STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93097

NO. STATE OF NEBRASKA
OFFICIAL
NOV 22 1993
DEPT. OF JUSTICE

DATE: November 19, 1993

SUBJECT: Authority of State Board of Equalization and Assessment to Consider Petitions to Vacate and Set Aside Prior Orders.

REQUESTED BY: M. Berri Balka, State Tax Commissioner

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

In your capacity as Secretary of the State Board of Equalization and Assessment ["State Board" or "Board"], you have requested our opinion on several questions relating to Petitions submitted to the State Board by various political subdivisions. On July 7, 1993, the State Board was presented with Petitions to Vacate and Set Aside Orders Entered by the Board on April 12, 1991, and June 14, 1991. The Order entered by the Board on April 12, 1991, recertified the valuations of numerous centrally assessed taxpayers for tax year 1989 at zero on remand of the Nebraska Supreme Court's decisions in ***Natural Gas Pipeline Co. v. State Bd. of Equal.***, 237 Neb. 357, 466 N.W.2d 461 (1991), and several companion cases. The Order entered by the Board on June 14, 1991, recertified the valuations of flight equipment of various centrally assessed air carriers for tax year 1990 at zero following the Court's decision in ***Natural Gas Pipeline Co.*** and the Court's granting of Stipulations for Remand of appeals filed by these taxpayers.

The Petitions request the State Board to set aside and vacate these Orders, in part, on the ground that the Orders "unlawfully" exempted personal property of these taxpayers and were "beyond the

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
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Terri M. Weeks
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Linda L. Willard

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Board's authority, unlawful, unconstitutional, and therefore null and void." The Petitions allege that, in ***MAPCO Ammonia Pipeline Co. v. State Bd. of Equal.***, 238 Neb. 565, 471 N.W.2d 734 (1991) ["***MAPCO I***"], and various companion cases, the Nebraska Supreme Court held that the process of "equalization" could not be applied to property that was not taxed, and that "equalization" of the complaining taxpayers' property was not the appropriate remedy. The Petitions also allege that, in ***MAPCO Ammonia Pipeline Co. v. State Bd. of Equal.***, 242 Neb. 273, 494 N.W.2d 535, ***cert. denied*** ___ U.S. ___, 113 S. Ct. 2930 (1993) ["***MAPCO II***"], and several companion cases, the Court approved the remedy provided by the State Board on remand of ***MAPCO I*** providing a reduction in the taxpayers' valuations of 18.8 percent, which remedy was designed to place the taxpayers in the position they would have been if personal property declared to be unconstitutionally exempted in ***MAPCO I*** had been taxed. The Petitions ask the State Board to set aside and vacate its prior Orders and enter orders which provide relief based on a proportionate reduction of the taxpayers valuations, such as was approved in ***MAPCO II***.

You have requested our advice on a number of questions relating to the Petitions submitted to the Board by the political subdivisions. Apart from your initial question concerning legal representation of the Board in these proceedings, your questions generally pertain to the authority or jurisdiction of the Board to consider and act upon the Petitions. In addition, should we determine that the Board has the authority to entertain the Petitions, you ask us if the Board must accept the Petitions and set the matters for hearing, and if the Board must give notice to centrally assessed taxpayers that have entered into settlement agreements for the tax years in question.

I. Legal Representation of the State Board.

Initially, you ask whether "the Attorney General [will] represent the State Board in this matter before the Board and/or on appeal from its action?"

Neb. Rev. Stat. § 84-203 (1991) provides, in part: "The Attorney General is authorized to appear for the state and prosecute and defend, in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interested." In addition, the Attorney General has the duty "[t]o appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Court of Appeals or Supreme Court in which the state is interested or a party; and, when requested by the Governor or the Legislature, to appear for the state and prosecute or defend any action or conduct any investigation in which the state is interested or a party,

before any court, officer, board, tribunal, or commission." Neb. Rev. Stat. § 84-205(9) (Cum. Supp. 1992).

