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NEBR. STATE OF NEBRASKA
OFFICIAL
JUL 13 1994
DEPT. OF JUSTICE

DATE: July 13, 1994.

SUBJECT: Authority of State Board of Equalization to Order Intercounty Equalization of Real Property at a Specified "Target Range of Value" Lower than "Actual Value."

REQUESTED BY: The Honorable E. Benjamin Nelson, Governor

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

By letter dated July 6, 1994, you note that the State Board of Equalization and Assessment ["State Board" or "Board"] is meeting to discuss possible adjustments to real property values for classes or subclasses of property for purposes of performing its duties relative to intercounty or "statewide" equalization. Stating that "[t]he standards of assessment practices in counties across the State seem to vary greatly in preliminary numbers", and that you "are aware of the constitutional requirement to equalize properties and treat each property owner uniformly and the statutory target of market value", you have asked us to address the following question: "While the statutes require that real property is to be valued at its actual value (with agricultural land at 80% of actual value), is it your opinion that the State Board would fulfill its constitutional duty if it requires that all real property is valued at or near a specified target range of value, even though the target range is less than actual value?" For the reasons set out below, we conclude that, while such action by the Board would not be consistent with the legislative requirement that real property be assessed at its "actual value", it may, based on language contained in decisions of the Nebraska Supreme Court, as well as

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authority from other jurisdictions, be possible to defend action of this nature by the Board as consistent with the overriding constitutional principle that uniformity of taxation must take precedence when deviations from the standard of "actual value" are necessary to assure uniform and proportionate assessment of property.

I. Nebraska Constitutional and Statutory Provisions.

The Nebraska Constitution provides that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Neb. Const. art. VIII, § 1. This provision further requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property. . . ."[1] The Constitution further provides that the State Board "shall have power to review and equalize assessments of property for taxation within the state." Neb. Const. art. IV, § 28.

Except for agricultural and horticultural land, "all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value." Neb. Rev. Stat. § 77-210(1) (Cum. Supp. 1992). The Legislature, pursuant to art. VIII, § 1, has provided the method of determining the taxable value of real property for tax purposes. Neb. Rev. Stat. § 77-112(1) (Cum. Supp. 1992) provides that "[a]ctual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade."[2]

The State Board "shall annually equalize the values of all real property as submitted by the county assessors on the abstracts of assessments. . . ." Neb. Rev. Stat. § 77-505 (Cum. Supp. 1992). "Pursuant to section 77-505, the State Board of Equalization and Assessment shall have the power to increase or decrease the value of a class or subclass of real property of any county or tax

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[1] Article VIII, § 1, also recognizes that "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 that are not uniform and proportionate with all other real property. . .but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land."

[2] The Legislature has, of course, provided a different method for determining the taxable value of agricultural and horticultural land. Neb. Rev. Stat. § 77-112(2) (Cum. Supp. 1992).

district. . . . Such increase or decrease shall be made by a percent." Neb. Rev. Stat. § 77-506 (Cum. Supp. 1992). "Pursuant to section 77-506, if the State Board of Equalization and Assessment finds that a just, equitable, and legal assessment of the property in the state cannot be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by any county, the board shall issue a notice to the counties which it deems either undervalued or overvalued and shall set a date for hearing [which it may be direct be conducted by the Tax Commissioner] at least five days following mailing of the notice." Neb. Rev. Stat. § 77-508 (Supp. 1993). "The State Board of Equalization and Assessment shall, pursuant to section 77-508, raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve intercounty equalization." Neb. Rev. Stat. § 77-508.01 (1990). "After a hearing conducted pursuant to section . . . 77-508, the State Board of Equalization and Assessment shall either (1) enter its order based on information presented to it at the hearing, or (2) meet to hear the recommendation of the Tax Commissioner based on information presented to him or her at the hearing." Neb. Rev. Stat. § 77-509 (Supp. 1993). An order of the Board entered pursuant to this section must be sent to county officials by August 15, and "shall specify the percentage increase or decrease and the class or subclass of property affected or the corrections or adjustments to be made to the class or subclass of property affected." *Id.*

