

Linda Willard

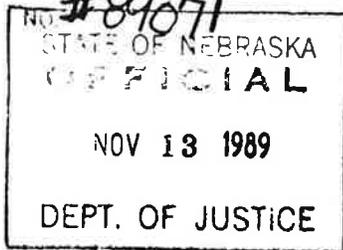
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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STATE CAPITOL

LINCOLN, NEBRASKA 68509



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DATE: November 13, 1989

SUBJECT: Constitutionality of Legislation Amending the Definition of Real Property in Neb.Rev.Stat. §77-103 (Reissue 1986)

REQUESTED BY: Senator James D. McFarland
Nebraska State Legislature

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

You have requested our opinion as to the constitutionality of legislation to be introduced at the special session which would amend the definition of "real property" currently contained in Neb.Rev.Stat. §77-103 (Reissue 1986). The draft bill which you have submitted for our review would add a subsection to §77-103 which would include within the definition of "real property" the following: "Buried pipelines, buried and overhead cables, transmission towers and lines, railroad tracks, fixed signals, and rights-of-way, and other similar property attached to real estate," Your question concerns whether the enactment of such legislation would violate the requirement of uniform taxation in Article VIII, Section 1, of the Nebraska Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Neb.Rev.Stat. §77-103 (Reissue 1986) provides:

The terms real property, real estate and lands shall include city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto.

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Personal property is defined to include all property other than real property and franchises. Neb.Rev.Stat. §77-104 (Reissue 1986).

Northern Natural Gas Co. v. State Board of Equalization and Assessment, 232 Neb. 806, 443 N.W.2d 249 (1989) ["Northern"], involved an appeal from a request presented by Northern to the State Board of Equalization and Assessment to have the personal property component of its unit value equalized with railroads and car companies in Nebraska, as well as a determination that its pipelines were personal property. In assessing Northern's contentions, the court, citing the decision in State ex rel. Meyer v. Peters, 191 Neb. 330, 215 N.W.2d 520 (1974), noted the definition of real property currently contained in Neb.Rev.Stat. §77-103 (Reissue 1986) largely codified the common-law rules relating to fixtures. Applying the common-law factors for determining whether an item constitutes a fixture, the court determined that Northern's pipeline property constituted personal property. Id. at 822, 443 N.W.2d at 259.

The question which arises in considering your proposed amendment to the definition of real property for tax purposes is whether the Legislature may, consistent with constitutional requirements, adopt a statutory definition of real property which differs from adherence to the common-law standards which the court has stated are presently contained in §77-103. In this regard, "[i]t is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, 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." Stahmer v. State, 192 Neb. 63, 68, 218 N.W.2d 893, 896 (1974). Primarily, the standard to be employed in assessing the validity of any action to be undertaken by the Legislature in classifying and defining real property for tax purposes is one of reasonableness.

With regard to the determination of whether particular kinds of property of public service corporations are to be regarded as real or personal for tax purposes, the following discussion is contained in 71 Am.Jur.2d State and Local Taxation §439 (1973):

The question is, of course, one within the discretion of the legislature, and if the legislative intention is deducible from the controlling statutes, it must be respected. Thus, in numerous instances the problem resolves itself into a determination of whether or not the particular kind of property under consideration may be regarded as "land," "real estate," "lots," etc., within the meaning of applicable statutes. Under some

statutes, broad terms of the kind mentioned are expressly defined as including structures or improvements attached to the soil, and where this is the case, a somewhat more liberal interpretation of the kinds of property owned by public service corporations which may be regarded as realty for tax purposes is usually adopted. Where the applicable statutes contain no clear indication of the intention of the legislature with respect to the question under consideration, many courts fall back upon general principles relating to the law of fixtures, making the question whether a particular form of property owned by a public utility is to be regarded as real estate for tax purposes depend upon whether or not it may be regarded as a fixture.

(Footnotes omitted).

Consistent with these general principles, states other than Nebraska have adopted statutory definitions of real property or real estate for tax purposes that include types of property which, under the common-law of fixtures, would likely be considered to be personalty. See, e.g., N.Y. Real Property Tax Law §102, Subd. 12 (McKinney 1984 and Supp. 1989); Iowa Code Ann. §427 A.1, Subd. 1 (West Supp. 1989); N.D. Cent. Code §57-02-04, Subd. 3 (1983). In particular, the New York statutory definition of real property cited above contains a list similar in nature to that contained in L.B. 1, which is before the Legislature for consideration in the current special session. In sustaining the constitutionality of this definition, the New York Supreme Court stated: "The Legislature has the power to classify and define what property is taxable as real property, and for some time prior to the enactment of the statute in question the Tax Law has provided that certain property, which under the common law is personal property, is subject to tax as real property." Beagell v. Douglas, 2 Misc.2d 361, 363, 157 N.Y.S.2d 461, 463 (N.Y.Sup.Ct. 1955). See also Signal Oil and Gas Co. v. Williams County, 206 N.W.2d 75 (N.D. 1973) (holding provision of property tax law defining as "real property" machinery and equipment used in refining oil and gas did not create unreasonable classification in violation of State Constitution or the Equal Protection Clause of the Federal Constitution); Heritage Cablevision v. Marion County Board of Supervisors, 436 N.W.2d 37 (Iowa 1989) (rejecting facial constitutional challenge to Iowa statute exempting most, but not all, tangible personal property by classifying certain types of property as real property).