If the Board determines to hear the Petitions filed by the political subdivisions, the subdivisions will undoubtedly present evidence before the Board attempting to support their position. The Court's decision in ***MAPCO II*** establishes that, in proceedings of this nature before the Board, the political subdivisions are "interested parties", and have the "right to appear before the State Board and offer evidence. . . ." 242 Neb. at 265, 494 N.W.2d at 537. Also, we assume the evidence before the Board would consist of any evidence offered by the various centrally assessed taxpayers which may be affected by any decision the State Board may make as a result of such a hearing.

To the extent any evidence on behalf of the state may be presented at any hearing of this nature, we believe that, consistent with recent practice, such should be offered to the Board by the legal staff of the Department of Revenue. The Attorney General acts as legal advisor to the Board. As you may recall, the Attorney General was present and advised the Board on various matters during the hearing on the remand following ***MAPCO I***. Although there are exceptions, generally an attorney should not act as both legal advisor regarding a matter before an administrative body serving in an adjudicatory capacity, and, at the same time, be responsible for prosecuting or presenting evidence in a case before the body. ***See Texaco Refining and Marketing, Inc. v. Assessment Board of Appeals,*** 579 A.2d 1137 (Del. Super. Ct. 1989); ***McIntyre v. Tucker,*** 490 So. 2d 1012 (Fla. Dist. Ct. App. 1986); ***Schmidt v. Independent School District No. 1,*** 349 N.W.2d 563 (Minn. Ct. App. 1984); ***Bruteyn v. State Dental Council and Examining Board,*** 380 A.2d 497 (Pa. Commw. Ct. 1977). Therefore, if evidence is presented by the state at any hearings the Board may hold on the Petitions to Vacate, such should be handled by the Department's legal staff.

This does not mean, of course, that this office would not be responsible for representing the Board on appeal of any decision or order it may make following hearing on the Petitions to Vacate. This office has always represented the Board in court actions, including appellate proceedings, unless the Attorney General has initiated the action against the Board. ***See State ex rel. Sorenson v. State Bd. of Equal.,*** 123 Neb. 259, 242 N.W. 609 (1932). Moreover, as the Attorney General is, by law, vested with the authority to represent the State in court proceedings, this office would, absent a conflict, represent the Board on appeal.

II. Authority or Jurisdiction of the State Board.

Your next three questions deal with issues pertaining to the authority or jurisdiction of the Board to act on the Petitions to Vacate. Specifically, you ask the following: (1) "What authority does the State Board have to consider matters that are not specifically authorized by its statutes or mandated by a court of competent jurisdiction?"; (2) "What authority, constitutional, statutory, or otherwise, does the State Board have to "reopen" a prior tax year?"; and (3) "What inherent powers does the State Board have as a quasi-judicial body, specifically is it clothed with the powers similar to that of a district court in that it may consider motions to vacate or a request to reconsider a case under its equity jurisdiction?". As each of these questions relate to the Board's power to act upon the Petitions, we will consider them together.

> Administrative officers and agencies, in the absence of a grant of power contained in the constitution, derive their powers and authority from the legislature, which must determine the standards of administrative action and may add to, or take away from, the powers and duties granted or imposed on them. The measure of their powers and duties is the statute granting or defining them. Hence, while their powers are derived from, and they have powers conferred on them by, valid statute, their powers are limited or circumscribed thereby, and they possess only such powers as are conferred on them by the constitution, or by statute, or. . . by implication from the grant of express powers.

73 C.J.S. Public Admin. Law and Proc. § 50 (1983) (footnotes omitted).

The Nebraska Supreme Court has generally recognized that "[a]n administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act." ***City of Schuyler v. Cornhusker Public Power Dist.***, 181 Neb. 704, 706, 150 N.W.2d 588, 590 (1967). ***Accord Nebraska Ass'n of Public Employees v. Game and Parks Comm'n***, 220 Neb. 883, 374 N.W.2d 46 (1985). In ***Antelope County v. State Bd. of Equal.***, 146 Neb. 661, 664, 21 N.W.2d 416, 417 (1946), the Court stated that the State Board "[h]as no power or authority except as specifically conferred upon it by statute." In a later decision, however, the Court noted that this "sweeping restriction" was "inconsistent" with Neb. Const. art. IV, § 28, setting forth the power of the Board to "review and equalize assessments of property for taxation within the state", stating that , "[i]n statewide equalization, the board exercises

constitutional power instead of authority delegated by the Legislature." *County of Otoe v. State Bd. of Equal.*, 182 Neb. 621, 624, 156 N.W.2d 728, 731 (1968). Thus, in considering the threshold issue of whether the Board has authority or jurisdiction to consider the Petitions, it is necessary to consider both the constitutional grant of authority to the Board and the statutes governing the Board's exercise of its powers.