II. Nebraska Caselaw Discussing the Board's Authority and Judicial Review of Its Orders.

While the Nebraska Supreme Court has often discussed the authority of the Board and the scope of judicial review of Board orders, perhaps the most extensive discussion of these principles is contained in ***Carpenter v. State Bd. of Equal.***, 178 Neb. 611, 134 N.W.2d 272 (1965) ["***Carpenter***"]. Discussing the respective duties of the State Board and the various county boards of equalization, the Court in ***Carpenter*** stated:

> In our scheme of taxation, the Board acts upon the abstracts of tax assessments furnished by each of the counties. The original determination of actual value under the statutory standard is the function of the county board of equalization. The determination of each individual county as to actual value within the county is clothed with a presumption of validity and, in the absence of evidence to the contrary, may be accepted by the Board as conforming to the law. <u>It is fundamental that the Board has no power to readjust individual valuations within the county. It can only act to equalize the assessments between different counties in</u>

> order to achieve the constitutional objective of uniform and proportionate valuations over the whole state. As we see it, the primary duty of the Board is to establish uniformity between the various counties.

Id. at 616, 134 N.W.2d at 276 (emphasis added). ***See also AT&T Information Sys. v. State Bd. of Equal.***, 237 Neb. 591, 595, 467 N.W.2d 55, 58 (1991) (noting that, in reviewing abstracts of assessments submitted by the counties, Board "deals only with the values of taxable property of a county in the aggregate.").

The Court in ***Carpenter*** continued its discussion of "[t]he proper relationship and the distinction in powers between the county boards of equalization and the Board" by quoting at length the following passage from its decision in ***S.S. Kresge Co. v. Jensen***, 164 Neb. 833, 83 N.W.2d 569 (1957):

> It is the function of the county board of equalization to determine the actual value of the property for taxation purposes. While the county board of equalization acts in a quasi-judicial capacity and its valuations are final as to individual taxpayers unless appealed from, such valuations are subject to the powers of the State Board of Equalization and Assessment, which powers have been described by this court as being purely incidental to proper equalization of the assessment of the different counties of the state as returned by that body. Hacker v. Howe, 72 Neb. 385, 101 N.W. 255. Both the county board of equalization and the State Board of Equalization and Assessment, however, must give effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property. It is evident that actual value and a uniform and proportionate value may not always result in identical results. In dealing with such a situation in this state, the Supreme Court of the United States said: `This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by the law, the latter requirement is to be preferred as the just and ultimate purpose of the law.' Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979.

178 Neb. at 616-17, 134 N.W.2d at 276-77 (emphasis in original). Significantly, the Court in ***Carpenter*** continued quoting its prior

opinion in ***S.S. Kresge Co. v. Jensen*** as follows:

> It could well be added that the application of this principle to the findings of the county board of equalization makes it possible for the State Board of Equalization and Assessment to fairly equalize between counties without doing injustice to individual taxpayers.

178 Neb. at 617, 134 N.W.2d at 277 (emphasis added).[3]

The ***Carpenter*** court also discussed the standard of judicial review applicable to orders of the Board. In this regard, the Court stated:

> [T]he proper rule is that we may not substitute our judgment for that of the Board. We do not pass upon the relative merits or the probative force of the evidence in the record. We review the record only to determine if the Board has complied with the requirements of the statute in exercising the powers granted to it by the Legislature. It is only where the record is clear and conclusive that the Board's action was illegal, contrary to law, arbitrary, and capricious that this court has any power to reverse the findings and the orders of the Board. . . .
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> * * *
>
> A wide latitude of judgment and discretion is vested in the Board.

Id. at 618, 134 N.W.2d at 277 (citations omitted).

Finally, we note that the Court in ***Carpenter*** expressly recognized the difficulties inherent in applying concepts of "value" and "equalization":

> [I]t can probably always be demonstrated that the Board, in dealing with the intangible concepts of valuation and uniformity, could never reach any mathematically precise result. Such a yardstick or criterion of equalization can never be accomplished. Approximation, both as to

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[3] In a prior opinion, we noted that the decision in ***Carpenter*** stood for the proposition that "the primary function of the Board was to equalize valuations among counties, even if that required a departure from a statutorily required standard of true value, . . . Op. Att'y Gen. No. 173 (1977-89 Report of Attorney General, Jan. 18, 1978) (emphasis added).

