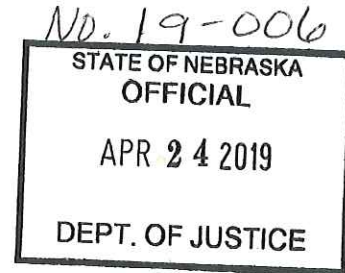




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Constitutionality of LB 512 as Amended - Valuation of Destroyed Property for Taxation

REQUESTED BY: Senator Ernie Chambers
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office on the constitutionality of AM1217 to LB 512 and, in particular, §§ 10-13 of AM1217. In general terms, these provisions would provide property tax relief to those with destroyed real property by requiring the county board of equalization to adjust the assessed value of the property. You have requested our opinion whether these provisions of AM1217 would violate Neb. Const. art. VIII, § 1, the "uniformity clause."

AM1217, §§ 10 and 11 provide that, for purposes of Chapter 77 of the Nebraska statutes, the term "destroyed real property means real property that is destroyed by fire or other natural disaster on or after January 1 and before October 1 of any year."¹ Section

¹ Because the language of AM1217 refers to destroyed property and construction of replacement property, we understand the bill would not apply to damage to the land itself. This interpretation is consistent with comments made by the amendment's introducer. Floor Debate on LB 512, 106th Neb. Leg., 1st Sess. 8, 15 (April 5, 2019) ("The valuation will never to go zero because...the land is still going to be there...and the taxation will continue on that parcel...") (Statement of Sen. Erdman).

12 provides that the county assessor must report to the county board of equalization all real property in the county that becomes destroyed real property and that the county board of equalization must then adjust the value of that property. Section 13 then provides that the adjusted value will be the sum of the following three factors:

- (a) The assessed value of the real property before it became destroyed real property multiplied by a percentage representing the portion of the year during which the property was intact and had not yet been destroyed;
- (b) The assessed value of the destroyed real property, as of the date of its destruction, multiplied by a percentage representing the portion of the year during which the property was destroyed and no replacement property had yet been completed; and
- (c) The assessed value of any replacement property, as of the date of completion of construction of such replacement property, multiplied by a percentage representing the portion of the year during which construction of such replacement property was complete.

Section 13 goes on to provide that the county board of equalization will give notice of the new assessed value to the property owner who may file a protest with the board and may appeal the decision of the county board of equalization to the Tax Equalization and Review Commission.

ANALYSIS

I. Uniformity Clause

Your question is whether these provisions would violate Neb. Const. art. VIII, § 1. The “uniformity clause” of our state Constitution provides that “[T]axes shall be levied by valuation uniformly and proportionately upon all real property and franchises . . . except as otherwise provided in or permitted by this Constitution.” In addition, “the Legislature may prescribe standards and methods for the determination of the value of real property at uniform and proportionate values.” Neb. Const. art. VIII, § 1(6).

Also pertinent to our discussion is Neb. Rev. Stat. § 77-201(1) (2018), which requires that all real property, except for agricultural land and horticultural land, agricultural land and horticultural land subject to special valuation, and historically significant real property, be valued at its actual value. “Actual value” is defined at Neb. Rev. Stat. § 77-112 (2018), for purposes of taxation, as “the market value of real property in the ordinary course of trade.” And, with respect to assessment of real property taxes, Neb. Rev. Stat. § 77-1301(1) (2018) provides: “All real property in this state subject to taxation shall be assessed as of January 1 at 12:01 a.m., which assessment shall be used as a basis for taxation until the next assessment.”

This office recently discussed the Nebraska case law concerning the uniformity clause in Op. Att'y Gen. No. 16007 (March 16, 2016). We will summarize that discussion here. "The object of the uniformity clause is accomplished 'if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.'" *Constructors, Inc. v. Cass County Bd. of Equal.*, 258 Neb. 866, 873, 606 N.W.2d 786, 792 (2000) [*Constructors*] (quoting *County of Gage v. State Bd. of Equal.*, 185 Neb. 749, 755, 178 N.W.2d 759, 764 (1970)). "The Legislature may prescribe standards and methods for the determination of the value of real . . . property at uniform and proportionate values." *Carpenter v. State Bd. of Equal.*, 178 Neb. 611, 615, 134 N.W.2d 272, 276 (1965). "The uniform method for valuing property which the Legislature has provided is to tax property at its 'actual value.'" *Xerox Corp. v. Karnes*, 217 Neb. 728, 732, 350 N.W.2d 566, 569 (1984). [*Xerox*] (quoting Neb. Rev. Stat. § 77-201). "While absolute uniformity of approach may not be possible, there must be a reasonable attempt at uniformity." *County of Sarpy v. State Bd. of Equal.*, 185 Neb. 760, 765, 178 N.W.2d 765, 769 (1970).

