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NO.
STATE OF NEBRASKA
OFFICIAL
JAN 1997
DEPT. OF JUSTICE

DATE: January 8, 1997

SUBJECT: Does the Exemption in Neb. Rev. Stat. § 76-2221(5) for Persons Rendering an Estimate of Real Estate Value for Tax Purposes Apply to Property Tax Consultants?

REQUESTED BY: Marilyn Hasselbalch, Executive Director
Nebraska Real Estate Appraiser Board

WRITTEN BY: Don Stenberg, Attorney General
Timothy J. Texel, Assistant Attorney General

Pursuant to the provisions of Neb. Rev. Stat. § 76-2248, you have requested our opinion regarding whether the exemption provided in Neb. Rev. Stat. § 76-2221(5) for persons rendering estimates of real estate value for taxation purposes applies to property tax consultants. We believe that the exemption does apply to property tax consultants.

You explained in your opinion request that the Lancaster County Assessor brought this matter to the Real Estate Appraiser Board's ("Board") attention when a property tax consultant developed and reported an appraisal for use in a property tax appeal in Lancaster County. The consultant is not authorized to appraise in Nebraska nor in his state of residence. The Board had believed that the property tax consultant exemption in § 76-2221(5) may apply only to appraisers hired by county assessors and to persons handling their own property tax appeals.

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Engaging in real estate appraisal activities without a license, certification, or registration is prohibited in § 76-2246. The pertinent part of § 76-2221 which sets out exemptions to the otherwise applicable requirements states:

> **76-2221. Act; exemptions.** The Real Estate Appraiser Act shall not apply to:
>
> . . .
>
> (5) Any person who renders an estimate or opinion of value of real estate or any interest in real estate when such estimate or opinion is for the purpose of real estate taxation or an employee of such person. . . .

Neb. Rev. Stat. § 76-2221(5) (Cum. Supp. 1994).

The above statutory language does not specifically address property tax consultants, nor does it draw a distinction based on whether the person rendering an estimate is retained by a governmental entity or a private individual or company. It appears the language used, including the inclusive term "any," covers a wide variety of possibilities and was intended to be broad in its scope. The statutory language itself therefore indicates that property tax consultants are exempted from the requirements set out in the Nebraska Real Estate Appraiser Act, Neb. Rev. Stat. §§ 76-2201 to 76-2250 (1990 and Cum. Supp. 1994) ("Appraiser Act"), when engaged in the activities set out in § 76-2221(5).

You mention in your opinion request that the Nebraska Supreme Court has ruled that a property tax consultant is exempt from the Appraiser Act. The cases you mentioned are ***DeVore v. Board of Equalization***, 144 Neb. 351, 13 N.W.2d 451 (1944), and ***Vogt v. Town and Country Realty of Lincoln***, 194 Neb. 308, 231 N.W.2d 496 (1975).

In the ***DeVore*** case, a property owner challenged the value assessment placed on her property for tax purposes. In arriving at the property valuation, the district court had allowed several individuals who were not real estate appraisers to testify concerning the value of the properties involved. The plaintiff alleged that the evidence submitted by the Board of Equalization was not competent for purposes of fixing valuations for assessment. In reviewing the qualifications necessary for a person to provide admissible testimony regarding property value, the court quoted from 20 Am. Jur. 748, sec. 891, which stated that professional appraisers and dealers engaged in the business of buying and selling similar property are competent to testify. ***Id.*** at 358, 13 N.W.2d at 454. In addition, persons familiar with the property in question and having knowledge of prices paid for similar property are qualified to testify. The extent of knowledge the witness has

regarding the type of property involved goes to weight, not admissibility. Whether a witness is qualified to testify is an issue left to the discretion of the trial judge. ***Id.***

The ***Vogt*** case dealt with a situation where a real estate broker violated his fiduciary duties to the homeowner he ostensibly represented in the sale of her home. The real estate broker, Stanley Portsche, worked for Town and Country Realty. Gerald and Peggy Gulland purchased the plaintiff's home. Gerald Gulland owned one-seventh of the stock in Town and Country Realty. Portsche never listed the plaintiff's property on the open market, knowing that the Gullands were interested in purchasing the plaintiff's property. The court found that neither Portsche nor the Gullands disclosed to plaintiff that the Gullands were part owners of the realty company where Portsche worked. The court held that Portsche violated his fiduciary duty to plaintiff as her agent, and the Gullands had committed constructive fraud. The ***Vogt*** case did not deal specifically with a challenge of a tax assessment value as the ***DeVore*** case had.