> value and uniformity, is all that can be accomplished. . . .And, we have held that the object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value. . . . Actual value is an intangible concept, is largely a matter of opinion, and there are no yardsticks by which it can be determined with accuracy. . . . [T]he judgment as to valuation is largely a matter of opinion and is committed to the sound discretion and judgment of the board. We have held that substantial compliance with the requirements of equality and uniformity in taxation laid down by the federal and state Constitution is all that is required and that such provisions are satisfied when designed and manifest departures of the rule are avoided.

Id. at 619, 134 N.W.2d at 278 (citations omitted) (emphasis in original).

III. Authority of the Board to Order Intercounty Equalization of Real Property at a "Target Range of Value" Lower than "Actual Value".

Laflin v. State Bd. of Equal., 156 Neb. 427, 428, 56 N.W.2d 469, 472 (1953), was an appeal by a landowner in Johnson County from action of the State Board claiming that the Board failed "to properly equalize the assessment of farm lands in the various counties of the state for the taxable year 1952." "The final decision of the Board was that the value of farm lands and improvements in all counties whose 1952 assessed valuations per acre as shown by the abstracts filed by the respective counties were less than 50 percent of the 20-year average selling price per acre be raised to equal at least 50 percent of such average." *Id.* at 432, 56 N.W.2d at 473. Thus, "the yardstick used in determining the value of farm lands and improvements for the assessment of taxes in 1952 was a percentage ratio of the 1952 assessed value per acre, as shown by abstracts of real and personal property assessed for taxation in the several counties of the state, to the 20-year average sale price per acre from 1932 to 1951 inclusive." *Id.*

The *Laflin* court found the Board's actions were contrary to the statutory requirement that taxes be assessed at "actual value":

> It is clear from an examination of the record before us that the Board failed in its duty to value farm lands and improvements on the basis of their actual value and to equalize between counties for the purpose of compelling compliance with controlling statutes on the subject. We cannot see where the 20-year average sale price of lands of similar kind or class in a county can have any

> evidentiary value in determining present market value. . . . It is the duty of the Board to fix the value of farm lands and improvements at their actual value at the time they are appraised for assessment purposes. Any attempt to depart from this provision of the statute by averaging values during past periods of time which are too remote to have evidentiary force, constitutes a noncompliance with legislative direction and any relief from this requirement must come from the Legislature.
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> * * *
>
> It is the function of the Board to see to it that all property is assessed at its actual value and that the failure of any of the various counties to comply with this requirement shall be corrected by the process of equalization between the counties. . . .
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> * * *
>
> The record shows on its face that the Board did not value farm lands and improvements for assessment in the various counties on the basis of actual value, their value in the market in the ordinary course of trade. This being so, the final orders of the Board are in violation of the positive directions of applicable statutes.

Id. at ___, 56 N.W.2d at 474-75.

While *Laflin* indicates that the Board, in exercising its intercounty equalization function, may not deviate from the "actual value" standard set by statute, the decision in *Laflin* must be read in light of subsequent Nebraska Supreme Court decisions addressing the equalization power of the Board, and the manner in which it determines to exercise that power.

In *Box Butte Cty. v. State Bd. of Equal.*, 206 Neb. 696, 295 N.W.2d 670 (1980), the Court considered appeals from several counties from action of the State Board ordering increases in assessment valuations of real estate throughout the state. The Court held that different appraisal methods applied by the Board to different classes or property resulted in appropriate determinations of fair market value for each class of property, and affirmed the Board's action. The Court discussed the recommendations adopted by the Board as follows:

> [A]fter utilizing the assessment/sales ratios for urban residential property of the eight highest counties as a starting point in order to attempt to achieve equalization throughout the state, the Department of

> Revenue tested the resultant average ratio of 35 percent. Its surveys disclosed that using such a ratio would place more than 50 percent of all properties over 35 percent of actual value. Therefore, it recommended use of an assessment/sales ratio of 30 percent which in its opinion would achieve 35 percent of actual value for the vast majority of nonagricultural land in Nebraska. Likewise, the beginning point for agricultural land was 30 percent over the 1976 Land Valuation Manual. However, after further research, the Department of Revenue offered evidence that an increase of only 20 percent over the manual was necessary to equalize that division of property with all other classes of property at actual value. We have previously referred to the correlation which existed between the two methods.
>
> Considering all of the evidence, the State Board perceived these recommendations as forming a reasonable basis to achieve equalization of all classes of property throughout the state at 35 percent of actual value. The evidence supports the action of the State Board and the appealing counties have failed to prove that its action was erroneous, arbitrary, or contrary to law.

