or within the boundaries of such county in any sum which exceeds two times the amount of the license fee required to be paid under the act to obtain such license.

Omaha Mun. Code § 19-62 establishes the occupation tax within the limits imposed by the above-quoted "[n]otwithstanding" provision. Section § 19-62 states that "the occupation tax for any person who engages in the manufacture, distribution, . . . or selling at retail of alcoholic liquors within the city shall be two times the amount of the license fee required to be paid under the . . . Liquor Control Act," as stated in a schedule to be maintained by the city clerk (Liquor Occupation Tax). The current liquor license fee is $300 annually for the type of liquor licenses maintained by the Restaurants in this case.[56] Thus, as stated, the current Liquor Occupation Tax under § 19-62 is $600 per year.

According to the Restaurants, § 53-132(4) does not just limit the City's Liquor Occupation Tax to two times the liquor license fee. The Restaurants argue that any occupation tax imposed by the City on an entity "licensed under the [Liquor Control A]ct," must be limited to two times the liquor license fee. The Restaurants claim that Omaha Mun. Code § 19-62 sets a similar limit to any occupation tax that is applied to entities "who engage[] in the manufacture, distribution, . . . or selling at retail of alcoholic liquors."

First, we find no merit to the Restaurants' reading of Omaha Mun. Code § 19-62 as establishing any broadly based proscription as to the amount of all municipal occupation taxes when imposed upon "any person who engages in the manufacture, distribution, . . . or selling at retail of alcoholic liquors." Section 19-62 was designed only to impose an occupation tax on the occupation of selling liquor. And it was passed to

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[56] See § 53-124.01(8).

impose such an occupation tax in an amount corresponding to the limitations of the Liquor Control Act.

We reach a similar conclusion as to the "[n]otwithstanding" provision of § 53-132(4). The "[n]otwithstanding" provision was first codified in 1935 as part of the predecessor to § 53-160.[57] That statute imposed a state tax upon the privilege of engaging in the business of manufacturing or distributing alcohol.[58] It principally detailed the rate of the tax, which depended on the type of alcoholic beverage. The predecessor to § 53-160 then stated:

> The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the state of Nebraska or by any municipal corporation or political subdivision thereof: Provided, notwithstanding any ordinance or charter power to the contrary, no city or village shall impose an occupation tax on the business of any person, firm or corporation licensed under [the Liquor Control] Act and doing business within the boundaries of such city or village, in any sum which exceeds the amount of the license fee required to be paid under [the Liquor Control] Act to obtain said license.[59]

In 1947, § 53-160 was amended to provide for the current limit of "double the amount of the license fee."[60]

The Legislature reenacted the Liquor Control Act in 1993, subsequent to a decision in which we struck down an unrelated provision of the Liquor Control Act as unconstitutional.[61] At that time, the "[n]otwithstanding" provision was extracted from § 53-160 and moved to its current location within § 53-132(4). The legislative history does not explain why this was done.

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[57] See Comp. Stat. § 53-350 (Supp. 1935).

[58] See 1935 Neb. Laws, ch. 116, § 50, p. 405.

[59] *Id.*, p. 406.

[60] 1947 Neb. Laws, ch. 189, § 1, p. 625. See, also, § 53-160 (Cum. Supp. 1949).

[61] See, General Affairs Committee Hearing, L.B. 183, 93d Leg., 1st Sess. 67-70 (Jan. 25, 1993); *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988).

Section 53-132 sets forth a multitude of requirements and considerations pertaining to the determination by the Nebraska Liquor Control Commission of whether it should issue a liquor retail license, craft brewery license, or microdistillery license to an applicant. As already described, § 53-132(4) states that once a license is issued or renewed by the commission, it shall be mailed to the clerk of the city, village, or county. The clerk shall subsequently deliver the license to the licensee upon proof of payment of (1) the license fee, if by the terms of § 53-124(6), the fee is payable to the treasurer of such city, village, or county; (2) any fee for publication of notice of hearing before the local governing body upon the application for the license; (3) the fee for publication of notice of renewal as provided in § 53-135.01; and (4) the "occupation taxes, if any, imposed by such city, village, or county."[62] It is only after referring to the proof that the "occupation taxes, if any," have been paid that the "[n]otwithstanding" provision appears.

