STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

91093

STATE OF NEBRASKA
OFFICIAL
DEC 18 1991
DEPT. OF JUSTICE

DATE: December 16, 1991

SUBJECT: Exemption of Property Held by Nonprofit Corporations Organized Under Neb.Rev.Stat. §§ 21-1901 to 21-1991 (Reissue 1987).

REQUESTED BY: Senator Rex Haberman
Nebraska State Legislature

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

You have requested our opinion on several questions relating to a proposed amendment to the provisions of the Nebraska Nonprofit Corporation Act, Neb.Rev.Stat. §§ 21-1901 to 21-1991 (Reissue 1987) [the "Act"].

Initially, you ask whether it would be permissible for the Legislature to amend § 21-1927 to provide that an individual may act as incorporator of a nonprofit corporation under the Act. Presently, § 21-1927 provides: "Two or more persons may incorporate a corporation by signing and delivering articles of incorporation in duplicate to the Secretary of State."

Generally, we can discern no reason why the Legislature could not amend § 21-1927 in the manner you suggest. We note that the Nebraska Business Corporation Act currently provides that, "[e]xcept as otherwise provided by law, one or more natural persons of the age of majority may act as incorporators of a corporation." Neb.Rev.Stat. § 21-2051 (Reissue 1987). There appears to be no basis which would compel us to conclude that the Legislature may not enact a similar provision relating to the incorporation of a nonprofit corporation under § 21-1927.

L. Jay Bartel, J. Kirk Brown, Laurie Smith Camp, Elaine A. Chapman, Mark L. Ells, James A. Elworth, Lynne R. Fritz, Royce N. Harper, Donald A. Kohtz, Sharon M. Lindgren, Charles E. Lowe, Lisa D. Martin-Price, Paul N. Potadle, Marie C. Pawol, Kenneth W. Payne, LeRoy W. Sievers, Susan M. Ugai, Barry Waid, Terri M. Weeks, Alfonza Whitaker

In the event such legislation were to be enacted, you then ask whether a nonprofit corporation could be organized by an individual incorporator pursuant to § 21-1903, and, if so, whether the real property of the nonprofit corporation would be exempt from taxation.

Section 21-1903 provides, in part, as follows:

> Corporations may be organized under the provisions of sections 21-1901 to 21-1991 for any lawful purpose or purposes, including, without being limited to, any one or more of the following purposes: Charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial, or trade association.

With respect to the question of whether a nonprofit corporation could be organized under § 21-1903, the provisions of this section set forth the purposes for which a corporation may be organized in order to qualify for incorporation under the Act. Whether a particular corporation may be organized as a nonprofit corporation under the Act would, of course, depend upon whether it is organized for a lawful purpose as set forth in § 21-1903.

With respect to your further question as to whether the real property of a nonprofit corporation may qualify for exemption from taxation, § 21-1903 further provides as follows:

> Corporations may be organized under the provisions of sections 21-1901 to 21-1991 for the purpose of providing for, erecting, owning, leasing, furnishing and managing any building, hall, dormitory or apartments, lands or grounds for the use or benefit in whole or in part of any governmental, religious, social, educational, scientific, fraternal or charitable society or societies, body or bodies, institution or institutions, incorporated or unincorporated, or for the purpose of holding property of any nature in trust for such society, body, or institution or for the purpose of assisting any governmental body in obtaining grants from the federal government, the performance of any requirements necessary to obtain a federal grant or carrying out the purpose for which a federal grant is obtained. <u>Such corporations, as to the ownership and taxation of their property, shall have all the rights, privileges, and exemptions of the body, society or institution for whose use or benefit or for whom in trust said property is held</u>. (Emphasis added).

The Nebraska Department of Revenue has issued a ruling relating to the exemption of property held by nonprofit corporations organized under §§ 21-1901 to 21-1991 for the use and benefit of political subdivisions. Nebraska Department of Revenue Ruling 42-90-1. In this ruling, the Department concluded that property held by a nonprofit corporation organized under §§ 21-1901 to 21-1991 for the benefit of a political subdivision is exempt from property tax, provided adequate proof of the corporation's purpose of holding the property for the benefit of the political subdivision is provided. The Department concluded such proof could be established by demonstrating the articles of incorporation of the nonprofit corporation provide that, upon dissolution, the property will pass to the political subdivision. Noting that § 21-1903 "allows nonprofit corporations that are organized for the support and benefit of a governmental unit to receive all rights, privileges and exemptions that are afforded to the subdivision," the Department ruled that "[a]ll property held by the corporation will automatically become exempt because of ownership pursuant to section 77-202(1)(a) by virtue of section 21-1903." Nebraska Department of Revenue Ruling 42-90-1.

"Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such interpretation." McCaul v. American Savings Co., 213 Neb. 841, 846, 331 N.W.2d 795, 798 (1983). "The interpretation of a statute given by an administrative agency to which the statute is directed is entitled to great weight." ATS Mobile Telephone, Inc. v. Curtin Call Communications, Inc., 194 Neb. 404, 410, 232 N.W.2d 248, 252 (1975).

We agree with the Department's interpretation that nonprofit corporations organized for the purpose of providing or owning real property for the use or benefit of governmental subdivisions under § 21-1903 would qualify for the exemption from taxation afforded such property under § 77-202(1)(a).[1] The clear intent and purpose of § 21-1903 is to permit a nonprofit corporation organized for the purpose of providing or owning real property for the benefit or use of a specified body, society, or institution with the same exemption from taxation which the body, society, or institution would be qualified to receive if it held the property. In our view, the Department's ruling correctly recognizes the intent of § 21-1903, and we agree with the agency's interpretation of the

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[1] With respect to property of the state and its governmental subdivisions, we also note that such is specifically exempted from taxation under Neb. Const. art. VIII, § 2.

statute as applied to nonprofit corporations holding property for the benefit of governmental subdivisions.

We point out, however, that § 21-1903 provides that nonprofit corporations may be organized for the purpose of providing or owning real property for the use and benefit of entities other than governmental subdivisions. If a nonprofit corporation sought to qualify for exemption under § 21-1903 based on its holding of property for the use or benefit of other entities referred to in the statute, different considerations would necessarily apply. While all property of the state and its governmental subdivisions is exempt from taxation, Neb. Const. art. VIII, § 2, and Neb.Rev.Stat. § 77-202(1)(a), only "property owned and used exclusively for educational, religious, charitable, or cemetary purposes" may be exempted, and only if "such property is not owned or used for financial gain or profit to either the owner or user." Neb. Const. art. VIII, § 2; See also Neb.Rev.Stat. § 77-202(1)(c).

Thus, while § 21-1903 allows nonprofit corporations organized for the purpose of providing or owning real property for the use or benefit of "religious," "educational," or "charitable" societies, bodies, or institutions, to receive the benefit these entities may be entitled to with respect to the ownership and taxation of such property, the requirement that the real property must be "used exclusively" for the purpose specified must be satisfied in order for the exemption to apply. This is so because § 21-1903 only permits a nonprofit corporation to qualify for the exemption the body, society, or institution would enjoy, which, in turn, would depend upon satisfaction of the requirements for exemption mandated by the Nebraska Constitution and applicable statutes for the exemption of property owned and used for educational, religious, or charitable purposes.[2] Whether exemption would be available to a particular nonprofit corporation holding property for the use or benefit of educational, religious, or charitable organizations would, of course, depend upon the facts in the specific case. Consistent with the Department's Revenue Ruling No. 42-90-1, we believe that any nonprofit corporation seeking to establish entitlement to exemption on this basis may demonstrate its proof of purpose that the property is held for the use and benefit of the qualifying entity by providing in its articles of incorporation that, upon dissolution, the property will pass to the qualifying

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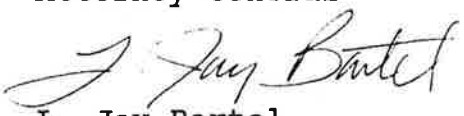
[2] In addition, we note that the pertinent portion of § 21-1903 refers to the holding by nonprofit corporations of real property for the use or benefit of "social," "scientific," or "fraternal" societies or bodies. None of these entities are referred to in Nebraska constitutional or statutory provisions relating to the exemption of property from taxation. See Neb. Const. art. VIII, § 2; Neb.Rev.Stat. § 77-202.

entity, as suggested in your request. The nonprofit corporation would also have to file an application for exemption pursuant to Neb.Rev.Stat. § 77-202.01 to permit the county to determine if the requirements for exemption are met with respect to the use of the property for educational, religious, or charitable purposes. If compliance with these requirements is established, real property held by a nonprofit corporation for such purposes would, in our view, qualify for exemption.

Very truly yours,

DON STENBERG
Attorney General



L. Jay Bartel
Assistant Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

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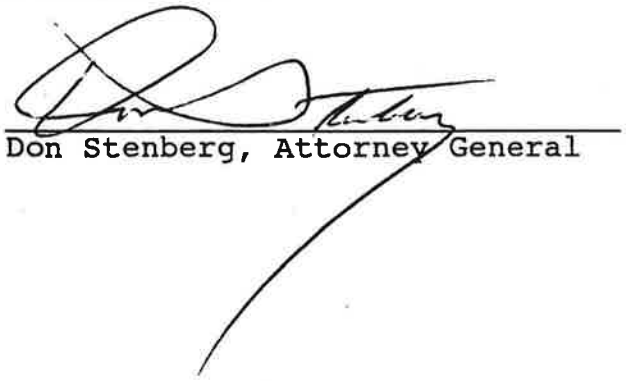

Don Stenberg, Attorney General