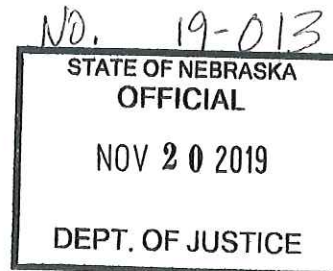




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ATTORNEY GENERAL



**SUBJECT:** Constitutionality of Legislation Reducing the Percentage of Actual Value of Real Property Subject to Taxation by K-12 Public Education Entities.

**REQUESTED BY:** Senator Mike Groene  
Nebraska State Legislature

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

### INTRODUCTION

You are considering legislation that would reduce the percentage of actual value of real property subject to taxation by Nebraska K-12 public education entities. In two prior opinions, we concluded it would be constitutional to reduce the percentage of valuation of agricultural and horticultural land used in determining state aid value under the Tax Equity and Educational Opportunities Support Act ["TEEOSA"]. Neb. Rev. Stat. §§ 79-1001 to 79-1033 (2014, Cum. Supp. 2018, and Supp. 2019); Op. Att'y Gen. No. 15-002 (Feb. 17, 2015); Op. Att'y Gen. No. 19-007 (May 6, 2019). You are now contemplating introducing legislation to provide a percentage reduction in the valuation of real property subject to taxation by K-12 public education entities. The reduction would apply to commercial and residential real property as well as agricultural and horticultural real property. One option would be to apply a ten percent reduction to all real property. A second option would be to apply a different percentage reduction to commercial and residential real property (i.e. ten percent) than is applied to agricultural and horticultural real property (i.e. twenty percent). The percentage applied would mirror the percentage reduction utilized in the TEEOSA formula. Your question is whether the proposed reduction to the percentage of actual value of real property subject to taxation by K-12 public education entities would violate the requirement that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property . . ." in Neb. Const. art. VIII, § 1.

## ANALYSIS

### I. Constitutional and Statutory Provisions.

Neb. Const. art. VIII, § 1(1) provides: “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution; . . . .”<sup>1</sup> Subsection (4) of art. VIII, § 1, provides:

[T]he 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 and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land; . . . . Neb. Const. art. VIII, § 1(4).<sup>2</sup>

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).

The standard the Legislature has adopted to value real property for taxation is “actual value.” Neb. Rev. Stat. § 77-201(1) (2018) (Except for agricultural land and horticultural land, agricultural land and horticultural land subject to special valuation, and historically significant real property, “all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value.”). Agricultural land and horticultural land, as well as agricultural land and horticultural land qualifying for special valuation, is “subject to taxation, and shall be valued at seventy-five percent” of its actual or special value. Neb. Rev. Stat. § 77-202(2) and (3) (2018). “Actual value” is defined in Neb. Rev. Stat. § 77-112 (2018), which provides:

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<sup>1</sup> Prior to 1992, art. VIII, § 1, required uniform taxation of “all tangible property and franchises.” A constitutional amendment approved by the voters in 1992 replaced this requirement with the current language requiring taxes to be “levied by valuation uniformly and proportionately upon all real property and franchises. . . .” Neb. Const. art. VIII, § 1(1), *as amended by 1992 Neb. Laws, LR 219 CA, § 1.*

<sup>2</sup> The Legislature also is authorized to “enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses.” Neb. Const. art. VIII, § 1(5). Pursuant to this so-called “Greenbelt amendment,” the Legislature has exercised this power by providing for the special valuation of certain lands used for agricultural or horticultural purposes. Neb. Rev. Stat. §§ 77-1344 to 77-1347.01 (2018).

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property, the analysis shall include a consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.

## **II. Nebraska Case Law Discussing the Constitutional Requirement of Uniform and Proportionate Taxation.**

"The object of Nebraska's uniformity clause is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value." *Sarpy County Farm Bureau v. Learning Community of Douglas and Sarpy Counties*, 283 Neb. 212, 246, 808 N.W.2d 598, 622 (2012) [*Sarpy County Farm Bureau*]. "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) (citing Neb. Rev. Stat. §§ 77-201 and 77-112). "There is no longer a constitutional requirement for the value of agricultural and horticultural land to be uniform and proportionate with the value of other real property." *Krings v. Garfield Cty. Bd. of Equal.*, 286 Neb. 352, 362, 835 N.W.2d 750, 757 (2013). The Constitution, however, "still requires uniformity within" the class of agricultural and horticultural land. *Id.* at 361, 835 N.W.2d at 756.