Id. at 714, 295 N.W.2d at 681-82.[4]

The decision in ***Box Butte Cty.*** illustrates that, depending on the nature of the evidence before the Board, use of an assessment/sales ratio at a level less than the absolute level of "actual value" for statewide equalization purposes is sustainable if the level established can statistically be validated. Further, it should be noted that it is widely accepted that "[t]olerances are frequently allowed in equalization orders" in statewide equalization; in fact, a tolerance of five percent is recognized as "warranted and justified" and a ten percent tolerance "is considered reasonable." J. Keith, ***Property Tax Assessment Practices*** 406 (1st ed. 1966). Indeed, it is our understanding that the Board has, in recent history, accepted a certain "range" or "tolerance" in performing its statewide equalization functions, based on evidence provided by the Department. Thus, while the Court in ***Laflin*** indicated that "actual value" must be the standard of assessment in the Board's performance of its equalization powers, use of an assessment/sales ratio lower than 100 percent of "actual value", coupled with an acceptable range of "tolerance" or deviation, would, if supported by the evidence, appear to satisfy the Board's responsibility to achieve statewide equalization.

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[4] Prior to the enactment of 1979 Neb. Laws, LB 187, the level of assessment was 35 percent of actual value.

Your question, however, is based on the Board's establishment of a "target range" of value which would be set at less than "actual value." This, of course, is not a question which the Nebraska Supreme Court has squarely addressed. The validity of so-called "uniform fractional assessments" is a question which has arisen in numerous jurisdictions, with inconsistent results. As stated in an annotation on the subject:

> Full-value assessments have been held required by state constitutional/statutory provisions for assessment at full value. . ., at full cash value. . ., although there is a wealth of contrary authority;. . .at fair cash value, although there are contrary decisions. . .; at full and fair cash value. . .; at true value. . .; at true and actual valuation. . .; and at actual value. . . although there are contrary results.
>
> On the other hand, uniform fractional assessments have been held permissible under state constitutional/statutory provisions requiring assessments at full and actual cash value. . .; at full and true value. . .; at true cash value. . .; at true value in money. . .; and at market value or fair market value. . . .

Annot., ***Requirement of Full-Value Real Property Taxation Assessments***, 42 A.L.R.4th 676, 682-83 (1985). While an exhaustive analysis of the cases discussed in the annotation is not possible for purposes of this opinion, it appears that most, if not all, of the cases cited concerned actions involving assessment practices by local assessors, as opposed to state bodies exercising constitutional duties to equalize properties statewide. Of all the cases reviewed, the California District Court of Appeals decision in ***Hanks v. State Bd. of Equal.***, 229 Cal. App. 2d 427, 40 Cal. Rptr. 478 (2d Dist. 1964), seems most directly on point.

In ***Hanks***, a taxpayer brought an action to mandate that the State Board increase assessment rolls of all counties to make them conform to "full cash value". The California Constitution required that "[a]ll property in the State. . .shall be taxed in proportion to its value. . .", and that "[a]ll taxable property shall be assessed for taxation at its full cash value." ***Id.*** at ___, 40 Cal. Rptr. at 479-80. The California Constitution also created the State Board of Equalization, whose duty it was "to equalize the valuation of the taxable property in the several counties of the state for the purposes of taxation. . . ." ***Id.*** at ___, 40 Cal. Rptr. at 480. The taxpayer argued that, "since all assessment for property tax purposes must be made at 100 per cent of market value, a uniform fraction or ratio of market value [could not] be used in the process of equalization of assessments." ***Id.*** at ___, 40 Cal.

Rptr. at 480.