The Nebraska Constitution provides that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Neb. Const. art. VIII, § 1. Prior to its amendment in 1992, this section also provided that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, ..." Article IV, § 28, provides, in part: "[The] Tax Commissioner. . . together with the Governor, Secretary of State, State Auditor and State Treasurer shall have power to review and equalize assessments of property for taxation within the state."

Consistent with these constitutional provisions, the Legislature has set forth the procedure by which the Board exercises its equalization power as part of the process of providing revenue for the state's governmental subdivisions. Neb. Rev. Stat. § 77-505 (1990) (*amended* 1992 Neb. Laws, 2d Special Sess., LB 1, § 55), provided that the State Board "shall annually review the abstracts of assessments of real and personal property submitted by the county assessors, examine the valuation of all other property which is valued by the state, and equalize such valuations for tax purposes within the state." "Pursuant to section 77-505, the State Board. . . [has] the power to increase or decrease [by a percent] the actual valuation of a class or subclass" of property. Neb. Rev. Stat. § 77-506 (1990) (*amended* 1992 Neb. Laws, 2d Special Sess., LB 1, § 56). The authority of the State Board to adjust valuations pursuant to its equalization power must be exercised on or before August 15 of each year, the last date on which the Board may certify values to the county assessors. "Each county shall be bound by the valuation established by the board", until the Court of Appeals (or the Supreme Court), "pursuant to an appeal prosecuted pursuant to section 77-510," "rules otherwise". Neb. Rev. Stat. § 77-509 (1990) (*amended* 1992 Neb. Laws, 2d Special Sess., LB 1, § 59). Within ten days of the Board's entry of any final action or decision with respect to the equalization or valuation of any property, "any person, county, or municipality affected thereby" must prosecute an appeal to the Court of Appeals. Neb. Rev. Stat. § 77-510 (Cum. Supp. 1992). If the appeal results in a "lower value than that upon which taxes have been paid," the State Board or the Tax Commissioner, within thirty days of receipt of a final

nonappealable order, must recertify the valuation of the prevailing party to the county or counties for purposes of providing a refund. Neb. Rev. Stat. § 77-1775.01 (Cum. Supp. 1992).

The foregoing recitation indicates that the State Board, in exercising its equalization function, does so on an annual basis. It meets annually for this purpose, and must complete its action for each tax year by August 15. Persons aggrieved by the Board's action must timely prosecute an appeal to obtain judicial review of a decision of the Board. If the appeal results in a decision requiring a lower valuation, the Board or Tax Commissioner then must recertify the valuation to the county or counties affected to provide a refund to the taxpayer. Absent an appeal pursuant to § 77-510, however, there appears to be no mechanism for review or modification of an order involving the Board's exercise of its equalization or valuation authority. Neither the Constitution nor statutes explicitly authorize or empower the Board to vacate or reconsider prior orders entered pursuant to the performance of its equalization power.

It is generally recognized that an administrative agency or body which exercises judicial or quasi-judicial power may, even in the absence of any statute or regulation allowing rehearing or reconsideration of its orders, reconsider and modify its decisions until either the aggrieved party files an appeal or the time for appeal has expired. ***Morris v. Wright,*** 221 Neb. 837, 381 N.W.2d 139 (1986); ***Bockbrader v. Department of Public Insts.,*** 220 Neb. 17, 367 N.W.2d 721 (1985). As noted, no express power providing the Board with authority to vacate and reconsider its prior orders exists. Moreover, § 77-510 requires that an appeal from a final decision of the Board must be taken within ten days of the Board's decision. As the Orders of the Board which are the subject of the Petitions to Vacate were entered in April and June of 1991, the statutory time for prosecution of an appeal from the Orders has long since passed. Under the general rule recognized in Nebraska, the Board's power to reconsider and modify its Orders expired when the time for appeal passed.

