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NO.
STATE OF NEBRASKA
OFFICIAL
AUG 9 1995
DEPT. OF JUSTICE

DATE: August 8, 1995

SUBJECT: Authority of State Board of Equalization to Adjust Real Property Values of Classes or Subclasses of Property for Counties Within the Range of Values Established by the Board for Statewide Equalization.

REQUESTED BY: M. Berri Balka, State Tax Commissioner and Secretary, State Board of Equalization and Assessment.

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

By letter dated August 3, 1995, you note that the State Board of Equalization and Assessment ["State Board" or "Board"] met on August 1, 1994, to establish a procedure for any interested person to request a hearing before the State Board to consider any adjustment to the value of real property in any county, even if the real property has an indicated level of value within the acceptable levels of value as established by the State Board at its July 14, 1995 meeting. At the July 14, 1995 meeting, the State Board approved the 1995 standards of equalization of real property, determining that acceptable levels of value of residential and commercial real property were from 89 percent to 100 percent of market value, and that acceptable levels of agricultural land were from 71 percent to 80 percent of market value.

You state that several counties which have classes of real property which fall within the acceptable range of values established by the Board may request that the Board act to adjust

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the level of value of all or certain classes of real property at the Board's meeting to be held on August 11, 1995. You have asked for our advice as to whether "the Board has the authority to adjust the level of value of any class of real property in any county even if the real property has an indicated level of value within the ranges of value established on July 14, 1995." More specifically, you ask whether "the Board ha[s] the authority, or is required, to adjust counties to the end of the range, to some other alternative point within the established range, or to the mid-points of the range established on July 14th?"

I. Nebraska Constitutional and Statutory Provisions.

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. This provision further requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property. . . ."[1] The Constitution further provides that the State Board "shall have power to review and equalize assessments of property for taxation within the state." Neb. Const. art. IV, § 28.

Except for agricultural and horticultural land, "all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value." Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 1994). The Legislature, pursuant to art. VIII, § 1, has provided the method of determining the taxable value of real property for tax purposes. Neb. Rev. Stat. § 77-112(1) (Cum. Supp. 1994) provides that "[a]ctual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade."[2]

The State Board "shall annually equalize the values of all real property as submitted by the county assessors on the abstracts

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[1] Article VIII, § 1, also recognizes that "the Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property. . .but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land."

[2] The Legislature has, of course, provided a different method for determining the taxable value of agricultural and horticultural land. Neb. Rev. Stat. § 77-112(2) (Cum. Supp. 1994).

of assessments. . . ." Neb. Rev. Stat. § 77-505 (Cum. Supp. 1994). "Pursuant to section 77-505, the State Board of Equalization and Assessment shall have the power to increase or decrease the value of a class or subclass of real property of any county or tax district. . . . Such increase or decrease shall be made by a percent." Neb. Rev. Stat. § 77-506 (Cum. Supp. 1994). "Pursuant to section 77-506, if the State Board of Equalization and Assessment finds that a just, equitable, and legal assessment of the property in the state cannot be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by any county, the board shall issue a notice to the counties which it deems either undervalued or overvalued and shall set a date for hearing at least five days following mailing of the notice." Neb. Rev. Stat. § 77-508 (Cum. Supp. 1994). "The State Board of Equalization and Assessment shall, pursuant to section 77-508, raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve intercounty equalization." Neb. Rev. Stat. § 77-508.01 (1990). "After a hearing conducted pursuant to section . . . 77-508, the State Board of Equalization and Assessment shall either (1) enter its order based on information presented to it at the hearing, or (2) meet to hear the recommendation of the Tax Commissioner based on information presented to him or her at the hearing." Neb. Rev. Stat. § 77-509 (Cum. Supp. 1994). An order of the Board entered pursuant to this section must be sent to county officials by August 15, and "shall specify the percentage increase or decrease and the class or subclass of property affected or the corrections or adjustments to be made to the class or subclass of property affected." *Id.*

