STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

#93046

NO.
STATE OF NEBRASKA
OFFICIAL
JUN 10 1993
DEPT. OF JUSTICE

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

DATE: June 10, 1993

SUBJECT: Distribution of in lieu of the tax funds pursuant to LB 348

REQUESTED BY: Governor E. Benjamin Nelson

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested our opinion as to whether the Department of Education may distribute in lieu of tax funds in the manner prescribed in section 43 of LB 348, 93rd Neb. Leg. (1993). This bill has been approved by the Legislature and presented for your consideration. Due to the time restraints inherent in this situation, we have necessarily limited our review of this bill to the specified section and issue.

Apportionment of School Funds Pursuant to LB348, §43(2)

Section 43 of LB 348 amends Neb. Rev. Stat. § 79-1303 by deleting the previous requirement that school or saline land be given an appraised value of "one hundred forty three percent of the appraised value." The use of the 143 percent of valuation factor was held unconstitutional by the Nebraska Supreme Court in 1991. ***Bartels v. Lutjeharms***, 236 Neb. 862, 464 N.W.2d 321 (1991). Notwithstanding the clear holding of the court in ***Bartels***, the Legislature re-enacted the same provision in 1992. Consequently, the Commissioner of Education sought the opinion of this office as to whether he could apportion the school funds of the state pursuant to the 143 percent of valuation factor contained in § 79-1303 (Cum Supp. 1992).[1] In Op.Att'y Gen. No. 93035 (May 4, 1993),

[1]The Commissioner of Education, rather than the Department of Education, has a statutory duty to distribute the general school fund paid over to him by the State Treasurer.

David K. Arterburn, L. Jay Bartel, J. Kirk Brown, David T. Bydalek, Laurie Smith Camp, Elaine A. Chapman, Delores N. Coe-Barbee, Dale A. Comer, James A. Elworth, Lynne R. Fritz, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Kimberly A. Klein, Donald A. Kohtz, Joseph P. Loudon, Charles E. Lowe, Lisa D. Martin-Price, Lynn A. Melson, Harold I. Mosher, Fredrick F. Neid, Marie C. Pawol, Kenneth W. Payne, Paul N. Potadle, Jan E. Rempe, James H. Spears, Mark D. Starr, John R. Thompson, Barry Wald, Terri M. Weeks, Alfonza Whitaker, Melanie J. Whittamore-Mantzios, Linda L. Willard

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we advised the Commissioner such apportionment would be unconstitutional under ***Bartels*** and that he should seek a proper amendment to the statute.

Section 43(2) of LB 348 amends § 79-1303 to read as follows:

> The county superintendents shall certify to the Commissioner of Education the tax levy for school purposes of each school district and the nonresident high school tuition levy of the county in which the school land or saline land is located and the last appraised value of such school land, ~~which value shall be one hundred forty-three percent of the appraised value~~ for the purpose of applying the applicable tax levy for each district and for the nonresident high school tuition fund in determining the distribution to the districts and to the nonresident high school tuition fund of the counties of such amounts.

Thus, under LB 348, school funds would be apportioned pursuant to "the last appraised value of such land" and not at 143 percent of the appraised value. If such a valuation avoids conferring a "benefit or bonus upon the school districts with school lands to the detriment of the school districts without trust lands" and thus, avoids the "violation of the duty of the state as trustee to treat all beneficiaries of the trust fairly and impartially" as found in ***Bartels v. Lutjeharms***, 236 Neb. at 868, it would withstand constitutional challenge.

We see no facial constitutional infirmity or legal impediment to the Commissioner distributing in lieu of tax funds in the manner prescribed in section 43 of LB 348. We understand the "appraised value" of school land may differ from the market value of school land. ***Bartels v. Lutjeharms***, 236 Neb. at 867. Furthermore, the appraised value of school land is determined by the Board of Educational Lands and Funds. The appraised value of taxable agricultural land is determined by the Department of Revenue. Section 77-1360.01 (Supp. 1992) provides a method whereby the Department of Revenue determines a market-derived capitalization rate of agricultural land. It then provides that this rate shall be adjusted so that agricultural land shall be assessed at eighty percent of market value. The method used by the Board of Educational Lands and Funds is quite different. *See* ***Bartels v. Lutjeharms***, 236 Neb. at 867. We have no facts before us, however, which would allow us to conclude the use of the appraised value factor in apportioning school funds is constitutionally invalid. A determination of whether this difference would result in a benefit to school districts with school lands to the detriment of districts without such lands would likely require expert factual

testimony and the consideration of numerous factors. In school financing cases, the Nebraska Supreme Court has repeatedly stressed the rule that statutes are presumed to be constitutional and unconstitutionality must be clearly established by those challenging its validity. *See* ***Ewing v. Scotts Bluff County Board of Equalization***, 227 Neb. 798, 814, 420 N.W.2d 685 (1988). Finally, it is significant that the Bartels court stated, "Neither § 79-1302 nor § 79-1303 provides the method of how school lands shall be valued for the purpose of in-lieu-of tax payments. Consequently, the plaintiffs are not entitled to any relief on this basis." ***Bartels v. Lutjeharms***, 236 Neb. at 868.

In sum, we conclude there is no facial constitutional infirmity in section 43 of LB 348 and the Commissioner, in the absence of a court order to the contrary, could distribute in lieu of tax funds in the manner prescribed in section 43 of LB 348.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

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