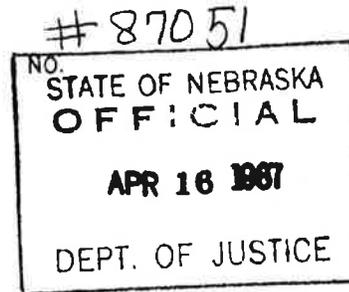


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



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Attorney General
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DATE: April 15, 1987

SUBJECT: Constitutionality of LB 775 - Employment
and Investment Growth Act

REQUESTED BY: Senator Vard R. Johnson
Nebraska State Legislature

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

You have requested our opinion on two questions pertaining to the constitutionality of a portion of LB 775, the Employment and Investment Growth Act. Your initial question concerns whether Section 6(3) of LB 775, which provides that "All personal property used by a qualified taxpayer in connection with a qualified project . . . shall constitute a separate class of personal property", violates either the uniformity requirement in Art. VIII, Section 1, of the Nebraska Constitution, or the prohibition against unreasonable class legislation contained in Art. III, Section 18, of the Nebraska Constitution.

Art. VIII, Section 1, of the Nebraska Constitution, provides, in part that "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. . . ." With respect to the taxation of personal property, Art. VIII, Section 2, of the Nebraska Constitution, provides: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation."

In Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), the Nebraska Supreme Court addressed the scope of the Legislature's authority to classify or exempt personal property from taxation under Art. VIII, Section 2. The plaintiffs in Stahmer challenged exemptions granted by the Legislature pertaining to personal property used in agricultural production, the products thereof, and business inventories, contending, in part, that the statutes violated Art. III, Section 18, prohibiting unreasonable

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class legislation, and Art. VIII, Section 1, requiring uniform taxation. In rejecting these contentions, the Court stated:

The 1970 amendment of Art. VIII, Section 2, to provide "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation" specifically confers broad authority on the Legislature to classify and exempt personal property from taxation. (Emphasis supplied.) The amended portion of Article VIII, Section 2, represents a special constitutional provision adopted later than, and with full knowledge of, the constitutional provisions relied on by plaintiffs. Within the plain ambit of its meaning and purpose it stands supreme and effectively negates plaintiffs' contentions, with the possible exception of the one dealing with the reasonableness of the classifications exempted.

* * *

In view of the recent amendment of Art. VIII, Section 2, Constitution, it is doubtful if the statutes are subject to challenge as violating Art. III, Section 18, dealing with special laws, or Art. VIII, Section 1, requiring uniform taxation. In any event, we do not find the classifications set forth in the act to be unreasonable. "Ability to bear the burden of the tax is everywhere recognized as a reasonable ground on which to base a classification in tax measures. Classification for tax purposes may be based on the manner of conducting business, and business conducted in one manner may be taxed differently from business conducted in another manner. The purpose for which property is kept or used has long been a recognized, if not a favorite, basis for distinction in taxation. The view has also been taken that reasonable discrimination with respect to tax matters to promote fair competitive conditions, equalize economic advantages, or encourage particular industries from consideration of public policy is lawful." 51 Am.Jur., Taxation, Section 182, p. 242. This court has held that: "It 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." *Shear v. County Board of Commissioners*, 187 Neb. 849, 195 N.W.2d 151.

Id. at 67-68, 218 N.W.2d at 896.

Based on the foregoing, we believe the creation of a separate class of personal property under Section 6(3) of LB 775, consisting of personal property used by qualified taxpayers in qualified projects under the terms of the Act, would not constitute unreasonable class legislation under Art. III, Section 18, and would not violate the uniformity provision of Art. VIII, Section 1. In this regard, we note that Section 2 of the bill evinces an intent

. . . to make revisions in Nebraska's tax structure in order to promote the general health, safety, and welfare of the people of the State of Nebraska by encouraging new businesses to relocate in Nebraska, retaining existing businesses and aiding in their expansion, promoting the creation and retention of new jobs in Nebraska, and attracting and retaining investment capital in the State of Nebraska.

These certainly constitute legitimate legislative purposes, and we cannot conclude that the separate classification for exemption purposes of personal property used in qualified projects under the Act is unconstitutionally unreasonable. In our view, the separate classification for purposes of exemption of such personal property is constitutional, since it bears a reasonable relation to the legitimate purposes of the Act relating to the encouragement of new jobs and investment in the state.

Your second question concerns whether Section 6(3) of LB 775, which provides that "Any county board may determine that all personal property within such class and located within the county shall be exempt from the tax on personal property for a period of 15 years", constitutes an unlawful delegation of legislative authority to county boards, or results in a violation of the uniformity requirement of Art. VIII, Section 1, of the Nebraska Constitution.

While the Nebraska Supreme Court has not had occasion to discuss the authority of the Legislature to delegate its exemption powers under Art. VIII, Section 2, the Court has, in several instances, upheld the constitutionality of statutes wherein the Legislature has delegated its powers to a subordinate agency or body. In each instance, however, the Court has held that, in order for the Legislature to validly delegate legislative powers to others, the Legislature must provide reasonable limitations and standards regarding the manner in which the power delegated is to be exercised. E.g., In re 1969-70 County Tax Levy, 186 Neb. 752, 186 N.W.2d 729 (1971); Williams v. Buffalo

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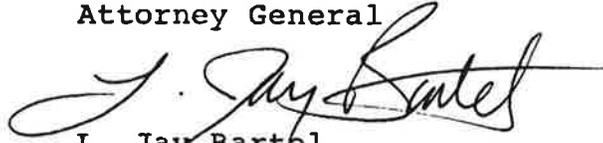
County, 181 Neb. 233, 147 N.W.2d 776 (1967); DeJonge v. School District of Bloomington, 179 Neb. 539, 139 N.W.2d 246 (1966).

In our view, an examination of Section 6(3) of LB 775 reveals no standards or limitations are provided regarding the decision by a county board to exempt personal property in the county within the class established under this subsection. Indeed, the bill appears to grant the county board sole and unfettered discretion as to whether or not such property will be exempted from taxation. We believe this provision could result in potentially arbitrary application of the exemption provided, and, given the absence of any standards or guidance regarding the implementation or granting of the exemption, the provision would likely be held to be an unconstitutional delegation of the Legislature's exemption powers granted under Art. VIII, Section 2.

An additional concern arising as a result of granting each county board the authority to determine whether or not to grant the exemption authorized under Section 6(3) is the potential for unequal treatment with respect to taxpayers in overlapping tax districts. Under the present version of the bill, the tax status of property within the class created would be subject entirely to the discretion and determination of each individual county. In the case of an overlapping tax district, lying in two or more counties, one of which had granted the exemption, and the other of which had not, the result would be unequal treatment of taxpayers with regard to such class of property within the taxing district. We believe this possibility presents a potential violation of the requirement of uniform and proportionate treatment within the class of property created under Section 6(3), as mandated by Art. VIII, Section 1, of the Nebraska Constitution.

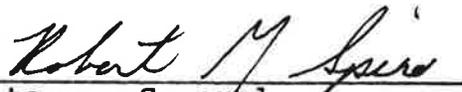
Very truly yours,

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cc: Patrick J. O'Donnell
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APPROVED:


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