II. Nebraska Caselaw Discussing the Board's Authority and Judicial Review of Its Orders.

An extensive discussion of the authority of the Board and the scope of judicial review of Board orders is contained in ***Carpenter v. State Bd. of Equal.***, 178 Neb. 611, 134 N.W.2d 272 (1965) ["***Carpenter***"]. Discussing the respective duties of the State Board and the various county boards of equalization, the Court in ***Carpenter*** stated:

> In our scheme of taxation, the Board acts upon the abstracts of tax assessments furnished by each of the counties. The original determination of actual value under the statutory standard is the function of the county board of equalization. The determination of each individual county as to actual value within the county is clothed with a presumption of validity and, in the absence of evidence to the contrary, may be accepted by the Board as conforming to the law. <u>It is fundamental that the Board has no power to readjust individual</u>

> valuations within the county. It can only act to equalize the assessments between different counties in order to achieve the constitutional objective of uniform and proportionate valuations over the whole state. As we see it, the primary duty of the Board is to establish uniformity between the various counties.

Id. at 616, 134 N.W.2d at 276 (emphasis added). ***See also AT&T Information Sys. v. State Bd. of Equal.***, 237 Neb. 591, 595, 467 N.W.2d 55, 58 (1991) (noting that, in reviewing abstracts of assessments submitted by the counties, Board "deals only with the values of taxable property of a county in the aggregate.").

The ***Carpenter*** court also discussed the standard of judicial review applicable to orders of the Board. In this regard, the Court stated:

> [T]he proper rule is that we may not substitute our judgment for that of the Board. We do not pass upon the relative merits or the probative force of the evidence in the record. We review the record only to determine if the Board has complied with the requirements of the statute in exercising the powers granted to it by the Legislature. It is only where the record is clear and conclusive that the Board's action was illegal, contrary to law, arbitrary, and capricious that this court has any power to reverse the findings and the orders of the Board. . . .
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> * * *
>
> A wide latitude of judgment and discretion is vested in the Board.

Id. at 617-18, 134 N.W.2d at 277 (citations omitted).

Finally, we note that the Court in ***Carpenter*** expressly recognized the difficulties inherent in applying concepts of "value" and "equalization":

> [I]t can probably always be demonstrated that the Board, in dealing with the intangible concepts of valuation and uniformity, could never reach any mathematically precise result. Such a yardstick or criterion of equalization can never be accomplished. Approximation, both as to value and uniformity, is all that can be accomplished. . . .And, we have held that the object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value. . . . Actual value is an intangible concept, is

> largely a matter of opinion, and there are no yardsticks by which it can be determined with accuracy. . . . [T]he judgment as to valuation is largely a matter of opinion and is committed to the sound discretion and judgment of the board. We have held that substantial compliance with the requirements of equality and uniformity in taxation laid down by the federal and state Constitution is all that is required and that such provisions are satisfied when designed and manifest departures of the rule are avoided.

Id. at 619, 134 N.W.2d at 278 (citations omitted) (emphasis in original).

III. Equalization by the Board Within a Range of Values.

The Nebraska Supreme Court, as noted, has recognized that "[t]he State Board has a wide latitude of judgment and discretion in equalizing assessment of property." *City of Omaha v. State Bd. of Equal.*, 181 Neb. 734, 738, 150 N.W.2d 888, 891 (1967). "Neither mathematical exactness nor precise uniformity is possible in the complex task of equalization. Substantial compliance with the requirements of equality and uniformity is all that is required." *Id.* While the Board has a great deal of latitude in exercising its statewide equalization function, its "judgment and discretion is not unlimited. . .", and the record of the Board must, "at a minimum, [include] the evidence upon which the State Board relied and the method by which it reached the determinations made must be shown." *Id.*