In considering the authority of the Board to act in the manner requested, the decision in ***County of Otoe v. State Bd. of Equal.*** is instructive. In ***County of Otoe,*** the Board met in 1966 for the purpose of equalizing valuations of property statewide. Following notice and hearing, it ordered 84 counties to increase the valuations of property of one or more classes or property. On appeals taken within ten days of the Board's order by fourteen counties, the Supreme Court, in May, 1967, reversed the increases ordered for these counties. 182 Neb. at 622-23, 156 N.W.2d at 730. In July 1967, the Legislature acted to enlarge the time for appeal from valuation orders made by the Board in 1966 from ten days from

the date of its order in 1966 to thirty days after the effective date of the act. In August 1967, thirteen counties and a taxpayer sought to appeal from the Board decision entered in 1966. Dismissal of the appeals was sought on the ground that the Legislature's action enlarging the time for appeal constituted special legislation prohibited by Neb. Const. art. III, § 18. Id. at 622, 156 N.W.2d at 730.

In holding the enlargement of the time for appeal of the Board's order from the prior year unconstitutional, the Court, while not "mark[ing] off the precise limits upon [the Board's] authority. . .", stated "it [was] enough that fractionation of board reconsideration because of appellate decisions a year apart would strain the administrative machinery." *Id.* at 624, 156 N.W.2d at 731. Noting that, at the time of the Board's original order, "every county and every taxpayer had an equal opportunity to appeal," and that, "[w]hatever action the board may have taken after the reversals, no one then complained", the Court stated the following regarding the impropriety of the Legislature's extension of the time for appeal:

> The provision extending time singles out the year 1966 for reasons remote from statewide equalization. It is a device for shifting tax burdens in that its sole purpose is ultimately to effect refunds for some taxpayers. The issue is equalization, not individual refunds. If the Legislature in 1967 constitutionally extended the time for appeals from the 1966 decisions, it would perhaps be able to do likewise in 1969 and subsequent years. Should the board readjust the 1966 valuations for these 14 counties, other counties would be in a position to complain of the resulting inequality in their own assessments and deprivation of their right to appeal. Such controversies must come to an end if efficiency and economy are worthwhile objectives of government. The enlargement of time for appeal is special legislation prohibited by the Constitution.

Id. at 625, 156 N.W.2d at 731-32.

County of Otoe v. State Bd. of Equal. establishes that the time for appeal of an order of the Board for a prior year cannot be increased by legislation extending the time for appeal enacted in a later year. The Court did state that, in "statewide equalization", the Board "exercise[d] constitutional power instead of authority delegated by the Legislature." *Id.* at 624, 156 N.W.2d at 731. It is important to note, however, that, in rejecting the Legislature's attempt to expand the right to seek review of an order of the Board for a prior tax year in this manner, the Court

specifically noted the legislation was principally concerned with "individual refunds", not "equalization." *Id.* at 625, 156 N.W.2d at 732. In actuality, the Petitions to Vacate presented here also do not address the Board's exercise of constitutional power relating to "statewide equalization"; rather, the Petitions relate to Orders affecting only certain taxpayers which will, if the relief sought is granted, affect refunds only for these taxpayers, and not "statewide equalization."

In sum, as to your second question, we conclude that the Board does not possess any clear express constitutional or statutory authority or jurisdiction to grant the relief requested in the Petitions. More specifically, with regard to your third question, it is our view that the Board possesses no express authority, either constitutional or statutory, to "reopen" orders affecting prior tax years. This leaves, then, the question of whether the Board possesses "inherent power" as a body exercising quasi-judicial power to vacate or reconsider its prior orders.

> It is not possible to state a general rule governing all administrative agencies in all situations in regard to their power, in the absence of specific statutory authority, to grant a rehearing or otherwise to reconsider or modify their own final decisions. The existence of such a power depends upon the nature of the functions of and power exercised by the agency, the scheme of the enabling statute as a whole, and on an evaluation of its specific provisions, such as a provision authorizing the agency to promulgate rules of procedure, or making administrative determinations final and conclusive, or authorizing judicial review. The existence of the power to reopen and reconsider a final decision may also depend upon the presence of extraordinary conditions, such as a substantial change of circumstances, or fraud, surprise, and similar grounds of an equitable nature.