## **III. Validity of "Fractional" Valuation of Property for Taxation Under the Uniformity Clause.**

The uniform standard of value adopted by the Legislature for property taxation is "actual value." "For purposes of taxation, the terms actual value, market value, and fair market value mean the same thing." *Richards v. Thayer Cty. Bd. of Equal.*, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965). *Accord Xerox Corp. v. Karnes*, 217 Neb. 728, 732-33, 350 N.W.2d 566, 569 (1984); *Gage Cty. v. State Bd. of Equal.*, 185 Neb. 749, 751, 178 N.W.2d 759, 762 (1970). Currently, all real property, other than agricultural and horticultural land or agricultural and horticultural land subject to special valuation, is assessed at 100 percent of its actual value. Agricultural and horticultural land, including agricultural and horticultural land subject to special valuation, is assessed at 75 percent of its actual or special value.

Your proposal would reduce the actual value of all real property subject to assessment, non-agricultural as well as agricultural, by a percentage, solely for taxation

by K-12 public education entities. The percentage may be the same, i.e., a ten percent reduction for all real property, or different, i.e., a ten percent reduction of the valuation of non-agricultural real property and a twenty percent reduction of the valuation of agricultural real property. In either scenario, the reduced assessed value would apply only to taxes levied by K-12 public education entities; property taxes imposed by all other taxing entities would be levied on the full actual value of non-agricultural real property, and 75 percent of the actual or special value of agricultural and horticultural land.

“There are two main types of real-property assessments for tax purposes: actual value assessments, under which real property is assessed at full value; and fractional or percentage assessments, under which real property is assessed at a fraction or percentage of full value. . . .” Annot., *Requirement of Full-Value Real Property Taxation Assessments*, 42 A.L.R.4<sup>th</sup> 676, 682 (1985). “[U]niform fractional assessments have been held valid under state constitutional/statutory provisions for assessment of real property at its just value . . . , at a uniform value . . . , at uniform and proportionate valuations . . . , or . . . in proportion to its true value.” *Id.* at 683.

Article IX, § 1 of the Nebraska Constitution of 1875 provided, in part: “The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises the value to be ascertained in such manner as the Legislature shall direct.” In *Beadle v. Sanders*, 104 Neb. 427, 428, 177 N.W. 789, 789 (1920), the Nebraska Supreme Court noted that the “state assesses property at a fraction of its actual value.” The Court cited the above constitutional provision, and the statute “mak[ing] the taxable value [of property] one-fifth of the actual or market value.” *Id.* at 428-29, 177 N.W. at 789-90 (citing Rev. Stat. § 6300 (1913)).

The Nebraska Constitution, as amended in 1920, provided in Article XIII, § 1, that “taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises . . . .” Following adoption of this amendment, the Legislature provided for the taxation of property at its “actual value.” Comp. Stat. § 5820 (1922). This basis for taxation continued until 1953, when legislation was enacted providing for the valuation of property at its “actual value” and the assessment of property “at fifty per cent of such actual value.” Neb. Rev. Stat. § 77-201 (Cum. Supp. 1953). For a short time, the standard was changed to valuation of property at its “basic value,” and assessment “at fifty percent of such basic value.” Neb. Rev. Stat. § 77-201 (Cum. Supp. 1955). The Legislature then returned to providing for valuation of property at its “actual value,” and assessment “at thirty-five percent of such actual value.” Neb. Rev. Stat. § 77-201 (Cum. Supp. 1957). “Actual value” was later made the basis for both the valuation and assessment of property by the enactment of 1979 Neb. Laws LB 187, § 191 (codified at Neb. Rev. Stat. § 77-201 (Cum. Supp. 1980)).

The Nebraska Constitution currently requires that “[t]axes be levied by valuation uniformly and proportionately upon all real property. . . .” Neb. Const. art. VIII, § 1(1). There is no language expressing an intent to require taxation of real property at its “full” or “actual value.” While the Legislature has used full “actual value” as the basis for

taxation in the past, and does so presently for nonagricultural real property, it has also provided for assessment real property at a percentage of full actual value. And, it currently provides for the taxation of agricultural and horticultural land (including land subject to special valuation) at a percentage of full actual value. Thus, the Legislature may provide for the assessment of real property at a uniform fraction or percentage of its actual value.

While assessment at a uniform percentage of actual value is constitutionally permissible, your proposed legislation would provide only for assessment of real property by K-12 public education entities at a reduced percentage of value. All other taxing entities would assess real property at full actual value, in the case of non-agricultural real property, or at seventy-five percent of actual or special value, in the case of agricultural and horticultural land. For example, you indicate the assessed value of all real property could be reduced by 10 percent, or that the assessed value of non-agricultural real property could be reduced by 10 percent, and agricultural and horticultural land could be reduced by 20 percent.