Rejecting the taxpayer's contention that the Board had acted contrary to its constitutional and statutory duties, the California court stated:

> Our determination of the issue whether defendant Board has a constitutional duty to raise or lower county assessment rolls to make them conform to 100 per cent of full cash value, is controlled by Article XIII, section 9, California Constitution. The State Board's duty to equalize the level of assessments in the various counties throughout the state is derived from section 9, Article XIII. . . . Thereunder, the State Board has the `duty * * * to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation'; and is `authorized and empowered * * * to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of property contained in said roll, * * *' Thus, the only expressed duty of the State Board is to equalize the valuation of taxable property in the counties of the state (Art. XIII, § 9). This duty is not set up in terms of equalizing at 100 percent of market value. . . . If the State Board is required under Article XIII, section 9, to lower or raise a roll to 100 per cent of market value, as urged by appellant, why then is the State Board, in addition, separately but in the same constitutional provision, given the duty and power to require to equalize; for if 100 per cent of market value (true value in money) must be used, then equality and uniformity are automatically produced by raising or lowering rolls to 100 per cent of market value. Of what purpose then is the duty of the Board to equalize? It is exactly what the name implies--`to equalize the assessment of taxes in the several counties, so as to cause them to approximate as nearly as possible the equality and uniformity enjoined by the Constitution.'. . . Thus, the inference is fair that Article XIII, Section 9, was intended to permit the State Board to equalize on the basis of fractional assessments to full cash value.

Id. at ___, 40 Cal. Rptr. at 480-81 (citations omitted) (emphasis added).

The court in ***Hanks*** further noted that

> [e]quality and uniformity in the imposition of the burden of taxation upon property throughout the state, and that all property be taxed in proportion to its value to be ascertained as directed by law, have always been the dominant goals of the Constitution in the field of taxation; and the evil that the State Board of Equalization was created to remedy was inequality and lack of uniformity producing discriminatory underassessment.

Id. at ___, 40 Cal. Rptr. at 483.

It should be noted that the decision in ***Hanks*** was based, in part, on California's historic practice of assessing property at the local level at less than 100 percent of actual value. ***Id.*** at ___, 40 Cal. Rptr. at 480-85. Nevertheless, the parallels between the constitutional duties to achieve statewide equalization under the California and Nebraska Constitutions are obvious. Article IV, § 28, imposes upon the Board the duty to "review and equalize assessments of property for taxation within the state." The Constitution makes no mention of the standard of valuation required in exercising this function. Moreover, we must be mindful of the Nebraska Supreme Court's discussion in ***Carpenter***, quoting from its decision in ***S.S. Kresge Co. v. Jensen***, of the impact of the U.S. Supreme Court decision in ***Sioux City Bridge Co. v. Dakota County***, recognizing "the principle that where it is impossible to secure both the standard of true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.'" ***Carpenter***, 178 Neb. at 617, 134 N.W.2d at 277 (emphasis in original). The ***Carpenter*** court continued by quoting its prior language in ***S.S. Kresge Co. v. Jensen*** that "[i]t could well be added that the application of this principle to the findings of the county board of equalization makes it possible for the State Board of Equalization and Assessment to fairly equalize between counties without doing injustice to individual taxpayers. 178 Neb. at 617, 134 N.W.2d at 277.[5] This language indicates that the Court may accept action by the Board deviating from the statutory "actual value" standard in exercising its duty to equalize property valuations statewide, provided the Board determined such action was necessary to achieve the overriding constitutional objective of uniform taxation.

The foregoing discussion indicates that Board action establishing a "target" of assessment at less than "actual value", within a specified narrow "range", may be deemed consistent with the Board's constitutional duty to "equalize assessments of

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[5] The Court's decisions in ***Carpenter*** and ***S.S. Kresge Co. v. Jensen*** were rendered after its decision in ***Laflin***.

property for taxation within the state".[6] The sustainability of any such action would, of course, depend greatly upon the nature and quality of the evidence before the Board, and whether the Board's reliance on the principle noted above that deviation from the "actual value" standard is appropriate "to fairly equalize between counties without doing injustice to individual taxpayers" is justified. Whatever aggregate increases (and decreases) in assessment levels the Board may choose to order for classes or subclasses of property in the various counties if it elects to follow such a course is a matter to be decided by the Board based on the evidence presented, giving due recognition, of course, to the wide latitude and discretion accorded the Board in exercising its judgment. In theory, however, such action would not, if properly supported, be clearly outside the Board's constitutional authority.

Very truly yours,

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APPROVED BY:

DON STENBERG, Attorney General

[6] It is our understanding that the only proposal presently before the Board concerns the establishment of a narrow range within a "target value" which is relatively high with respect to the statutorily defined "actual value" for the classes of property under review. We express no opinion as to whether the Board could attempt to utilize an equalization measure substantially lower than the mandated "actual value" standard. This would, of course, present a fundamentally different question.