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15-005
NO.
STATE OF NEBRASKA
OFFICIAL
APR 27 2015
DEPT. OF JUSTICE

DOUGLAS J. PETERSON
ATTORNEY GENERAL

SUBJECT: LB 414 – Interpretation of the Property Tax Exemption for Fraternal Benefit Societies.

REQUESTED BY: Senator Burke Harr
Nebraska Legislature

WRITTEN BY: Doug Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

A "fraternal benefit society" is defined to include "[a]ny incorporated society, order, or supreme lodge, without capital stock, including one exempted under subdivision (1)(b) of section 44-10,109 whether incorporated or not, conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and which provides benefits in accordance with sections 44-1072 to 44-10,109...." Neb. Rev. Stat. § 44-1072 (2010). A fraternal benefit society "shall operate for the benefit of its members and their beneficiaries by: (a) Providing benefits as specified in section 44-1087; and (b) Operating for one or more social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic, or religious purposes for the benefit of its members, which may also be extended to others." Neb. Rev. Stat. § 44-1076(1) (2010). Fraternal benefit societies may enter into contractual obligations to provide benefits to their members and their dependents, including, among others, death, endowment, annuity, disability, medical, and life insurance benefits. Neb. Rev. Stat. § 44-1087 (2010).

Currently, Neb. Rev. Stat. § 44-1095 (2010) provides: "Every society organized or licensed under sections 44-1072 to 44-10,109 shall be a charitable and benevolent institution, and all its funds shall be exempt from all and every state, county, district, municipal, and school tax other than taxes on real estate and office equipment." Also, Neb. Rev. Stat. § 77-202(1)(d) (Cum. Supp. 2014) allows an exemption for "[p]roperty owned by educational, religious, charitable, or cemetery organizations, or any

organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for educational, religious, charitable, or cemetery purposes,...." Section 77-202(1)(d) further states that, "[f]or purposes of this subdivision, charitable organization means an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons;...." *Id.* In light of questions which have arisen as to whether fraternal benefit societies are subject to property taxes under § 44-1095, or whether property of fraternal benefit societies is eligible for exemption under § 77-202(1)(d) as property owned and used for charitable purposes, LB 414 was introduced for "[t]he purpose of...exempt[ing] a society organized or licensed under sections 44-1072 to 44-10,109 (fraternal benefit organizations) from paying taxes on property." Committee Statement on LB 414, 104th Leg., 1st Sess. 1 (March 5, 2014) (Introducer's Statement of Intent). To that end, LB 414 proposes to amend § 44-1095 to provide that "[e]very society organized or licensed under sections 44-1072 to 44-10,109 shall be a charitable and benevolent institution, and all of its funds and property shall be exempt from all and every state, county, district, municipal, and school tax." LB 414, § 1. In addition, the bill would amend § 77-202(1)(d) to provide that, "[f]or purposes of this subdivision, charitable organization means an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons and a fraternal benefit society organized and licensed under sections 44-1072 to 44-10,109;...." LB 414, § 2.

You advise that, during floor debate, a question arose regarding whether LB 414 would exempt all property owned by a fraternal benefit society from taxation, including any property owned by a fraternal benefit society which is not used for charitable purposes. Apparently, the question concerns the language in LB 414, § 1, which states "all of [a fraternal benefit society's] funds and property shall be exempt from all and every state, county, district, municipal, or school tax...," indicating that "all" property of such societies is exempt, regardless of whether it is used for charitable purposes. For the reasons explained below, the bill cannot be interpreted in this manner, as it would be unconstitutional if construed to exempt all property of fraternal benefit societies regardless of its use. To be constitutional, this subsection must be construed, together with the language in section 2 of the bill including fraternal benefit societies as a charitable organization for purposes of applying the exemption in § 77-202(1)(d), to mean that a fraternal benefit society is eligible to seek exemption as a charitable organization only for property it owns and uses exclusively for charitable purposes. Any property owned by a fraternal benefit society not used for charitable purposes would be taxable.

You also ask us to address whether LB 414 would exempt fraternal benefit societies from payment of sales tax. As the bill's stated intent is to exempt such societies from paying property taxes, it does not affect liability of a fraternal benefit society for payment of Nebraska sales and use taxes. To the extent you ask us to opine as to whether fraternal benefit societies are presently exempt from payment of sales and use taxes, we cannot provide an opinion, as we do not give opinions to members of the Legislature construing existing statutes.

ANALYSIS

Neb. Const. art. VIII, § 1, provides, in pertinent part: "(1) Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution;...." Further, "[t]angible personal property, as defined by the Legislature, not exempted by this Constitution or by legislation, shall all be taxed at its depreciated cost using the same depreciation method with reasonable class lives, as determined by the Legislature, or shall all be taxed by valuation uniformly and proportionately;...." Neb. Const. art. VIII, § (2). Article VIII, § 2(2), of the Nebraska Constitution provides, in part: "[T]he Legislature by general law may classify and exempt from taxation...property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user;...." Article VIII, § 2(10), further provides that "no property shall be exempt from taxation except as permitted by or as provided in this Constitution;...."