A statutory provision focused on prerequisites to the procurement of a liquor license is an unlikely place for an overarching limit in the amount of occupation taxes imposed upon entities which happen to hold liquor licenses. The Restaurants' reading of the provision is also inconsistent with the statutory reference to only one "occupation tax" so limited in amount, while at the same time referring to multiple "occupation taxes" without such a limitation. But perhaps most fundamentally, the Restaurants' reading of the provision is manifestly contrary to the scope and purposes of the Liquor Control Act.

[12,13] In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.[63] When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which we see plainly

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[62] § 53-132(4).

[63] *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). See, also, *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997).

could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then we may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.[64]

The Liquor Control Act concerns the regulation and control of the manufacture, distribution, and sale of alcoholic liquor.[65] It is also designed to generate revenue by imposing an excise tax upon alcoholic liquor.[66] The stated policy of the Liquor Control Act is to "encourage temperance in the consumption of alcoholic liquor."[67] Section 53-101.05 specifically states that the Liquor Control Act "shall be liberally construed to the end that . . . *temperance* in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor." (Emphasis supplied.)

A construction which imposes a special monetary limitation on all occupation taxes as applied to any "business . . . licensed under the [Liquor Control A]ct" would have the manifestly absurd result of creating a special tax immunity for any business with a liquor license. Pursuant to the Restaurants' reasoning, any number of occupation taxes in Omaha and other cities would, as applied to businesses with a liquor license, violate § 53-132(4). Liquor licensees would thus be granted the privilege of avoiding those occupation taxes, while businesses that do not sell alcohol would have to pay them. It would reward businesses for selling alcoholic beverages and encourage more businesses to do so. The Restaurants' reading of § 53-132(4) is therefore contrary to the stated policy of § 53-101.01 of "encourag[ing] temperance in the consumption of alcoholic liquor" and contrary to the mandate of § 53-101.05 that the Liquor Control Act be construed to "foster[] and promote[]" temperance.

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[64] *Morton v. Green*, 2 Neb. 441 (1872) (Oliver, C.J., dissenting).

[65] See § 53-101.01.

[66] *Id.*

[67] *Id.*

Furthermore, we observe that while the "occupation tax" which must be limited to twice the license fee is referred to by the statute in the singular, the "occupation taxes" which the licensee must prove paid before obtaining the license is plural. In other words, the limit of two times the liquor license fee pertains only to *one* occupation tax. Other "occupation taxes," are plainly contemplated, but are not similarly limited to two times the license fee. And we observe that this has always been the case. At the time of the inception of the "[n]otwithstanding" provision, the language preceding it stated that the liquor license tax "shall be in addition to all other occupation or privilege *taxes* imposed . . . by any municipal corporation."[68]

[14] Accordingly, given the language of the statute and the purposes of the Liquor Control Act, the only sensible reading of § 53-132(4) is that municipalities are prohibited from imposing a tax on the occupation of selling liquor which exceeds two times the liquor license fee. Municipalities are not limited, however, in the amount of occupation taxes upon other activities—regardless of whether the business taxed also engages in the activity of selling liquor. The monetary limit for "an occupation tax" "on the business of any person, firm or corporation licensed under [the Liquor Control] Act" is a specific limitation on an occupation tax on the type of business or activity licensed under the Liquor Control Act.

[15] A state legislature, in fixing a license tax on a certain subject, may limit taxes against the same subject by other branches of government.[69] The Liquor Control Act so limits the amount municipalities may tax for the occupation of having a liquor license and selling alcohol pursuant to such license. But the Liquor Occupation Tax and the Restaurant Tax are directed toward different objects. The Restaurant Tax is on the occupation of serving food and beverages—be they with or without alcohol. Reading § 53-132(4) as prohibiting any type of municipal occupation tax over $600 per year for

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[68] § 53-160 (Cum. Supp. 1949) (emphasis supplied).

