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No. 19-009

STATE OF NEBRASKA
OFFICIAL
JUN 04 2019
DEPT. OF JUSTICE

SUBJECT: Constitutionality of LB 470 – Defining Dwelling Complexes and Related Amenities Located on U.S. Department of Defense Military Installations as Tangible Personal Property and Exempting Such from Personal Property Taxation.

REQUESTED BY: Governor Pete Ricketts

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office regarding LB 470, which is pending legislation presented to you on May 30, 2019. LB 470, as introduced, would amend statutory provisions concerning the Nebraska Educational Savings Plan Trust ["NEST"]. LB 470, as amended, also includes provisions of two other bills. The provisions from LB 444 would define dwelling complexes and related amenities located on federal military installations as tangible personal property and exempt such from personal property tax, providing instead for payments in lieu of taxes. The provisions of LB 545 would authorize employers to make contributions to an employee's NEST account and allow a reduction to that employee's adjusted gross income for contributions made by the employer. The LB 545 provisions also prohibit consideration of those employer NEST contributions in determining financial eligibility for certain government programs.

Your specific question concerns the provisions of LB 444 which were amended into LB 470. Restated, your question is whether these provisions violate Neb. Const. art. VIII, § 1, which requires taxes to be levied uniformly and proportionately on all real property?

ANALYSIS

Section 2 of LB 470 amends the definition of "tangible personal property" in Neb. Rev. Stat. § 77-105 (2018) to include:

> (b) A dwelling complex and any related amenities located on a United States Department of Defense military installation in this state if:
>
> (i) The owner of record of the land upon which such installation is situated is the United States Government or any instrumentality thereof;
>
> (ii) Such complex and amenities are developed pursuant to a federal military housing privatization initiative; and
>
> (iii) Such complex and amenities are provided primarily for use by military personnel of the United States and, as applicable, their families . . . .

Section 3 of LB 470 includes the dwelling complexes and related amenities defined in Section 2 among the types of property exempt from personal property tax in Neb. Rev. Stat. § 77-202 (2018). The owner of a dwelling complex receiving a personal property tax exemption is required to make payments in lieu of taxes in the amount of 100 percent of the real estate taxes that would have been paid to the local school district if the property were taxed as real property. LB 470, § 4. An amount equal to five percent of all real property taxes, other than real property taxes payable in support of local school districts, that would have been paid if the property was taxable as real property and not treated as exempt personal property, is required to be paid to the county treasurer, unless waived by the county board. *Id.* An amount equal to 95 percent of all real property taxes, other than real property taxes payable in support of local school districts, that would have been paid if the property was taxable as real property and not treated as exempt personal property, is required to be paid to a restricted infrastructure maintenance fund to be used for capital repair, maintenance, and improvement of the dwelling complex. *Id.*

Improvements on leased public lands are assessed, along with the value of the lease, to the owner of the improvements as real property. Neb. Rev. Stat. § 77-1734 (2018). Section 6 of LB 470 amends this definition to provide that improvements on leased public lands in the nature of dwelling complexes and related amenities located on military installations developed pursuant to a federal military housing privatization initiative are assessed to the owner as personal property.

Neb. Const. art. VIII, § 1, provides, in relevant part:

> (1) Taxes shall be levied uniformly and proportionately upon all real property and franchises as defined by the Legislature, except as otherwise provided in or permitted by this Constitution; (2) tangible personal property, as defined by the Legislature, not exempted by this Constitution or by

> legislation, shall all be taxed at depreciated cost using the same depreciation method with reasonable class lives, as determined by the Legislature, or shall all be taxed by valuation uniformly and proportionately . . . .

Neb. Const. art. VIII, § 2, provides for the exemption of property from taxation. Subsection (9) of this section permits the Legislature to "define and classify personal property in such manner as it sees fit, whether by type, use, user, or owner, and may exempt any such class or classes of property from taxation if such exemption is reasonable . . . ."

You ask whether the provisions of LB 470 which "reclassif[y] dwelling complexes located on a U.S. Department of Defense military installation from real property to tax exempt personal property" violate the requirement in article VIII, § 1, that taxes be levied uniformly and proportionately on all real property.

"Although the Legislature has broad power to define property for tax purposes, its power to define is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded." *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal.*, 238 Neb. 565, 571, 471 N.W.2d 734, 739 (1991) ["*MAPCO*"]. "The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution." *Id.*

In *MAPCO*, the Nebraska Supreme Court considered whether legislation amending the definition of taxable "real property" to include pipelines, railroad track structures, electrical and telecommunications poles, towers, and lines was a proper exercise of the Legislature's definitional power. The court noted this change was "apparently to avoid the characterization of certain pipeline property as personal property rather than real estate, thus increasing the proportion of pipeline property presumably taxable as real estate" under a prior court decision. The court held the amendment was unconstitutional, stating:

> The definition found in § 77-103, as amended, tends to nullify or circumvent a provision of the Nebraska Constitution, in that Neb. Const. art. VIII, § 2, 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." (Emphasis supplied). In this case, the Legislature has not so much "classified" certain items as personal property as it has arbitrarily declared the personal property owned by an unfavored group of taxpayers to be "fixtures," so that it is presumably taxable as real estate under our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). Here, the Legislature has attempted to define and designate as a "fixture" that which is, in fact and in truth,

> personal property and has gone beyond the bounds of its legitimate powers under our Constitution in doing so. 238 Neb. at 573, 471 N.W.2d at 740.

