

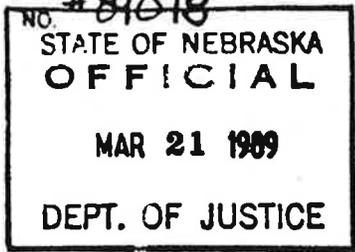
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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 20, 1989

SUBJECT: LR 2CA - Proposed Constitutional Amendment to Except Agricultural Land from the Uniformity Requirement

REQUESTED BY: Senator Rod Johnson
Nebraska State Legislature

WRITTEN: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on several questions relating to LR 2CA. Generally, this proposed constitutional amendment would amend Article VIII, Section 1, of the Nebraska Constitution, to permit the Legislature to establish agricultural and horticultural land as a separate and distinct class of property for tax purposes which may be excepted from the uniformity requirement contained in this constitutional provision. Specifically, the bill would amend Article VIII, Section 1, to provide, in pertinent part, as follows:

The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that:

* * *

(2) 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 which are not uniform or proportionate (a) with other classes of property or (b) within the class of agricultural and horticultural land.

As you note in your request letter, some of the questions you have asked concerning this proposed amendment were addressed in an opinion issued by this office during the previous legislative

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session discussing the provisions of LR 249CA. Attorney General Opinion No. 88027, March 25, 1988. While the amendments and issues presented are similar, we will nevertheless endeavor to specifically address each of your present questions involving LR 2CA.

QUESTION NO. 1: Is it constitutionally permissible to classify agricultural and horticultural land as a separate and distinct class of property for tax purposes, and to use a method to determine the value of agricultural and horticultural property for tax purposes which is different from that used for other taxable property?

RESPONSE: In Banner County v. State Board of Equalization and Assessment, 226 Neb. 236, 411 N.W.2d 35 (1987) ["Banner County"], the Nebraska Supreme Court stated that the adoption of amendment four in 1984 (permitting the Legislature to establish agricultural land as a separate and distinct class of property for tax purposes) did not exempt agricultural land from the requirement of uniformity of taxation in relation to all other tangible property, as mandated by Article VIII, Section 1, of the Nebraska Constitution. The court specifically noted that amendment four permitted ". . . agricultural property to be treated as a separate class for purposes of property tax." Id. at 252, 411 N.W.2d at 45. In discussing the effect of this amendment, the court noted that the language of amendment four, while permitting the Legislature to separately classify agricultural and horticultural land for tax purposes, did not eliminate the requirement of uniformity of taxation of such property in relation to other tangible property. In this regard, the court stated:

The uniformity clause requires that all tangible property be taxed uniformly and proportionately, while amendment four merely permits the Legislature to place agricultural land in a separate class for tax purposes, permitting the valuation of such land by a different method. . . . [A]mendment four permitted the Legislature to classify property as a separate class, but the uniformity clause required the Legislature to treat that class in a uniform manner with other tangible property.

Id. at 253, 411 N.W.2d at 46.

Accordingly, it is apparent that the court's decision in Banner County should not be construed as precluding the separate classification of agricultural land for tax purposes; rather, the opinion reveals the court did not view the language of amendment four as indicative of an intent to eliminate the requirement of uniformity in relation to the taxation and valuation of agricultural land and all other tangible property. The question which remains, then, is whether, if agricultural land is established as a separate and distinct class of property for tax purposes, it is constitutionally permissible to value and tax such property in a manner different than that employed to value other property subjected to taxation.

In Banner County, the court indicated some concern as to whether a state constitutional amendment permitting agricultural land to be taxed differently than other land utilized to produce income would violate the equal protection clause of the United States Constitution. 226 Neb. at 255, 411 N.W.2d at 47. In raising this concern, the court cited the United States Supreme Court decision in Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923), in which the Court held that the failure to provide a taxpayer with equal tax treatment in accordance with the state constitutional requirement of uniform taxation resulted in a violation of the due process and equal protection guarantees contained in the Fourteenth Amendment of the United States Constitution. In view of the Nebraska Supreme Court's reference to this issue in the Banner County case, it is possible that, if presented with a question as to the validity of a constitutional provision permitting unequal treatment among owners of agricultural land and owners of other real property, the court may conclude that such disparate treatment would violate the guarantees of due process and equal protection of the law under the federal constitution.