[69] 9 Eugene McQuillin, The Law of Municipal Corporations § 26:41 (rev. 3d ed. 2005).

any business that happens to hold a liquor license would have the absurd result that a liquor license would provide a special exemption from all occupation taxes otherwise applicable. We reject the Restaurants' reading of the statute. Therefore, the Restaurant Tax, when applied to the Restaurants, does not violate § 53-132(4).

### Special Legislation

[16] Finally, the Restaurants assert that the Restaurant Ordinance is special legislation. They argue it creates an arbitrary and unreasonable distinction between restaurants and "drinking places," and "all other businesses who sell goods and services to the public within the City."[70] When passing on the constitutionality of an ordinance, this court begins with a presumption of validity.[71] Therefore, the burden of demonstrating the constitutional defect rests with the challenger.[72]

[17] The enactment of special legislation is prohibited by Neb. Const. art. III, § 18, which prohibits the Legislature from passing local or special laws for any of a number of enumerated cases, including the "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever[.]" It also states that "where a general law can be made applicable, no special law shall be enacted." When a law confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, then the law in question has resulted in the kind of improper "special favors" prohibited by the special legislation clause.[73]

[18] 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.[74] The Restaurants argue that the Restaurant Ordinance creates an arbitrary and

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[70] Brief for appellants at 22.

[71] *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007).

[72] *Id.*

[73] See *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

[74] *Id.*

unreasonable method of classification. The City points out that occupation taxes will always, by their nature, separate out a particular class. At the same time, the revenue from a tax on a particular occupation usually inures to the municipality's general fund.

[19,20] We have never addressed the validity of a municipal occupation tax under the special legislation clause. We have, however, addressed the validity of occupation taxes under the same principles as those applied in a special legislation analysis. We have said that, to be valid, a municipal ordinance classifying an occupation for the purpose of levying a tax thereon must not be arbitrary in its classification.[75] The classification must instead rest on some reason of public policy or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.[76]

[21] Under these principles, "[t]his court has repeatedly held that a classification separating out commercial businesses or occupations as distinct from the use by the general public is a reasonable classification."[77] "Classifications have been upheld imposing different amounts of revenue charges on both widely diverse and closely related commercial enterprises."[78] We have said that "'municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with

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[75] *Speier's Laundry Co. v. City of Wilber, supra* note 55. See, also, *Hug v. City of Omaha, supra* note 73.

[76] *Id.*; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[77] *City of Ord v. Biemond*, 175 Neb. 333, 337, 122 N.W.2d 6, 10 (1963) (citing *Gooch Food Products Co. v. Rothman*, 131 Neb. 523, 268 N.W. 468 (1936). See, also, *Petersen Baking Co. v. City of Fremont*, 119 Neb. 212, 228 N.W. 256 (1929); *Norris v. City of Lincoln*, 93 Neb. 658, 142 N.W. 114 (1913); *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, 58 N.W. 415 (1894).

[78] *City of Ord v. Biemond, supra* note 77, 175 Neb. at 338, 122 N.W.2d at 10.

by the courts, unless it manifestly appears that it is unreasonable and arbitrary.'"[79]

The only special legislation principle we have never expressly applied to municipal occupation taxes is that the distinction in the classification should bear some reasonable relation to the legitimate objectives and purposes of the legislation.[80] This is understandable since the objective of municipal occupation taxes is simply to increase revenue—albeit to do so in a way that is fair and justified by some reason of public policy. The type of connection between an occupation tax's purpose and the occupation taxed is thus different from the connections looked for in special legislation challenges to laws involving tax revenue earmarked for special purposes, exemptions from regulations, or legislation expressly granting a special privilege to a certain class.[81] The connection for an occupation tax is the connection to the public policy behind singling out a certain occupation for the burden of taxation.