“The object of the uniformity clause is satisfied if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.” *Sarpy County Farm Bureau*, 283 Neb. at 246, 808 N.W.2d at 622. The “taxing jurisdiction” or jurisdictions relevant to your proposed legislation are those included in the undefined term “K-12 public education entities.” Presumably, the intent is to utilize the same reduced valuation percentage throughout the relevant taxing jurisdiction or jurisdictions encompassed by this term. Under your first scenario, the assessed value providing the basis for taxation for K-12 education entities is reduced by a uniform percentage for all real property subject to assessment within the taxing jurisdiction. Under your second scenario, which applies a greater percentage reduction to agricultural and horticultural land than other real property, the reduced percentages again are uniform within the taxing jurisdiction. While the percentage reduction of actual value for agricultural and horticultural land is greater than that applied to other real property, that is permissible, as agricultural and horticultural land is a separate class of real property that is not required to be valued uniformly in relation to non-agricultural real property; only uniformity within the class of agricultural and horticultural land is required. Accordingly, the reduced valuations you propose, if applied uniformly, do not appear to contravene art. VIII, § 1.

The remaining question is whether it is permissible to establish an assessed level of value for taxation by K-12 public education entities that is different than the level of assessed value for all other taxing entities. While we have not found any Nebraska case law on point, the Supreme Court of Texas has considered whether a statute providing for assessment of property at a greater percentage of value in one subdivision than the level of value subject to assessment by other taxing subdivisions violated the Texas Constitution’s uniformity clause and the Equal Protection Clause of the U. S. Constitution. *Smith v. Davis*, 426 S.W.2d 827 (Tex. 1968) [“*Smith*”]. The challenged statute allowed hospital district tax assessments to be made “at a greater percentage of fair cash market value than that used in assessing the property for state and county purposes.” *Id.* at 830.

Art. VIII, § 1, of the Texas Constitution provided that “taxes shall be equal and uniform, and all property \* \* \* shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.” *Smith*, 426 S.W.2d at 833. While noting that the state and federal constitutions “do require that taxation be uniform, equal, and in proportion to the value of the property being taxed . . . ,” the court found the assessments were “uniform and equal,” as “[t]here is no constitutional requirement that different taxing bodies use the same proportion of fair market value in assessing property for tax purposes.” *Id.* at 834.

While assessment at disparate levels of value by different taxing entities is permissible provided they are uniform within the taxing jurisdiction, a question could arise as to whether the creation of two classes of taxing entities results in impermissible special legislation in violation of Neb. Const. art. III, § 18.<sup>3</sup> A legislative act violates the prohibition against special legislation if it “creat[es] a totally arbitrary and unreasonable method of classification. . . .” *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 845 (1991). “A special legislation analysis focuses on a legislative body’s purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation.” *J.M. v. Hobbs*, 288 Neb. 546, 557, 849 N.W.2d 480, 489 (2014). “A legislative body’s distinctive treatment of a class is proper if the class has some reasonable distinction from other subjects of a like general character.” *Big John’s Billards, Inc. v. State*, 288 Neb. 938, 945, 852 N.W.2d 727, 735 (2014). “[T]hat distinction must bear some reasonable relation to the legitimate objective and purposes of the legislative act.” *Id.*

In Att’y Gen. Op. No. 15-002, we concluded that legislation that would reduce the value of agricultural and horticultural land, including land subject to special valuation, but not other real property, for purposes of calculating state aid to schools, did not create an improper classification in violation of the special legislation clause. *Id.* at 5. You indicate the proposed reduction in assessed values for taxation by K-12 public education entities would correspond with reductions in the valuation of real property for purposes of computing available resources under TEEOSA. The stated purpose is “to assure that the amount of reduction of property valuations within the TEEOSA formula will translate into actual property taxes paid by a property owner. . . .” Given this connection and purpose, we cannot say the classifications created are improper and contrary to art. III, § 18.

## CONCLUSION

The uniformity clause requires that all real property within a taxing jurisdiction be assessed and taxed at a uniform standard of value. While art. VIII, § 1, requires uniform and proportionate taxation, it does not mandate taxation at full actual value. While the Legislature has used full “actual value” as the basis for taxation in the past, and does so

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<sup>3</sup> Article VIII, § 1, states this section applies “[n]otwithstanding” other provisions of the Constitution, including Article III, § 18. The effect of this language has not yet been subject to judicial interpretation. Nevertheless, we will consider the application of the special legislation clause to the proposed classifications.

presently for nonagricultural real property, it has also provided for the assessment of real property at a percentage of full actual value. And, it currently provides for valuing and taxing agricultural and horticultural land (including land subject to special valuation) at a percentage of full actual value. Thus, the Legislature may provide for the assessment of real property at a uniform fraction or percentage of its actual value. While there is no Nebraska case law addressing whether it is permissible to establish disparate levels of value subject to assessment by different taxing entities, there is authority indicating that uniformity does not require that different taxing entities use the same proportion of value in assessing property for tax purposes. What is required is uniformity in the percentage of taxable value within each taxing jurisdiction. The reduced valuations of real property for taxation by K-12 public education entities you propose, applied uniformly, do not appear to contravene art. VIII, § 1. Further, the classifications created by the different levels of assessed value proposed do not appear to violate the prohibition against special legislation in Neb. Const. art. III, 18.


Very truly yours,

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