In spite of this precedent from other jurisdictions upholding legislative classifications and definitions which alter the common-law of fixtures in determining the status of property as real or

personal, it is necessary to give due consideration to the potential impact of the Nebraska Supreme Court decision in Moeller, McPherrin and Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934) ["Moeller"]. Moeller involved a constitutional challenge to an attempt by the Legislature to alter the taxation of tangible and intangible property. Prior to the adoption of the challenged legislation, tangible property was defined for tax purposes to include all personal property possessing a physical existence, excluding money. Intangible property was defined as all other personal property, including money. 127 Neb. at 432, 255 N.W. at 555. The Legislature attempted to amend these definitions by providing that tangible property would consist of two classes: Class 1, to include all personal property possessing a physical existence; and Class 2, to include stocks, notes, securities of foreign countries, accounts, judgments, liens, bonds, and all demands for labor, or other valuable things, due or to become due. Id. at 433, 255 N.W. at 555.

Our court, in assessing the constitutionality of the Legislature's redefinition of tangible property, stated:

May a legislature, under the guise of defining a word, do so with a definition which contravenes our Constitution, and which is not true or legal in fact? Class 2 of tangible property, as defined in House Roll No. 9, is intangible property as defined by the leading dictionaries.

* * *

Can the legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the legislature has power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? Tangible is the direct opposite of intangible; and can the legislature, under the guise of calling it two separate classes of tangible property, include all intangible property under class 2 of tangible property? In our opinion, there is a limit to the legislature's power to nullify and circumvent constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word.

The Constitution of Nebraska clearly provides for two kinds of personal property for purposes of taxation, and the legislature has abrogated one of these by the device of calling it a class under the other. The legislature could not directly blot out a provision of

the Constitution; has it not, by House Roll No. 9, attempted to do it indirectly?

If the Constitution gives one definition of a legal term, and a statute another, it is the duty of a court to declare that the Constitution governs.

Id. at 433, 255 N.W. at 555-56.

While the above-quoted language seems to cast some doubt on the Legislature's ability to redefine terms for property tax purposes, the situation addressed in Moeller is distinguishable from the proposal currently before the Legislature to alter the definition of real property. As noted in the court's decision, the Nebraska Constitution was amended in 1920 to separate tangible property from intangible property for tax purposes, in order to permit a different rate of taxation upon tangibles. 127 Neb. at 428, 255 N.W. at 553. Thus, the effect of the Legislature's action, defining as Class 2 of tangible property types of property which were intangible, was to nullify the constitutional distinction between the classes of tangible and intangible property. In contrast, if the Legislature were to alter the definitions of real or personal property for tax purposes, no similar concern should arise, as both real property and taxable personal property are within the class of "all tangible property" under Article VIII, Section 1, of the Nebraska Constitution. See Grainger Bros. Co. v. County Board of Equalization, 180 Neb. 571, 144 N.W.2d 161 (1966) (business inventories and real estate are in the same class for purposes of taxation.) Under these circumstances, it appears that the rationale behind the decision in Moeller is not applicable to the current legislation before the Legislature regarding the definition of real property for tax purposes.¹

In sum, it is our opinion that neither the uniformity requirement of Article VIII, Section 1, of the Nebraska Constitution, nor the Equal Protection Clause of the United States Constitution, preclude the enactment of legislation which would alter the definition of real property established for tax purposes pursuant to Neb.Rev.Stat. §77-103 (Reissue 1986), provided a reasonable and rational basis can be articulated for the definition

¹ It should be noted that the Legislature could not, by definition, seek to create a class of exempt personal property under the authority granted under Article VIII, Section 2, by defining property which clearly constituted real property to be personal. This, in our opinion, represents the type of action prohibited by application of the principle enunciated in Moeller.

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established. The question of whether a proper basis exists to support any redefinition to be enacted must, in the first instance, be committed to the Legislature's consideration and discretion.

Very truly yours,

ROBERT M. SPIRE
Attorney General

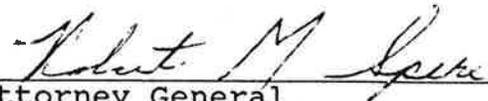


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cc: Patrick J. O'Donnell
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APPROVED BY:



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