In analyzing the constitutionality of AM1217, we first note that "[s]tatutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void." *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 942, 663 N.W.2d 43, 68 (2003). If LB 512 with AM1217 is enacted, anyone seeking to have its provisions declared unconstitutional will bear the burden of overcoming the presumption of constitutionality.

The Nebraska Supreme Court has adopted a strict construction of our state's uniformity clause, which raises a question as to the constitutionality of AM1217. The taxation of property "must be uniform, not only as to the rate of taxation, but to the valuation of the property as well." *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 588, 177 N.W.2d 596, 598 (1970) [*McNeil*]. The Court held in *McNeil* that legislation attempting to provide a different method of valuing certain farm machinery and equipment violated the uniformity clause. "The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1." *Id.* at 588, 177 N.W.2d at 598. "There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests on some reason of public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation" *Id.* at 588-89, 177 N.W.2d at 598.

In *Xerox*, the Court considered the effect of an amendment to Neb. Rev. Stat. § 77-1301(1), and its interpretation by the Tax Commissioner, which resulted in *Xerox* being required to pay personal property taxes on leased equipment based on actual value determined only in odd-numbered years. No changes could be made to account for actual depreciation in even-numbered years. The Court held that the amended statute violated the uniformity clause "in that it directs that taxes be levied upon personal property in even-numbered years without regard to the uniform method of valuing property at actual value as provided in § 77-201" *Id.* at 733, 350 N.W.2d at 569.

More recently, in *Constructors*, the Court again stated that the uniformity clause requires that all property within a taxing jurisdiction be assessed and taxed at a uniform standard of value. A valuation scheme which created two subclasses of land, farmland controlled by mining companies and similar farmland not controlled by mining companies, and provided differential tax treatment of each subclass was found to violate the uniformity clause.

Here, with the enactment of AM1217, most real property would continue to be valued at its actual value on January 1, pursuant to Neb. Rev. Stat. § 77-1301(1), without taking into account any fluctuations in value. Other “destroyed real property” would be valued on a different date with use of a statutory prorated formula. The Nebraska Supreme Court has not yet addressed legislation such as that proposed in AM1217. It is possible that the Court could find that AM1217 establishes a second, non-uniform standard of value for destroyed real property. However, in our view, it is also possible that the Court could determine that the creation of a different assessment date and adjustment of assessed value of the destroyed property on that date does not violate our state constitution’s uniformity clause.

Outside of the plain language of a statute, a legislative body’s purpose in enacting legislation can be determined by examining the legislative history of the bill. *Sarpy County Farm Bureau v. Learning Community of Douglas*, 283 Neb. 212, 808 N.W.2d 598 (2012) (in which the Court considered both the language of a statutory scheme and its legislative history in determining whether a statute violated art. VIII, § 1A). The Court could, therefore, consider any relevant committee hearing testimony and floor debate with regard to AM1217, and for LB 482, which was amended into LB 512 as AM1217. While the committee hearing transcripts are not yet available, we note that, in the floor debate on AM1217, senators expressed a need for differential tax treatment based on a public policy of fairness and the sudden, unforeseen and calamitous nature of a natural disaster. Floor Debate on LB 512, 106th Neb. Leg., 1st Sess. 8-9 (April 5, 2019) (Statement of Sen. Erdman). Introducer’s Statement of Intent on LB 482, 106th Neb. Leg., 1st Sess.