Thus, the connection need not necessarily be that the occupation taxed is especially responsible for the drains on the city's economy or that it especially benefits from the revenue generation. Nevertheless, in this case, the Restaurant Ordinance explains that restaurants and "drinking places" are subject to the occupation tax because they derive a special benefit from public expenditures. The Restaurant Ordinance states that "persons engaging in restaurant and drinking place businesses are benefited from tourism and recreational activity."[82] Such tourism and recreational activity "places unique

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[79] *Gooch Food Products Co. v. Rothman, supra* note 77, 131 Neb. at 528, 268 N.W. at 471 (quoting *Norris v. City of Lincoln, supra* note 77).

[80] See, *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000); *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[81] See, e.g., *Hug v. City of Omaha, supra* note 73; *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *Big John's Billiards v. Balka, supra* note 80; *Pfizer v. Lancaster Cty. Bd. of Equal., supra* note 80; *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995); *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985).

[82] Omaha Mun. Code, ch. 19, art. XVI, § 19-801(a).

demands on the city's resources, but . . . should be promoted and encouraged."[83]

Thus, the classification bears a reasonable relation to the purposes of the Restaurant Tax. The purposes of the Restaurant Tax are to increase revenue so the City may expend money on special attractions that draw visitors to the City and bring its citizens out to enjoy recreational activities. Restaurants and "drinking places" tend to be located near these attractions and are especially benefited from people's recreational activities, because those activities tend to also involve eating and drinking out.

The classification also soundly rests upon the city council's public policy determination that it is preferable to target discretionary spending in restaurants and "drinking places" instead of in the much broader, and not always discretionary, category of "all other businesses who sell goods and services." The Restaurant Ordinance states that the "residents and non-residents who patronize these businesses are enjoying a discretionary activity that is dependent upon, and generating revenue from, the business's location within the city and the business's access to the services provided by the city."[84] Thus, "[s]ubjecting the business's revenue to taxation for general city purposes is fair, reasonable, and just."[85]

Finally, the classification rests upon a substantial difference that would naturally suggest the justice or expediency of diverse legislation. The Restaurant Ordinance states:

> [T]he city council finds, determines, and declares that restaurant and drinking place businesses form a discrete class of occupation engaged in within the city and it is appropriate that a tax be imposed on this class of businesses for the purpose of raising revenue to support and further general city activities and services.[86]

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*, § 19-801(b).

While other retail businesses might also benefit from tourism, and some of those businesses might also principally sell discretionary goods, restaurants and drinking places are easily identifiable as a distinct class. They are easily identifiable as a certain discretionary form of entertainment. "[A]ll other businesses who sell goods and services to the public within the City"[87] are not. It would be difficult for the City to come up with a different, broader retail category which similarly focused on discretionary spending and the entity's benefit from tourism. The classification of restaurants and drinking places, as distinguished from other retail establishments, is not unreasonable or arbitrary.

The Restaurants have failed to meet their burden of demonstrating a constitutional defect in the Restaurant Ordinance. By focusing on restaurants and drinking places, the Restaurant Ordinance does not create an arbitrary and unreasonable method of classification. Its classification of restaurants and drinking places from other retail businesses in the City soundly rests on reasons of public policy, justice, and expediency. And the classification bears a reasonable relation to the legitimate objective and purposes of the legislation. Having already found no merit to the Restaurants' other challenges to the Restaurant Ordinance, we affirm the judgment of the district court.

## CONCLUSION

For the foregoing reasons, we find no merit to the Restaurants' arguments that the Restaurant Ordinance is invalid. The Restaurant Ordinance is not an illegal sales tax, does not violate § 53-132(4) as applied to liquor licensees, and does not violate the prohibition against special legislation. Accordingly, we affirm the judgment of the district court which granted summary judgment in favor of the City and denied summary judgment in favor of the Restaurants.

AFFIRMED.

WRIGHT, J., not participating.

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[87] Brief for appellants at 22.