Various decisions concerning the validity of state taxation under the equal protection clause have upheld the classification of property for tax purposes, provided the distinctions drawn by virtue of such classification schemes rest upon some difference that bears a rational and reasonable relationship to the object of the act. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Indeed, this principle was reaffirmed in the recent United States Supreme Court decision in Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. _____, 102 L.Ed.2d 688, 109 S.Ct. 633, (1989), in which the Court stated the following:

The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. Allied Stores, supra, at 526-

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527 ("The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products"). It might, for example, decide to tax property held by corporations, including petitioners, at a different rate than property held by individuals. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (Illinois ad valorem tax on personalty of corporations.) In each case, "[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

Id. at _____, 102 L.Ed.2d at 697-98, 109 S.Ct. at 638. (Footnote omitted).

Courts from various jurisdictions have upheld the validity of legislative classifications of property for tax purposes based on the use of the property against challenges asserting such classification schemes violated the equal protection clause. Howell v. Malone, 388 So. 2d 908 (Ala. 1980); Holzwasser v. Brady, 262 S.C. 481, 205 S.E.2d 701 (1974). A number of states have adopted either constitutional or statutory provisions allowing the classification of real property for tax purposes. Note, Classification of Real Property for Tax Purposes in Illinois - Hoffman v. Clark, 28 DePaul L. Rev. 849, 849 n. 9 (1979), and many states specifically provide for the separate classification of agricultural land for tax purposes. Note, Separate Property Tax Classification for Agricultural Land: Cure or Disease?, 64 Neb. L. Rev. 313, 315 n. 9 (1985). Specifically, the validity of providing different tax treatment for agricultural property has been upheld against challenges brought on equal protection grounds. See, e.g., Weisinger v. White, 733 F.2d 802 (11th Cir. 1984); Great Northern Ry. Co. v. Whitfield, 65 S.D. 173, 272 N.W. 787 (1937); See Comment, Preferential Assessment of Agricultural Property in South Dakota, 22 S.D.L.Rev. 632 (1977); See generally Annot, 98 A.L.R.3d 916, 928-29 (1980).

The general rule regarding the validity of providing special treatment of agricultural land for tax purposes is stated in 3 Am.Jur.2d Agriculture §9 (1986) as follows:

In an agricultural state it is reasonable for the legislature to offer inducements to agriculture through tax laws. Although it is generally held, in jurisdictions with constitutions that require taxes to be uniform, that an exemption of agricultural land from taxation results in an unconstitutional discrimination,

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if a separate classification of agricultural lands for tax purposes is not prohibited, or if it is specifically authorized by constitutional provisions, land devoted to agricultural purposes may properly be given the benefit of a lighter tax burden than that imposed on other land or even exempted altogether from certain taxes. Among other reasons, the state's power to offer inducements to agriculture and to improve a depressed economic condition of that industry is held to justify the discrimination in favor of agricultural lands.

Furthermore, it has been suggested that different or preferential tax treatment of agricultural land is justified based on the unique nature of agri-business and concern over land use and the environment. In particular, the high-risk character and high outlay, low income nature of farming provides a valid and rational basis for establishing protective tax treatment for agricultural land, especially in a state like Nebraska, where agriculture is the principle industry in the state. Comment, Nebraska's "Mysterious" New Tax Valuation System: LB 271, the Agricultural Land Valuation Law, 19 Creighton L.Rev. 623, 628 (1986).

In Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), the Nebraska Supreme Court, in upholding the validity of legislation granting preferential treatment with respect to the taxation of personal property used in agricultural production, reiterated the general rule that it is competent for the Legislature to classify property for purposes of taxation, provided the classification rests on some reason of public policy, or some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. The criteria outlined in Stahmer with regard to the validity of classifications scrutinized under our state constitution are equally applicable in considering whether legislative classifications satisfy the requirement of equal protection guaranteed under the federal constitution.