Thus, even if the Court should find that AM1217 creates a separate classification for taxation purposes, an argument could be made that the separate classification for real property destroyed by a natural disaster rests on a “substantial difference of situation or circumstances” so as to justify the separate classification.²

² A number of other states have enacted legislation to provide tax relief to certain property owners whose property has been damaged or destroyed. These statutes vary greatly. See, for example, Tenn. Code Ann. § 67-5-603; Cal. Rev. and Tax Code § 170; N.D. Cent. Code. Ann. §§ 57-02-11 and 57-23-04.7; Tex. Tax Code Ann. § 23.02; Ind. Code § 6-1.1-4-11; 35 Ill. Comp. Stat. 200/ 9-190; and Or. Rev. Stat. § 308.425. We note that at least two of these states, Oregon and California, have constitutional provisions which specifically authorize the differential tax treatment. The constitutions of other states, however, may not have uniformity clauses, or may have clauses which differ from Neb. Const. art. VIII, § 1.

II. Implementation of LB 512 with AM1217

If the Legislature decides to pursue property tax relief through LB 512, as amended by AM1217, there are several issues to be considered and corrected. First, while AM1217 adds a definition of “destroyed real property” to the definitions currently found at Neb. Rev. Stat. §§ 77-102 to 77-132, and which are to be used for purposes of Chapter 77, it fails to amend Neb. Rev. Stat. § 77-1301. Therefore, it would leave in place the requirement that all real property be assessed as of January 1. Language should be added to § 77-1301(1) which would exclude “destroyed real property” from the January 1 assessment date.

Second, the definition of “destroyed real property” at § 11 of AM1217, as “real property that is destroyed by fire or other natural disaster,” may be unclear and, perhaps, insufficient to accomplish the intended purpose of the amendment. It is not clear whether real property destroyed by all fires would be included in the definition or only those due to a natural disaster. And, it is not entirely clear what would be encompassed by the term “natural disaster.” In addition, the term “destroyed” would likely be read to mean completely uninhabitable or unfit for customary use. If that is not the intent, the language should be modified.

Third, the time frame set forth in AM1217 may allow insufficient time for the county assessor and county board of equalization to act prior to the statutory deadline for the county tax levy. Neb. Rev. Stat. § 77-1601(1) (2018) provides that the county board of equalization shall levy the necessary taxes on or before October 15. AM1217 defines “destroyed real property” as real property that is destroyed “on or after January 1 and before October 1 of any year.” Depending on the date of destruction, there will simply be insufficient time prior to October 15 for the entire process set forth in AM1217 to occur. The county assessor must learn of and report the destroyed real property. The county board of equalization must meet to adjust the assessed value, and give the notice of assessed value to the record owner as provided by AM1217. There must also be time for the protest provided by § 13(3).³

³ Any change in assessed value after the statutory tax levy deadline would violate Nebraska’s “commutation clause,” which is found at Neb. Const., art. VIII, § 4. Once the tax is levied, “the legislature cannot reduce the amount of the tax, extend the time for payment, or in any manner change the method of payment.” *Steinacher v. Swanson*, 131 Neb. 439, 446, 268 N.W. 317, 321 (1936).

CONCLUSION

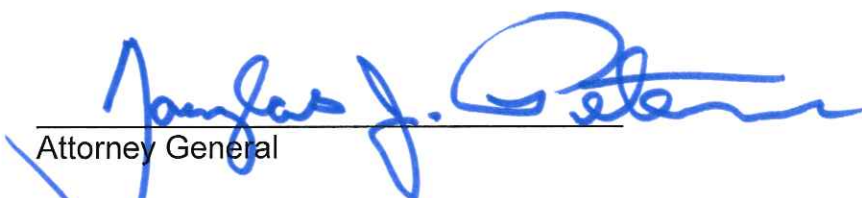
The Nebraska Supreme Court has not yet addressed an enactment similar to AM1217 with regard to the uniformity clause and the Court's past strict construction of Neb. Const. art. VIII, § 1 raises some concerns regarding the constitutionality of the legislation. However, it is our opinion that the provisions of AM1217 do not clearly contravene the uniformity clause of our state Constitution.

Sincerely,

DOUGLAS J. PETERSON
Attorney General


Lynn A. Melson
Assistant Attorney General

Approved by:



Attorney General

pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature