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STATE OF NEBRASKA
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DEPT. OF JUSTICE

DATE: September 5, 1995

SUBJECT: Authority of the Nebraska Legislature to Set "Acceptable Ranges" for Statewide Equalization Under 1995 Neb. Laws, LB 137

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

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

On behalf of the State Board of Equalization and Assessment ["State Board" or "Board"], you have requested our opinion on several issues relating to the impact of 1995 Neb. Laws, LB 137, on the authority of the Board to set standards for statewide equalization. LB 137 amended Neb. Rev. Stat. 77-506 (Cum. Supp. 1994) to require that the State Board make percentage increases or decreases in values of classes or subclasses of real property in any county or tax district or real property valued by the state "so that all classes or subclasses of real property in all counties fall within the acceptable range." The "acceptable range" for agricultural land under LB 137 is "from seventy-four to eighty percent of actual value of agricultural land." The "acceptable range" for nonagricultural real property is "from ninety-two to one hundred percent of actual value. . . ." Increases or decreases of classes or subclasses of real property in a county or tax district falling outside this range are to be "made by a percentage and shall result in an average level of assessment for the class or subclass adjusted at seventy-seven percent of actual value for agricultural land and ninety-six percent of actual value for nonagricultural real property." 1995 Neb. Laws, LB 137, 1.

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In light of the enactment of the "acceptable ranges" for statewide equalization established by the Legislature in LB 137, you have asked us "whether the Nebraska Legislature has the authority to set the standards for equalization for the State Board, which is a constitutionally created board." You further ask whether, "[i]f the State Board is bound by the standards for equalization established by LB 137, may the State Board establish standards that are more restrictive than the standards in the legislation?" Finally, you ask if the State Board may "order an adjustment to a class or subclass of property that would achieve a level of value for that class of property at other than the midpoint of the range established in legislation or by the State Board?"

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 Legislature "may prescribe standards and methods for the determination of the value of real property at uniform and proportionate values." Neb. Const. art. VIII, § 1(6). The Constitution further provides that "[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." Neb. Const. art. IV, § 28.[2]

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

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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] These officials have, by statute, been designated as the "State Board of Equalization and Assessment". Neb. Rev. Stat. § 77-501 (1990).

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."[3]

Consistent with its constitutional authority to provide the necessary revenue for state's governmental subdivisions, the Legislature has set forth various procedures by which the Board exercises its statewide equalization power. Neb. Rev. Stat. § 77-505 (Cum. Supp. 1994) provides that "[t]he State Board "shall annually equalize the values of all real property as submitted by the county assessors on the abstracts of assessments. . . ." "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).[4] "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 [which it may direct be conducted by the Tax Commissioner] 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) (amended, 1995 Neb. Laws, LB 452, § 14. An order of the Board entered pursuant to this section must be sent to county officials by May 15, and "shall specify the percentage increase or decrease and the class or subclass of

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[3] 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).

[4] LB 137, of course, amends § 77-506 to establish "acceptable ranges" of values of agricultural and nonagricultural land, and to require adjustments to aggregate assessment levels of classes or subclasses of real property of a county or tax district falling outside the acceptable ranges.

property affected or the corrections or adjustments to be made to the class or subclass of property affected." *Id.*

II. Nebraska Case Law Discussing the Board's Equalization Power.

On many occasions, of course, the Nebraska Supreme Court has recognized that "[a] wide latitude of judgment and discretion is vested in the Board" in the performance of its statewide equalization function. *Carpenter v. State Bd. of Equal.*, 178 Neb. 611, 618, 134 N.W.2d 272, 277 (1965). *See also Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078 (1990); *City of Omaha v. State Bd. of Equal.*, 181 Neb. 734, 150 N.W.2d 888 (1967). The deference granted to the Board's exercise of its equalization power is based on the Court's recognition that "[n]either mathematical exactness nor precise uniformity is possible in the complex task of equalization." *City of Omaha v. State Bd. of Equal.*, 181 Neb. at 738, 150 N.W.2d at 891. Thus, "[s]ubstantial compliance with the requirements of equality and uniformity is all that is required." *Id.*

The power of the State Board to "review and equalize assessments of property for taxation within the state" is, as noted, specifically granted in the State Constitution. Neb. Const. art. IV, § 28. 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 on it by statute." In a later decision, however, the Court noted that this "sweeping restriction" was "inconsistent" with the grant of authority in art. IV, § 28, 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).

III. Power of the Legislature to Enact "Acceptable Ranges" for Statewide Equalization Under LB 137.

LB 137 amends § 77-506, the statute providing the Board has the power to increase or decrease values of classes or subclasses of property by a percent to equalize property in the state, by establishing "acceptable ranges" of values for agricultural and nonagricultural property for statewide equalization. The bill further provides that, if the average level of assessment for a class or subclass of property falls outside the "acceptable range", an increase or decrease "shall" be made which brings the class or

subclass to the "midpoint" of the range.[5] Your initial question is whether the Legislature "has the authority to set the[se] standards for equalization for the State Board, which is a constitutionally created board."