In several cases, the Court, recognizing that mathematical exactness is not possible in the Board's performance of its equalization function, has recognized that assessment ratios among the various counties may vary, and that deviations can be tolerated, if the disparities are not unreasonable. *E.g., County of Kimball v. State Bd. of Equal.*, 180 Neb. 482, 485, 143 N.W.2d 893, 895 (1966) (upholding Board order increasing by seven percent urban property values in Kimball County, although several counties with similar or lower sales-assessment ratios were not adjusted, stating the "court should not interfere with the discretion of the board when the discrepancy appears to be slight,. . . ."); *County of Lancaster v. State Bd. of Equal.*, 180 Neb. 497, 500, 143 N.W.2d 885, 887 (1966) (upholding Board order for percentage increases in property values in Lancaster County, finding the relationship between the County's sales-assessment ratio and the mean and median ratios of all counties were "close enough, although deviates for other counties are unexplained."). In some cases, however, the Court has reversed Board orders where it has found that deviations in ratios between counties were too great, or so unsupported by the record as to be arbitrary. *E.g., County of Box Butte v. State Bd.*

of Equal., 180 Neb. 492, 493, 143 N.W.2d 900, 901 (1966) (reversing Board order for percentage increase in urban land values in the County, noting that, while "[t]he board is of course not to be straightjacked by percents, [ ] without other evidence the deviate is too great for us to hold that this increase was discretionary."); *County of Garfield v. State Bd. of Equal.*, 180 Neb. 491, 143 N.W.2d 899 (1966) (reversing Board order for percentage increase in rural land values in County, finding deviation of resulting sales-assessment ratio from mean and median of adjusted ratios for all counties too great, thus establishing arbitrary action in the absence of contrary evidence in the record.).

Moreover, the Court's decision in *Carpenter* further indicates that a permissible "range" of values may exist in the Board's performance of its equalization function. In *Carpenter*, the appellants, urging the Court to find that the Board had failed to perform its duty to equalize statewide, argued, in part, that the Board erroneously failed to act in the face of admissions by county assessors that their valuations were below the "actual value" level. 178 Neb. at 628, 134 N.W.2d at 282. The Court rejected this contention, stating that "approximation is all that is required", and that "[a] range above or below 35 percent of actual value was permissible." *Id.*[3]

As we noted in our opinion to the Governor of July 13, 1994, allowance of "tolerances" or "ranges" in statewide equalization orders is widely accepted. Op. Att'y Gen. No. 94053 (July 13, 1994). As one author on the subject has stated:

> Tolerances are frequently allowed in equalization orders by the state agency. . . . The determination of the assessment level by sampling or other techniques is not precise. Also, the many changes in assessments that must be made under a flat equalization order are not generally justified for a rather minor change in the assessment level. These minor changes and the work involved are not only costly but require much explanation. <u>A tolerance of five percent is warranted and justified and a ten percent tolerance is considered reasonable. A ten percent tolerance is used frequently in across-the-board equalization orders.</u>

J. Keith, *Property Tax Assessment Practices* 406 (1st ed. 1966) (emphasis added).

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[3] Prior to the enactment of 1979 Neb. Laws, LB 187, the level of assessment was 35 percent of actual value.

In our Opinion No. 94053, we also noted that the Board had, in prior years, accepted a certain "range" or "tolerance" in performing its statewide equalization functions, based on information and evidence provided by the Department of Revenue. In this regard, we note that, at the July 7, 1994, Board meeting, Mr. Robert Gloudemans, an expert in appraisal methodology employed in advising states regarding their assessment and equalization practices, testified regarding acceptable levels of assessment. He stated that the Board should consider a "target" level of assessment of 95 percent, with a five percent tolerance above or below this point, thus creating a range for equalization purposes of between 90 and 100 percent. He stated a range of this nature established a goal of "[a]ppraising properties real close to market value without moving the center above market value." Mr. Gloudemans further testified that other reasonable alternatives existed, however, and stated that the target or range employed by the Board in previous years, establishing a range between 85 and 100 percent, was also reasonable.

IV. Authority of the Board to Adjust Real Property Values of Classes or Subclasses of Property for Counties Falling Within the Range of Values Established by the Board for Statewide Equalization.

Based on our discussion in section III., the "range" of acceptable aggregate levels of value previously established by the Board (89 to 100 percent for residential and commercial property and 71 to 80 percent for agricultural land), appears reasonable in light of recognized statewide equalization tolerances.[4] Your question, however, is whether "the Board has the authority to adjust the level of value of any class of real property in any county even if the real property has an indicated level of value within the ranges of value established on July 14, 1995", or, more particularly, whether "the Board ha[s] the authority, or is required, to adjust counties to the end of the range, to some other alternative point within the established range, or to the mid-points of the range established on July 14th?"

In your letter, you state that the Board, at its meeting on August 1, 1995, established "a procedure for any interested person to request a hearing before the State Board to consider an adjustment to the value of real property in any county, even if the real property ha[d] an indicated level of value within the acceptable levels of value as established by the State Board at its

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[4] While such tolerances would, based on generally accepted assessment standards, be reasonable, the record before the Board should contain some evidence underlying the basis for the Board's adoption of the ranges established.

July 14, 1995 meeting." Based on reported accounts of the Board's action, this procedure was adopted to allow counties and individuals an opportunity to be heard regarding requests to adjust values within the ranges approved by the Board on July 14, 1995. Counties or taxpayers were given until 3 p.m. on Friday, August 4, 1995, to submit such requests; based on those requests, the Department of Revenue sent out notices to counties potentially affected by the requests to appear before the Board at its meeting on August 11, 1995, to show cause why the adjustments should be made.[5]

With respect to whether the Board may make percentage adjustments to classes or subclasses of property in counties seeking percentage adjustments which fall within the ranges previously established by the Board, we can find no legal authority which would preclude the Board from considering and acting on such requests. In our opinion, the issue is not one of the legal authority of the Board to act on such requests; rather, it is an issue of whether the Board, having established what it previously determined to be an acceptable range of values for statewide equalization purposes, chooses to exercise its judgment to make percentage adjustments to classes or subclasses of property in those counties in performing its statewide equalization function. The determination whether to do so, of course, is one which falls within the sound discretion of the Board. As noted previously, the Board has a wide latitude of judgment and discretion in performing its duty to equalize property values statewide. In exercising its discretion, it should consider the evidence presented by the Department of Revenue, the evidence presented by any county or taxpayer appearing before the Board, and any recommendation to the Board by the Tax Commissioner "as to the action necessary to achieve intercounty equalization." Neb. Dept. of Rev. Reg. 48-006.03.

V. Conclusion.

In conclusion, it is our opinion that, under the circumstances presented, the Board has the authority to consider requests for percentage adjustments to values in classes or subclasses of property in counties whose values fall within the "ranges" previously established by the Board, where requests to make such adjustments have been made and due notice to affected counties has

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[5] This procedure was adopted to comply with statutory requirements governing the Board's exercise its power to make percentage adjustments to the value of classes or subclasses of property in any county or tax district to achieve statewide equalization. *See* Neb. Rev. Stat. §§ 77-505, -506, -508, and -509 (Cum. Supp. 1994).

been provided. In finding that the Board has the authority to consider such requests, we do not mean to imply that the Board is required to make particular adjustments, whether those requests be a percentage adjustment to the "low" end of the range, the "mid-point" of the range, or some other alternative. The Board, as a matter of law, has a wide latitude of judgment and discretion in performing its duty to equalize property values statewide, and it is not required to attempt to do so in a manner which achieves mathematical precision or exactness. If, based on consideration of the evidence before it, the Board determines some adjustments are warranted, we will attempt to defend any such actions in the event of appeals of Board actions. Alternatively, if the Board determines to make no adjustments to values of property in counties which are within the ranges previously established by the Board, we will also attempt to defend such action in the face of appeals. At bottom, whatever action the Board may choose to take is a matter to be decided by the Board based on the evidence presented.

Very truly yours,

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7-2042-7.34

APPROVED BY:

DON STENBERG, Attorney General