Annot., Power of Administrative Agency to Reopen and Reconsider Final Decision as Affected by Lack of Specific Statutory Authority, 73 A.L.R.2d 939, 942 (1960).

The Nebraska Supreme Court has stated that administrative agencies or bodies cannot, absent legislative authority, rescind or change their own decisions. *Slosburg v. City of Omaha,* 183 Neb. 839, 165 N.W.2d 90 (1969). As noted previously, however, the Court has held that administrative agencies or bodies which exercise judicial or quasi-judicial power possess inherent or implied authority to reconsider or modify their decisions until either the aggrieved party files an appeal or the time for appeal has expired.

Morris v. Wright, 221 Neb. 837, 381 N.W.2d 139; *Bockbrader v. Department of Public Insts.*, 220 Neb. 17, 367 N.W.2d 721. The Court has not addressed whether an administrative agency or body exercising quasi-judicial authority has inherent or implied power to reconsider or modify its decisions beyond these periods. Based on our previous discussion regarding the absence of any express power for the Board to vacate and modify the Orders at issue, we do not believe the Nebraska Supreme Court would find any general implied or inherent authority allowing the Board to act in the manner requested.

It is conceivable that, even if such general implied power to reconsider does not exist, the Board could be held to possess the power to reopen and reconsider its Orders based on the presence of "extraordinary circumstances." Some courts have recognized that administrative agencies may reconsider and modify their determinations or correct errors on grounds of "fraud . . ., illegality, irregularity in vital matters, mistake, misconception of facts, erroneous conclusion of law, surprise, or inadvertence." 2 Am. Jur. 2d Administrative Law § 524 (1962) (footnotes omitted). In this regard, the Petitions allege that the Board's prior Orders were "unlawful" or "illegal"; that the Orders constituted a "mistake" and were "based upon erroneous conclusions of law"; and that the Orders "constituted a substantial irregularity affecting vital state matters and interests, including those of all political subdivisions levying property taxes, as well as those of all property taxpayers within the state who are affected by the erroneous and illegal" Orders of the Board. Based on these allegations, it is evident that the political subdivisions rely, at least in part, on this principle to support their claim that the Board has authority to act on the Petitions.

Upon review of the decisions from other jurisdictions applying this principle, we conclude that these cases do not directly support the proposition that the Board has authority to vacate and modify its prior Orders. Cases adopting this principle of administrative law are generally distinguishable, either because they recognize the agency's power to reverse and correct errors only until jurisdiction is lost by appeal, the expiration of the time for appeal, or a "reasonable time", *Anchor Casualty Co. v. Bongards Co-Operative Creamery Ass'n*, 253 Minn. 101, 91 N.W.2d 122 (1958), or because the existence of the power to reconsider or modify was exercised to alter agency determinations which had not previously been subjected to judicial review. *E.g.*, *Automobile Club of Michigan v. Commissioner of Internal Revenue*, 353 U.S. 180 (1957); *Warburton v. Warkentin*, 185 Kan. 468, 345 P.2d 992 (1959).

The Orders sought to be vacated and modified were entered in 1991 after the prosecution of appeals of decisions made by the

Board for tax years 1989 and 1990 affecting the valuations of certain centrally assessed taxpayers. These appeals resulted in reversal of the Board's actions, and remand to the Board. The Board, as noted previously, exercises its equalization powers on an annual basis. It must complete the exercise of this power by August 15 of each year. Those aggrieved by a final decision of the Board must timely perfect an appeal pursuant to § 77-510. If, as in these cases, the Board's action is reversed and the cause remanded to the Board to take action lowering valuations, the adjusted valuations are certified to the county or counties affected. Neb. Rev. Stat. § 77-1775.01.