The general rule setting forth the authority and powers of state boards of equalization is set forth in 84 C.J.S. ***Taxation*** § 501 (1954) as follows:

> A state board of equalization acts by virtue of the statute or constitutional provision which brought it into being and prescribed its powers and functions. Accordingly, it has only such powers as are conferred on it by statute or the constitution.
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> * * *
>
> Where duties and powers are imposed on a state board of equalization by the constitution, the legislature is powerless to take them away or confer them on another; but the conferring of express powers on the board does not prohibit the legislature from giving it additional powers. (footnotes omitted) (emphasis added).

The issue of the Legislature's authority to establish the acceptable ranges for statewide equalization set forth in LB 137 thus requires an analysis of whether the Legislature's action amounts to am impermissible divestiture or usurpation of the power granted by the Nebraska Constitution to the members of the Board to "review and equalize assessments of property for taxation within the state."

In analyzing this question, we do not have the benefit of any Nebraska Supreme Court decisions directly addressing the scope of the Legislature's authority to enact legislation impacting the Board's exercise of its equalization power. We can, however, examine the Court's interpretation of the authority of the Public Service Commission, another constitutionally created body, and the power of the Legislature to affect the Commission's exercise of its constitutional grant of authority to regulate common carriers.

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[5] The adjustment for classes or subclasses of agricultural land falling outside the range of seventy-four to eighty percent is seventy-seven percent, and the adjustment to classes or subclasses of nonagricultural real property falling outside the range of ninety-two percent to one hundred percent is ninety-six percent. These figures, of course, are the "midpoints" of the respective ranges.

Neb. Const. art. IV, § 20, which outlines the constitutional authority of the Public Service Commission ["Commission"], provides:

> The powers and duties of such commission shall include the regulation of rates, service, and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

The Court has consistently held that this constitutional provision vests the Commission with jurisdiction to regulate common carriers, unless restricted by "specific legislation". ***State ex rel. State Railway Commn. v. Ramsey,*** 151 Neb. 333, 37 N.W.2d 502 91949); ***Union Transfer Co. v. Bee Line Motor Freight,*** 150 Neb. 280, 34 N.W.2d 363 (1948). Under article IV, § 20, the Legislature may not constitutionally divest the Commission of jurisdiction over a class of common carrier by granting another governmental agency or body (except the Legislature) control over the class of common carrier. ***State ex rel. State Railway Commn. v. Ramsey,*** (Legislature could not constitutionally vest Department of Aeronautics with power to "control common carriers by air"). The Legislature may, however, act to divest the Commission of jurisdiction of common carriers if, through specific legislation, if preempts Commission control. ***Rodgers v. Nebraska State Railway Commission,*** 134 Neb. 832, 279 N.W. 800 (1938).

In ***State ex rel. Spire v. Northwestern Bell Telephone Co.,*** 233 Neb. 262, 445 N.W.2d 284 (1989), the Court considered whether certain legislation[6] which, inter alia, altered the Commission's authority to regulate local telephone rates, unconstitutionally divested the Commission of its authority to regulate rates because it did not constitute "specific legislation". While noting that the act "undoubtedly restrict[ed]" the Commission's power, including its "authority over the rates set by telecommunications companies", the Court held the legislation did not contravene art. IV, § 20, stating:

> [The act] does not totally divest the PSC [Commission] of jurisdiction over telecommunications companies, completely preclude the PSC's regulation of telecommunications companies, or transfer regulatory control to a governmental agency, body of government, or branch of government except the Legislature. Instead, [the act] restricts the situations and manner in which

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[6] 1986 Neb. Laws, LB 835 (*codified at* Neb. Rev. Stat. §§ 86-801 to -811 (1994).

> the PSC may exercise its regulatory power over rates of telecommunications companies.
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> * * *
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> [The act] does not violate Neb. Const. art. IV, § 20, by nullifying PSC jurisdiction over telecommunications companies. Rather, the act constitutes specific legislation prescribing the method and manner in which the PSC will exercise its regulatory activities concerning telephone companies.

233 Neb. at 277-79, 445 N.W.2d at 294-95.

There is a significant difference between the constitutional provision pertaining to the power of the Board and the constitutional grant of jurisdiction to the Public Service Commission. While the Commission's jurisdiction over common carriers must yield in the face of "specific legislation", and this language permits the Legislature to "preempt" Commission jurisdiction, no corresponding language granting the Legislature authority to divest the Board of its power to equalize is provided in art. IV, § 20. Recognizing this difference, we believe it is necessary to analyze the validity of LB 137 in light of its impact on the Board's exercise of its equalization function, and to assess whether the bill effectively divests or nullifies the Board's exercise of its constitutional grant of authority to equalize property values statewide.

