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STATE OF NEBRASKA
OFFICIAL
NOV 27 1991
DEPT. OF JUSTICE

DATE: November 25, 1991

SUBJECT: Extension of the Assessment Date for Real and Personal Property Beyond January 1, 1992.

REQUESTED BY: Senator Jim Cudaback
Nebraska State Legislature

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

You have requested our opinion regarding the constitutionality of legislative action which would extend the date of assessment for real and personal property taxation beyond January 1, 1992. Presently, Neb.Rev.Stat. § 77-1301(1) (Reissue 1990) provides: "All real and personal property in this state subject to taxation shall be assessed as of January 1 at 12:01 a.m. which assessment shall be used as a basis of taxation until the next regular assessment." The principal constitutional issue raised by legislation of this nature is whether altering the date of assessment for property taxation would represent an unlawful "commutation" of taxes in violation of Neb. Const. art. VIII, § 4.

Neb. Const. art. VIII, § 4, provides in pertinent part:

> Except as to tax and assessment charges against real property remaining delinquent and unpaid for a period of fifteen years or longer, the Legislature shall have no power to release or discharge any county, city, township, town, or district whatever or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall

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> commutation for such taxes be authorized in any form whatever; . . . .

The power to tax is exercised when the tax is levied. See American Province of the Servants of Mary Real Estate Corp. v. County of Douglas, 147 Neb 485, 23 N.W.2d 714 (1946); see also Lynch v. Howell, 165 Neb. 525, 86 N.W.2d 364, (1957) ("The power to tax is determinable as of the date the tax is levied." (syllabus of the court)).

In Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936), the Nebraska Supreme Court held that an act which provided that, under certain conditions, delinquent personal property taxes could be paid in five equal annual installments and delinquent real property taxes could be paid in ten annual installments violated the prohibition in Neb. Const. art. VIII, § 4, against the commutation of taxes "in any form whatever." The court in Steinacher quoted the definition of "commutation" set forth in Woodrough v. Douglas County, 71 Neb. 354, 361, 98 N.W. 1092, 1095 (1904):

> [C]ommutation is a passing from one state to another; an alteration, a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor or of a single payment in lieu of a number of successive payments, usually at a reduced rate.

131 Neb. at 445-46, 268 N.W. at 321.

The decision in Steinacher contains the following discussion of the effect of the prohibition contained in Neb. Const. art. VIII, § 4:

> It is quite apparent that the framers of the Constitution of 1875, the one first containing this provision, and the members of all subsequent constitutional conventions, have been imbued with the idea that all taxpayers are entitled to the same treatment by the government they support. For this reason they have expressly written into our Constitution that the legislature not only shall have no power to release or discharge any one from the payment of his share of taxes, but a commutation from taxes in any form whatever is prohibited. From an examination of the definitions of the word "commutation" hereinbefore set out, and the use of the words "in any form whatever," contained in our constitutional provision, it is quite apparent that the legislature is prohibited by the

> Constitution from changing the method of payment of any tax once levied. Clearly, under this constitutional provision, the legislature cannot reduce the amount of the tax, extend the time of payment, or in any manner change the method of payment.

Id. at 446, 268 N.W.2d at 321.

Recently, in Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991) ["Natural"], the court addressed the effect of the prohibition against the commutation of taxes in Article VIII, § 4. In concluding the redefinition of real property under LB 1 could not be constitutionally applied retroactively to the 1989 tax year because such would result in a commutation of taxes, the court noted that the tax year is "completed on November 1," as both levies and the extension of levies and preparation of tax lists must be accomplished prior to November 1, and that, as to personal property taxes, such are due and become a lien on the property on November 1. Id. at 366-67, 466 N.W.2d at 468. The provisions of LB 1 were found to violate Article VIII, § 4, in that the effect of retroactively applying the redefinition of real and personal property for tax year 1989 would have been to substitute payment of taxes on real estate for payment of taxes on personal property, when "the 1989 levy on both real and personal property was completed, and the taxing power exercised, 20 days before L.B. 1 was enacted." Id. at 369, 466 N.W.2d at 469.

The import of the court's discussion in Natural of the prohibition against the "commutation" of taxes in Neb. Const. art. VIII, § 4, is that legislation which affects the payment of taxes which have been levied, and as to which the taxing process has been completed, may not be altered by the Legislature. Alteration of the date of assessment of property by extending such beyond January 1 would not represent an unlawful "commutation" of taxes under Article VIII, § 4, as the power to tax and the exercise of the taxing power is not completed until the date of levy and the extension of the levy and preparation of tax lists. Therefore, extending the date beyond January 1 on which the value of property is to be determined for assessment purposes would not violate Article VIII, § 4.

We would point out, however, that legislation extending the assessment date for property taxation would likely impact the time deadlines under existing statutes governing the completion of various aspects of the taxing process occurring subsequent to the date of assessment. These deadlines were recently discussed at length in Attorney General Opinion No. 91081, November 12, 1991, p. 4. Thus, any legislation altering the assessment date for property tax purposes should also encompass consideration of the time required to complete all phases of the property tax process. As we

noted in our previous opinion, "[w]hile various time periods relating to the assessment and equalization process could conceivably be adjusted, . . . it appears that any effort to `roll back' the entire process would pose numerous administrative difficulties in the operation of the property tax system." Id. at 4-5. Altering the assessment date established in § 77-1301 would invariably require the amendment of various other statutory time periods currently providing for the assessment, equalization, and levy of property taxes.

You have also asked whether, if legislation were passed during a special session in December to extend the date of assessment beyond January 1, without an emergency clause, county assessors would still be required "to conduct the assessment even though the law doesn't take effect until after March 1?"

Neb. Const. art. III, § 27, provides, in pertinent part:

> No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all members elected otherwise direct.

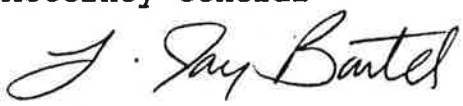
Pursuant to this constitutional provision, a statute which contains no emergency clause does not become operative until three calendar months after the adjournment of the session of the Legislature at which it is passed. Bainter v. Appel, 124 Neb. 40, 245 N.W. 16 (1932). The provisions of Article III, § 27, establishing the time when a statute takes effect, are mandatory. Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

If legislation were enacted extending the assessment date for property taxes in a special session in December (and approved by the Governor) without an emergency clause, such legislation would not, under the plain terms of Article III, § 27, become effective until three calendar months after the adjournment of such session. Until such legislation became effective, county assessors would be obligated to continue to perform those duties relative to the taxing process established under existing statutes, as such would technically remain operative and in effect. If new legislation were to subsequently become effective, however, county assessors (or any other tax officials impacted by legislation of this nature) would then be compelled to act in accordance with the requirements of such statutes following their effective date. While the existence of a such a situation would obviously inject an element of confusion and difficulty into the taxation process, this result is compelled by application of the mandate of Article III, § 27,

should legislation of this nature be enacted without an emergency clause.

Very truly yours,

DON STENBERG
Attorney General



L. Jay Bartel
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cc: Patrick O'Donnell
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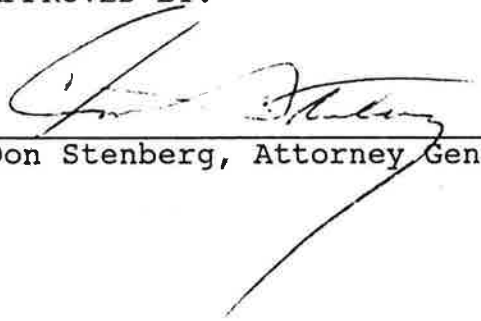

Don Stenberg, Attorney General