"Like statutes, constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary." *Hall v. Progress Pig, Inc.,* 259 Neb. 407, 413, 610 N.W.2d 420, 427 (2000). "In ascertaining the intent of a constitutional provision from its language, the words must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense." *Id.* "If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layperson." *Id.*

Article VIII, § 1, requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property...except as otherwise provided in or permitted by [the] Constitution...," and that "tangible personal property...not exempted by this Constitution or by legislation...shall all be taxed at depreciated cost...or shall all be taxed by valuation uniformly and proportionately...." Neb. Const. art. VIII, § 1(1) and (2). Exemptions from property taxation are authorized in art. VIII, § 2, including the exemption for "property owned by and used exclusively for...educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user...." This subsection further provides that "no property shall be exempt from taxation except as permitted by or as provided in this Constitution." Neb. Const. art. VIII, § 2(10). Thus, the plain meaning of these constitutional provisions is that all property is subject to taxation unless an exemption is provided in or permitted by the Constitution.

If section 1 of LB 414 were construed to exempt all property of a fraternal benefit society from taxation, regardless of its use, it would be unconstitutional, as no basis for such an exemption would exist under the Constitution. "If possible, [however], a statute should be construed in such a way as to negative any constitutional infirmity." *Prendergast v. Nelson,* 199 Neb. 97, 111, 256 N.W.2d 657, 667 (1977). Thus, the language in section 1 amending § 44-1095 to exempt property of fraternal benefit

1 amending § 44-1095 to exempt property of fraternal benefit societies from taxation must be construed together with the language in section 2 of the bill including fraternal benefit societies as a charitable organization for purposes of applying the exemption in § 77-202(1)(d), meaning that a fraternal benefit society is eligible to seek exemption as a charitable organization only for property it owns and uses exclusively for charitable purposes. Any property owned by a fraternal benefit society not used for charitable purposes would be taxable.[1]

Indeed, it has long been recognized "[t]hat part of a building owned by a religious, charitable and educational institution, but leased and used by the tenant for business purposes, is not exempt from taxation." *Masonic Temple Craft v. Lincoln County Bd. of Equal.,* 129 Neb. 293, 296, 261 N.W. 569, 570 (1935). *Accord Young Men's Christian Ass'n of City of Lincoln v. Lancaster County,* 106 Neb. 105, 182 N.W. 593 (1921); *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642, 83 N.W. 924 (1900). This principle is recognized in regulations promulgated by the Property Assessment Division of the Nebraska Department of Revenue, which provide that, "[i]f the property, when considered as a whole, is not used exclusively for exempt purposes, but the property has a separate and distinct exempt use portion, an exemption for the value of the portion used for exempt purposes will be allowed." 350 Neb. Admin. Code ch. 40, § 005.03A. One of the examples included in the regulations discussing the "exclusive use" requirement involves "[a] qualifying organization [that] owns a building, which is used for its office space, and leases a portion of the building to a private law firm." 350 Neb. Admin. Code ch. 40, § 005.04E. In that situation, "[t]he portion leased to the private law firm is not used exclusively for exempt purposes and is not eligible for the exemption." *Id.*

Finally, you also ask us to address whether LB 414 would exempt fraternal benefit societies from payment of sales tax. LB 414 was introduced for "[t]he purpose of...exempt[ing] a society organized or licensed under sections 44-1072 to 44-10,109 (fraternal benefit organizations) from paying taxes on property." Committee Statement on LB 414, 104th Leg., 1st Sess. 1 (March 5, 2014) (Introducer's Statement of Intent). As the bill's stated intent is to exempt fraternal benefit societies from paying property taxes, it does not impact the liability of such societies for payment of Nebraska sales and use taxes. We have long taken the position that the Attorney General cannot issue

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[1] This would apply to both real and personal property owned by a fraternal benefit society. In addition to the exemption for property owned and used exclusively for educational, religious, charitable, or cemetery purposes, art. VIII, § 2, also permits "the Legislature to define and classify personal property in such manner as it sees fit, whether by type, use, user, or owner, and may exempt any such class or classes of property from taxation if such an exemption is reasonable or may exempt all personal property from taxation;...." Neb. Const. art. VIII, § 2(9). LB 414 does not attempt to classify personal property of fraternal benefit societies as a separate class for purposes of exemption, and we express no view on whether such a classification, if attempted, would be "reasonable."

Att'y Gen. No. 157 (December 20, 1985). To the extent responding to your question would require us to opine whether fraternal benefit societies are exempt from sales and use taxes under existing statutes, we cannot provide an opinion as to the liability of fraternal benefit societies for payment of sales and use taxes.

CONCLUSION

In conclusion, LB 414 cannot be interpreted to exempt from taxation all property of fraternal benefit societies regardless of its use, as such a construction would be unconstitutional. To be constitutional, section 1 of the bill must be construed, together with the language in section 2 including fraternal benefit societies as a charitable organization for purposes of applying the exemption in § 77-202(1)(d), to mean that a fraternal benefit society is eligible to seek exemption as a charitable organization only for property it owns and uses exclusively for charitable purposes. Any property owned by a fraternal benefit society not used for charitable purposes would be taxable. To clarify this intent, language could be added to section 1 referencing the exemption for property of charitable organizations in section 2 of the bill which includes fraternal benefit societies as charitable organizations.

Further, as the bill's stated intent is to exempt such societies from paying property taxes, it does not affect the liability of a fraternal benefit society for payment of Nebraska sales and use taxes. To the extent you ask us to opine as to whether fraternal benefit societies are presently exempt from sales and use taxes, we cannot provide an opinion, as we do not give opinions to members of the Legislature construing existing statutes.

Very truly yours,

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Approved by:

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pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

07-942-29