In *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974), the court considered the validity of legislation purporting to implement the constitutional authority to exempt "[h]ousehold goods and personal effects, as defined by law" in Neb. Const. art. VIII, § 2. The definition of "household goods" included "major appliances either attached or detached to real property". Noting that "[t]he term 'household goods' would not normally encompass fixtures", the court concluded that the Legislature's attempt to define "household goods" in this manner was improper:

> Any definitional powers given to the Legislature are prefixed and limited. The power to define household goods and personal effects necessarily is limited to those articles which ordinarily would be understood to be embraced within that term. Certainly, it cannot be interpreted to give the Legislature power to include air-conditioning systems, furnaces, automobiles, or real estate within the term "household goods and personal effects." Since there must be a limit to such powers, it is reasonable to find the common law concepts serve as guides. 191 Neb. at 334, 215 N.W.2d at 524.

Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934), involved the constitutionality of a legislative attempt to define various items of intangible personal property as tangible personal property for taxation. Finding the redefinition unconstitutional, the court noted:

> Can the legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the legislature has the power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? . . . In our opinion, there is a limit to the legislature's power to nullify and circumvent constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word. 127 Neb. at 433, 255 N.W. at 555-56.

LB 470 defines "dwelling complexes and related amenities located on a United States Department of Defense military installation" as tangible personal property, and purports to exempt such property from personal property tax, presumably under the authority granted under art. VIII, § 2, to classify and exempt personal property. The bill goes on to provide that improvements on all other leased public lands will be assessed as real property, while improvements in the nature of dwelling complexes and related amenities located on a military installation are assessed as personal property. Dwelling complexes and the related amenities are undoubtedly real property. The Legislature, while it has the power to define terms, cannot define as tangible personal property that which is plainly real property. By classifying dwelling complexes and related amenities as personal property, the Legislature has nullified and circumvented the Constitution by

attempting to exempt real property in a manner not permitted by the Constitution. Accordingly, we conclude that the Legislature's attempt in LB 470 to define such property as personal, and classify it as exempt, is unconstitutional.[1]

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[1] We note that the Committee Statement on LB 470 cites *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 (1956) ["*Offutt Housing*"] for the proposition that "to the extent this type of property [privately developed military housing] may be taxed by a state or local authority, it must be taxed as personal property rather than real property." Committee Statement on LB 470, 106th Neb. Leg., 1st Sess. at 2. This statement reflects a misunderstanding of the holding in that case. In *Offutt Housing*, the U.S. Supreme Court held that, where a lease granted by the United States Government to a private contractor for construction of military housing provided it would run for 75 years and, at the end of that term, improvements would revert to the United States, the enjoyment of the entire worth of the improvements was the contractor's and was subject to state taxation on the full value of the improvements, less any value attributable to the useful life of items beyond the term of the lease. It is true that the improvements, including the value of the lease, were taxed at that time as personal property under Neb. Rev. Stat. § 77-1209. *Id.* at 256. The Court's holding, however, was not based on whether the property was taxed as real or personal property; rather, it was grounded on its conclusion that Congress had consented to taxation of the lessee's interest in the project. *Id.* at 258-61 (citing the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949). Indeed, other cases predating *Offutt Housing* upheld real property or ad valorem taxes imposed on military housing projects. *See, e.g., Ft. Dix Apartments Corp. v. Borough of Wrightstown*, 225 F.2d 473 (3d Cir. 1955) (Wherry Military Housing Act of 1949 authorized real estate taxation of leasehold interests in United States land for construction of housing near military facility); *Meade Heights, Inc. v. State Tax Comm'n*, 202 Md. 20, 95 A.2d 280 (Md. 1953) (Wherry Military Housing Act authorized real estate tax on leasehold interest in building on U.S. Army base). In 1996, Congress enacted the Military Housing Privatization Initiative ["MHPI"] as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186 (February 1996) (codified as amended at 10 U.S.C. §§ 2871-2886)). It has been suggested that Congress did not provide consent to state or local taxation of privatized housing developments established pursuant to the MHPI. Morrison, Philip D., *State Property Tax Implications for Military Privatized Family Housing Program*, 56 A. F. L. Rev. 261, 275-78 (2005). That question is, of course, beyond the scope of our inquiry.

CONCLUSION

In sum, we conclude that LB 470, by improperly defining tangible personal property to include dwelling complexes and related amenities on military installations, nullifies and circumvents the Constitution by attempting to exempt real property in a manner not permitted by the Constitution. Accordingly, we conclude that the Legislature's attempt in LB 470 to define such property as personal, and classify it as exempt, is unconstitutional.

Sincerely,

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Approved by:

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