LB 137 drastically alters the manner in which statewide equalization of property values is to be accomplished. In the past, of course, the Board has exercised its discretion to act within a "range" of values established by the Board for statewide equalization. Under LB 137, the acceptable "ranges" for agricultural or nonagricultural real property are set by statute, not by the Board. Also, in the past, the decision to order percentage increases or decreases to classes or subclasses of property to achieve statewide equalization (either for properties falling outside or within the range) rested solely in the discretion of the Board. Under LB 137, the Board is directed to adjust the aggregate level of assessment for classes or subclasses of property falling outside the acceptable range to the midpoint of the range established in the bill.

In our opinion, LB 137 does not merely impose restrictions on the Board's exercise of its equalization power. Rather, it effectively divests the Board of jurisdiction or authority to act to equalize property values in the state. It limits the Board's power to increase or decrease values of real property in a class or subclass for equalization purposes to instances where those values

do not fall within the acceptable ranges. As we read the bill, if real property values of a class or subclass of property of a county or tax district fall within the range, the Board may not adjust those values. And, if the values of a class or subclass of property of a county or tax district fall outside the acceptable ranges, the Board must act to adjust the aggregate level of assessment to the midpoint of the acceptable range. Thus, the effect of the act is to divest the Board of any discretion in acting to "review and equalize assessments of property for taxation within the state." Neb. Const. art. IV, § 28. In effect, that function has, by legislative directive, been taken away from the Board, in that it has no discretion under LB 137 in determining how to act to equalize property values in the state. The Legislature has, by enacting LB 137, effectively usurped the Board's authority to carry out its constitutional duty to equalize property values in the state.[7]

We are aware that, prior to the enactment of LB 137, the Legislature imposed limitations on the Board's authority by virtue of the many statutes, noted above, directing the time in which the Board must act (i.e., mandating Board meeting and action by specified dates), and the manner in which the Board must act (i.e., limiting the Board to percentage adjustments by class of property). These statutes, however, are markedly different than the restrictions imposed by LB 137. These prior legislative acts primarily set forth the procedural and mechanical boundaries under which the Board exercised its constitutional duty. LB 137, in contrast, goes much further, and, in effect, divests the Board of any power to act pursuant to the grant of power given it by the Constitution to equalize property values for taxation in the state.

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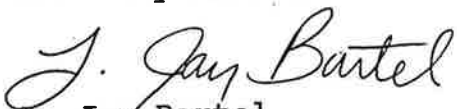
[7] We note that the State Constitution does contain language providing that "the Legislature may prescribe standards and methods for the determination of the value of real property at uniform and proportionate values;. . . ." Neb. Const. art. VIII, § 1(6). This language was originally added to art. VIII, § 1, in 1954. We have reviewed the legislative history underlying the Legislature's submission of this language amending art. VIII, § 1, to the voters for approval, and it reveals the intent of the change was to allow the Legislature greater authority and flexibility to determine the manner in which values were to be determined for property tax purposes. *See* Floor Debate on LB 4, 66th Neb. Leg., Special Sess. 32, 77, 80, 82-85 (May 3,4 1954). It does not reveal any intent to give the Legislature authority to alter the constitutional power of the Board to exercise its power to "equalize assessments of property for taxation within the state." Neb. Const. art. IV, § 28.

IV. Conclusion.

In view of the foregoing, it is our opinion that the Legislature lacked the authority to impose the "standards" for equalization for the State Board contained in LB 137. We therefore conclude that the Board is not bound to follow the "acceptable ranges" for equalization set forth in LB 137. In view of our conclusion, it is unnecessary to address the remainder of your questions, as they are predicated on the premise that the Board is bound to follow the dictates of LB 137.[8]

Sincerely,

DON STENBERG
Attorney General



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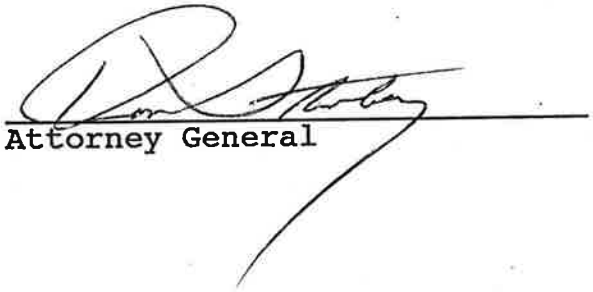

Attorney General

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[8] The only exception is your final question, to the extent it asks if the Board can order an adjustment to a class or subclass of property that would achieve a level of value for that class or subclass at other than the midpoint of any range established by the Board. The determination of an appropriate adjustment would rest in the sound discretion of the Board. We are aware of no Board rule, or any other action taken by the Board, which would preclude it from exercising its discretion in a proper case to equalize at some level other than at the "midpoint" of a range it has established.