The Board, in exercising its equalization function for a tax year, is limited to its annual review of assessments and its final decision certifying values to be made by August 15. After that time, equalization decisions of the Board may be altered only as the result of an appeal taken pursuant to § 77-510. And, if an appeal results in reversal of the Board's action and remand to the Board, persons aggrieved by the Board's action on remand must seek review pursuant to § 77-510. ***MAPCO II***, 242 Neb. 263, 494 N.W.2d 533. The Board possesses no apparent "continuing" jurisdiction or power to reconsider and modify its orders, either express or implied. Therefore, in response to your fourth question, it is our view that the Board likely does not possess inherent or implied power to consider and act upon the Petitions to Vacate.

By concluding that the Board likely does not itself have either express or implied power to reconsider and modify its prior Orders, we point out that this does not necessarily mean that the subdivisions are without recourse to seek alteration of the Board's action. The Petitions to Vacate generally allege that the Board's Orders were "illegal", "unlawful", "based on erroneous conclusions of law", or were otherwise in error, and, therefore, should be set aside and modified. Without addressing the merits of these claims, the nature of these allegations indicates that the subdivisions may be able to state a cause of action in a judicial action challenging the Board's Orders. ***See Hacker v. Howe***, 72 Neb. 385, 393, 101 N.W. 255, 258 (1904) (Actions of the State Board "not subject to collateral attack except upon grounds of fraud, actual or constructive, or for the exercise of a power not conferred upon them by statute.").

While the issue of "fraud" is, of course, not implicated, the subdivisions have asserted, in substance, that the Board's Orders were "illegal" or "unlawful". We cannot, of course, speculate as to the propriety or ultimate success of any such court action which the subdivisions may bring. We raise this point only to indicate that the relief the subdivisions seek, while apparently not available directly from the Board, could conceivably be pursued in

a judicial forum.

III. Requirement that the Board Accept the Petitions and Establish a Hearing Process.

For the reasons stated above, we believe that the Board lacks express or implied authority to act on the Petitions. Accordingly, the Board may, either on its own motion or at the request of an affected party, dismiss the Petitions for lack of authority and/or jurisdiction. Any such action, however, should be taken only after proper notice and opportunity to be heard is provided to all parties affected by the Petitions to Vacate.

IV. Requirement of Notice to Taxpayers "Settling" Liabilities for the Tax Years in Question.

Finally, you ask whether, "[i]n order to provide due process, must the State Board notice those taxpayers/appellants who have entered into settlement of the tax years in question?"

The political subdivisions have not requested the Board to reconsider its prior Orders as to those centrally-assessed taxpayers who have entered into so-called "Settlement Agreements". It is our understanding that these agreements, by their terms, will not be fully performed until approximately March 1, 1994.

We have concluded, of course, that the Board lacks authority or jurisdiction to act on the Petitions and to grant the relief requested. Should the Board determine to hear the Petitions, however, we believe that all taxpayers that were parties to the Board's prior Orders should be provided notice and an opportunity to be heard at any further proceedings the Board may conduct on the Petitions. While the relief sought is not directed at the Board's prior Orders as to those taxpayers that have entered into settlement for the tax years which are the subject of the Petitions to Vacate, we believe that, in light of the apparent lack of final performance under the agreements, the prudent course of action would be for the Board to notice all taxpayers subject to the prior Orders of any further proceedings on the Petitions, including those taxpayers which have entered into Settlement Agreements. This course should eliminate any due process objections based on the failure to provide notice and an opportunity to be heard.

V. Conclusion.

In sum, it is our opinion that the Board itself does not have power to consider and act upon the Petitions to Vacate filed by the political subdivisions. In reaching this conclusion, we are not unmindful of the financial hardships various political subdivisions

face in dealing with property tax refunds resulting from the Board's prior Orders. As we have pointed out, our conclusion may not necessarily leave the subdivisions without legal recourse. It may be that their claims can be considered by a court in a proper action challenging the legality or lawfulness of the Orders. If such claims can be considered, however, we believe they must be decided by a court, and that, in view of the Board's apparent lack of power to change its own Orders in the manner requested, the forum chosen by the subdivisions is simply improper.

Very truly yours,

DON STENBERG
Attorney General

L. Jay Bartel
Assistant Attorney General

APPROVED BY:

Don Stenberg, Attorney General

7-746-7.24