The Nebraska Supreme Court affirmed the district court's decision that the plaintiff's home had been worth $2,500 more than what the Gullands had paid for it. In arriving at damages, the trial court had accepted expert testimony regarding the value of the plaintiff's home. Expert testimony was provided by a licensed real estate broker. Defendants alleged the trial court had committed error by accepting the broker's testimony into evidence. The supreme court, in holding that the district court properly received the expert testimony, citing to its holding in the ***DeVore*** case, and stated that "The opinion of a witness as to the value of land will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his testimony being for the trier of fact." ***Vogt*** at 319-20, 194 N.W.2d at 503, citing to ***DeVore v. Board of Equalization***, 144 Neb. 351, 13 N.W.2d 451 (1944).

However, the Nebraska Supreme Court did not specifically hold that property tax consultants are exempt from the Appraiser Act in either the ***DeVore*** or ***Vogt*** decisions. We note that the Appraiser Act, in its present form, was originally enacted in 1990 (then known as the "Real Estate Appraiser Licensing and Certification Act"). Prior to the Appraiser Act, Nebraska did have laws dealing with real estate appraisers. In 1973, the Nebraska Legislature enacted a statute which stated that the statutes dealing with real estate appraisers were not applicable to "Any person or employee thereof, who renders an estimate or opinion of value of real estate or any interest therein when such estimate or opinion of value is for the purpose of real estate taxation." Neb. Rev. Stat. § 81-8,277(4) (Cum. Supp. 1974). Section 76-2221 in its current form

was present in the 1990 Act and was amended in 1994. The substantive provisions of § 76-2221(5) were not changed from the 1990 version. The Appraiser Act and § 76-2221(5) were not in place when the ***DeVore*** case was decided, but a similar law was in effect when the ***Vogt*** decision was rendered.

Even though statutory language similar to that provided in § 76-2221(5) was present when the ***Vogt*** decision was rendered, the cases dealt with what qualifications a person must have in order to provide competent evidence as to the value of property, not with licensure requirements or exemptions therefrom. The issue of whether property tax consultants must be licensed, certified, or registered as an additional prerequisite in order to engage in real estate appraisal activities was not addressed. The portion of the cases pertinent to your opinion request dealt only with evidentiary standards. The cases held that an individual's testimony may be admissible without meeting any licensure requirements. It does not appear the cases set forth the proposition that any individual engaging in providing estimates or opinions for real estate taxation purposes is necessarily released from statutory licensure requirements.

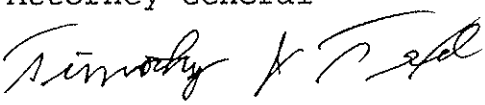
We have also reviewed the legislative history for the Appraiser Act and, in particular, for § 76-2221. There is one statement which could be seen as lending support to the belief by some current and past Board members that the exemption in § 76-2221(5) was intended to apply to appraisers hired by county assessors to assist in county tax appraisals. Senator Landis, explaining the committee amendments during the floor debate, stated, "Secondly, there is a continuation of the list of exemptions of appraisers who are not covered by this act, those include . . . persons who render estimates or opinions for the purpose of taxation, real estate taxation, for example a county who would go out and hire an appraiser. . . ." Floor Debate on LB 1153, 91st Neb. Leg., 2nd Sess. 11870 (March 27, 1990). Other than the one statement mentioned above, the legislative history provides no indication that the Legislature intended the exemption in § 76-2221(5) to be limited only to appraisers hired by county officials. Even the statement made by Senator Landis appears to have been an example used for illustrative purposes, not as an indication that the language in § 76-2221(5) should be read more narrowly than its plain and ordinary meaning.

In conclusion, we believe that the exemption in § 76-2221(5) does apply to property tax consultants. When those individuals are rendering real estate value estimates or opinions for the purpose of real estate taxation, the Real Estate Appraiser Act does not apply to them. The holdings in the ***DeVore*** and ***Vogt*** cases, although perhaps not directly on point, do not contradict the exemption provided in § 76-2221(5). The ***DeVore*** and ***Vogt*** holdings are not

necessary in order to arrive at our conclusion in this opinion. The statutory language in § 76-2221(5) appears to be plain, unambiguous, and controlling.

Sincerely,

DON STENBERG
Attorney General



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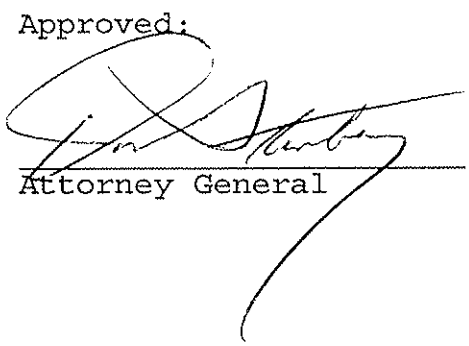

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