As was noted, Sioux City Bridge Co. v. Dakota County involved a challenge under the equal protection clause based on a failure to provide uniform tax treatment of property within the same class, as mandated under the state constitution. LR 2CA, however, would allow the Legislature to specifically except agricultural land from the general uniformity requirement. Under such circumstances, the appropriate question to consider in analyzing the impact of the equal protection clause with regard to any disparate treatment which may result in the valuation and taxation of agricultural land in comparison to other real property concerns whether a rational basis exists to justify a difference in tax treatment of these types of property. In light of the above-cited authority, we believe that the separate classification, valuation, and taxation

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of agricultural land in a manner which differs from the tax treatment of other property does not, per se, violate the due process or equal protection clauses of the federal constitution.

QUESTION NO. 2: Does the language of LR 2CA establish a separate and distinct class or property for agricultural and horticultural land, or does it merely establish a subclass of tangible property? In the event that the language of LR 2CA establishes a separate class of property for agricultural and horticultural land, taxed in a manner which results in values which are not uniform in relation to other property, does the language of the proposed amendment remove agricultural and horticultural land from the constitutional requirement that all taxes be levied by valuation uniformly and proportionately in relation to all other tangible property?

RESPONSE: An examination of the amendment to Article VIII, Section 1, of the Nebraska Constitution, proposed under LR 2CA, reveals the amendment will not, in and of itself, result in the removal of agricultural land from the uniformity requirement. Rather, the proposed amendment provides the Legislature may establish agricultural and horticultural land as a separate class of property for tax purposes, and that agricultural and horticultural land may be valued and taxed in a manner which is not uniform with "other classes"¹ of property. To the extent that the amendment would permit the Legislature to act in this regard, it appears the language of LR 2CA is sufficient to enable the Legislature to classify agricultural and horticultural land separately from other property, and to value such property in a non-uniform or different manner than other property for tax purposes.

QUESTION NO. 3: Does the language of LR 2CA eliminate any requirement that taxes on agricultural and horticultural property be levied by valuation uniformly and proportionately, and, if so, is it constitutionally permissible for the proposed amendment to permit non-uniform tax treatment of property within the class of agricultural and horticultural property?

RESPONSE: Initially, as previously noted, it seems the plain meaning of the proposed amendment would allow the Legislature to eliminate any requirement that taxes on agricultural and

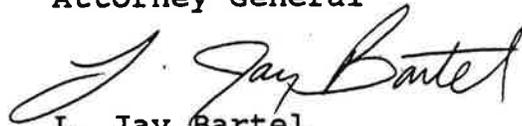
¹ While it seems that the use of the term "other classes" in this regard is meant to refer to all other property outside the agricultural class which would remain subject to the uniformity requirement in Article VIII, Section 1, the provision of language clarifying such an intent may be advisable to clearly reflect this purpose.

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horticultural property be levied in a manner which is uniform with other tangible property. In the event the Legislature were to act pursuant to an amendment such as LR 2CA (removing any requirement as to uniformity by enacting a statutory classification of property consistent with such an amendment), it is evident that the same concerns expressed in Attorney General Opinion No. 88027, March 25, 1988, regarding the rationality and reasonableness of such legislation, would provide the basis for a challenge as to the constitutionality of legislation eliminating any requirement of uniform or equal treatment within the agricultural land classification. As stated in our previous opinion, we cannot readily discern any rational basis upon which different tax treatment of various "subclasses" of agricultural property may be supported. Accordingly, we cannot say that any disparity in taxation which may result from the elimination of any requirement of uniform or equal treatment in the taxation of subclasses of agricultural land could withstand constitutional attack on equal protection grounds.

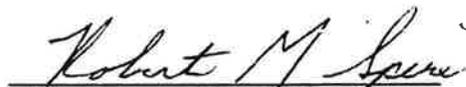
Very truly yours,

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APPROVED:


Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

7-101-13