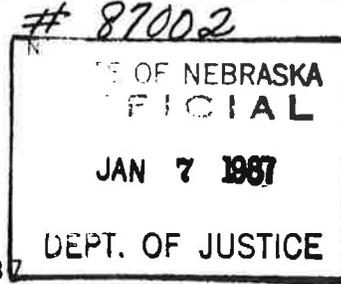


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
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DATE: January 7, 1987

SUBJECT: Constitutionality of Requiring Payments in Lieu of Taxes by Cities and Villages Owning Real Property Outside Their Own County Used for Water Supply Purposes.

REQUESTED BY: Senator Emil E. Beyer, Jr.
Nebraska State Legislature

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

You have requested our opinion concerning the constitutionality of legislation requiring cities and villages to make payments in lieu of taxes on real property located outside of their own county which is used for water supply purposes. Upon examination of this issue, it is our conclusion that imposing such a requirement by legislative act would be unconstitutional.

Article VIII, Section 2, of the Nebraska Constitution, provides, in pertinent part: "The property of the state and its governmental subdivisions shall be exempt from taxation." This constitutional provision exempts from taxation the property of all governmental subdivisions, including property owned by cities, villages, and municipalities. City of Omaha v. Douglas County, 96 Neb. 865, 148 N.W. 938 (1914) (municipally owned water works exempt from general state and county taxes); See, Platte Valley Public Power and Irrigation District v. County of Lincoln, 144 Neb. 584, 14 N.W.2d 202 (1944).

The plain language of Article VIII, Section 2, prohibits the imposition of any direct tax on property owned by governmental subdivisions of the State of Nebraska, which would include cities, villages, and municipalities. The question which remains is whether legislation may nevertheless be enacted to require such governmental subdivisions to make payments in lieu of taxes on real property owned under the circumstances previously described.

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In analyzing this issue, we believe it is significant to note that the Nebraska Constitution contains a specific provision requiring public corporations and political subdivisions providing electricity to make payments in lieu of taxes on property held for such purpose. Neb. Const. Art. VIII, Section 11. The effect of this constitutional provision was discussed by the Nebraska Supreme Court in Nebraska Public Power District v. Hershey School District, 207 Neb. 412, 299 N.W.2d 514 (1980). In this case, the court held that payments required by statute to be made by a public power district to offset the expense of educating the children of persons employed in the construction of electrical generating facilities constituted taxes or payments in lieu of taxes in addition to those payments authorized under the Constitution, and that the statute in question therefore violated the provisions of Article VIII, Section 11. In reaching this conclusion, the court discussed the historical background behind the adoption in 1958 of the payments "in lieu of taxes" mandated by Article VIII, Section 11, as follows:

The original enabling act providing for the creation and operation of public power districts in Nebraska was enacted in 1933. Thereafter, protests arose over the loss of tax revenue which would be sustained by the state and its various governmental subdivisions if tax exempt public power districts acquired the taxable properties of privately owned electrical facilities. The Legislature then enacted statutes which required any public power district which acquired property of an existing privately owned utility to make payments "in lieu of taxes" to the various taxing entities in amounts equal to those paid by the private utility in the year immediately preceding the purchase or acquisition. Payments in lieu of taxes on real property purchased from other than a private utility were required on the same basis for the year of acquisition, but for subsequent years the appropriate county board of equalization was to determine the amount to be paid in lieu of taxes on such real estate "as equity and justice may require." See Neb.Rev.Stat. §§70-651 and 652 (Reissue 1985) (repealed 1959).

In the years that followed, case law in Nebraska and elsewhere raised substantial questions as to whether mandatory payments in lieu of taxes constituted an indirect attempt to tax public property which was otherwise exempt from taxation under the Constitution. In order to settle the issues, an amendment to the Constitution was proposed and adopted in 1958. That is the amendment involved here.

(Emphasis added). Id. at 414-15, 299 N.W.2d at 516.

Robb v. Nielson, 71 Idaho 222, 229 P.2d 981 (1951), involved the constitutionality of a statute requiring payments in lieu of taxes on lands owned by the Idaho Fish and Game Department. Article VII, Section 4 of the Idaho Constitution, provided: "The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation." In holding the statute requiring payments in lieu of taxes unconstitutional, the court stated:

Chapter 85 appears to be an effort to provide by indirection for taxation by the counties of state lands. It seeks to accomplish the same result as taxation.

* * *

What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.

* * *

Under our constitutional provisions, the legislature cannot, either directly or indirectly, tax or authorize the taxation of public property, or provide for the same result, and cannot waive the exemption provided for in the constitution and voluntarily pay taxes on public property.

We are constrained to hold that said Chapter 85 indirectly provides for taxation of state lands by authorizing payments which accomplish the same result as taxation, and that it is void because of conflict with Article VII, Section 4 of the constitution.

Id. at 226, 228, 229 P.2d at 983, 984-85.

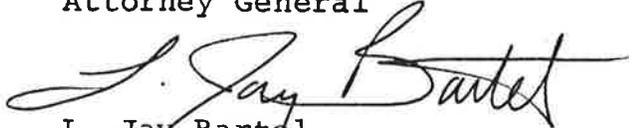
It is fundamental that the Legislature may not circumvent an express provision of the constitution by attempting to do indirectly what it may not do directly. Nebraska Public Power District v. Hershey School District, supra. Based on the historical background surrounding the adoption of Article VIII, Section 11, of our constitution, and the decision in Robb v. Nielson, supra, it is our opinion that legislation requiring cities or villages to make payments in lieu of taxes on real

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property owned by such entities would be viewed as an attempt to indirectly tax property of such governmental subdivisions, in contravention of the exemption from taxation of such property provided under Article VIII, Section 2. Any attempt to impose such a requirement should be accomplished by virtue of a constitutional amendment, similar in nature to the provisions of Article VIII, Section 11, rather than through the enactment of legislation.

Sincerely,

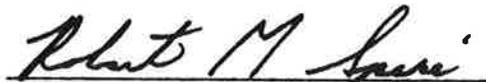
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LJB:jem
cc: Patrick J. O'Donnell
Clerk of the Legislature
2/06

APPROVED:


Robert M. Spire
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