

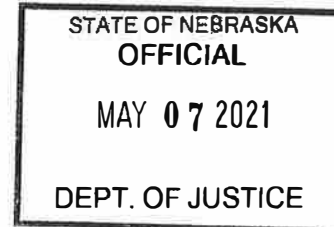


STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

21-010



SUBJECT: Constitutionality of Adjusting the Value of “Damaged” Property for Tax Purposes

REQUESTED BY: Senator Steve Erdman
Nebraska State Legislature

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

INTRODUCTION

You have requested an opinion of the Attorney General concerning LB 165 which would amend Neb. Rev. Stat. §§ 77-1301, 77-1307, 77-1308, 77-1309 and 77-1725.01 (Cum. Supp. 2020) to provide tax relief to those with “damaged” real property. With the enactment of LB 512, Laws 2019, the Legislature provided 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 now ask whether replacing the word “destroyed” with the word “damaged” in these statutes would violate the Nebraska Constitution in any way and whether striking the definition of a calamity in § 77-1307(2) would make LB 165 unconstitutional in any way. You have asked that we provide our opinion as soon as possible as you are considering an attempt at an amendment of another bill.

Your opinion request does not articulate a specific constitutional provision which LB 165 may contravene. We have frequently explained in the past that a general question on the constitutionality of proposed legislation will necessarily result in a general response from this office. Op. Att’y Gen. No. 09008 (April 16, 2008); Op. Att’y Gen. No. 04015 (April 7, 2004). However, in a recent opinion, we discussed whether LB 512, Laws 2019, would violate Neb. Const. art. VIII, § 1, the “uniformity clause.” Op. Att’y Gen. No. 19006

(April 24, 2019). LB 165 would amend many of the same statutes amended by or created by LB 512 and it appears that your question may relate to our prior opinion. Given the short time frame in which to provide our opinion and the fact that LB 165 would amend the statutory provisions created by LB 512, Laws 2019, our analysis will discuss the uniformity clause.

ANALYSIS

I. Uniformity Clause

Neb. Const. art. VIII, § 1(1) provides: “[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).

This office has discussed the Nebraska case law concerning the uniformity clause in a number of opinions, including Op. Att’y Gen. No. 16007 (March 16, 2016); Op. Att’y Gen. No. 19013 (November 20, 2019); and Op. Att’y Gen. No. 19006 (April 24, 2019). “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 our prior analysis of AM1217 to LB 512, Laws 2019, we noted that the Nebraska Supreme Court has adopted a strict construction of our state’s uniformity clause, which raised some 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.

* * *

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.

Op. Att’y Gen. No. 19006 at 3-4.

In that opinion, we expressed our concern that, 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), while certain “destroyed real property” would be valued on a different date with use of a statutory prorated formula.

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 to reflect the actual value of the destroyed property on that date does not violate our state constitution’s uniformity clause.

Op. Att’y Gen. No. 19006 at 4.

Based, in part, on the legislative history of AM1217 to LB 512, we opined that “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.” (footnote omitted). We concluded, in that opinion, that the provisions of AM1217 did not clearly contravene the uniformity clause.

II. Constitutionality of LB 165

You now ask us to address the constitutionality of certain provisions of LB 165. Currently, Neb. Rev. Stat. § 77-1307(1) states the legislative finding that “fires, earthquakes, floods and tornadoes occur with enough frequency” that property tax relief to owners of affected real property should be granted. In § 77-1307(2), the term “calamity” is defined as a “disastrous event, including, but not limited to, a fire, an earthquake, a

flood, a tornado, or other natural event” and the term “destroyed real property” is defined as “real property that suffers significant property damage as a result of a calamity.”

With LB 165 you propose to amend §§ 77-1301, 77-1307, 77-1308, 77-1309, and 77-1725.01 by replacing the word “destroyed” with the word “damaged.” LB 165 would also omit the definition of “calamity” now found at § 77-1307(2)(a) and the reference to “result of a calamity” in the definition of damaged (currently destroyed) real property now found at § 77-1307(2)(b). Damaged real property, under LB 165, § 2, would be defined as real property that suffers significant property damage. And, the term significant property damage would be described as damage to an improvement exceeding twenty percent of the improvement’s assessed value in the current tax year or damage to land exceeding twenty percent of the land’s assessed value in the current tax year. If LB 165 is enacted, 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. Any real property with “significant property damage” from whatever cause, other than damage caused by the owner of the property, would receive an adjusted value based on the assessed value on the date it suffered the significant property damage. LB 165, § 4.

Your question is whether replacing the word “destroyed” with “damaged” in these statutes and deleting the definition of calamity would make the statutes unconstitutional. We previously concluded that these statutes did not appear to clearly contravene the uniformity clause in Op. Att’y Gen. No. 19006. In light of our 2019 opinion, the question is perhaps whether these proposed changes in terminology would lead us to a different conclusion. We note that, while certain terms and definitions would change, the concept remains the same. LB 165, like LB 512, would afford tax relief to those property owners with damaged property by requiring the county board of equalization to adjust the assessed value of the property. As with LB 512, a court could find that LB 165 creates a second, non-uniform standard of value for damaged property. While LB 165 would change the terminology so as to perhaps provide tax relief to a broader group of property owners, an argument can still be made that the statutes are constitutional with regard to the uniformity clause.

The Nebraska Supreme Court has not yet addressed the requirements of the uniformity clause with regard to legislation similar to LB 165 or with regard to the statutory provisions which your bill would amend. As discussed above in section I. of this opinion, if a constitutional challenge was made to the legislation you propose, the court would determine, as stated by the Supreme Court in *McNeil*, whether “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.

A court would first look at the language of LB 165 itself to determine whether the differential tax treatment for damaged property rests on “some substantial difference of

situation or circumstances." In our prior opinion discussing LB 512, we stated that a court could also consider the legislative history of that bill in order to determine the Legislature's purpose in enacting the legislation and that the floor debate on LB 512 included some statements concerning the sudden, unforeseen and calamitous nature of natural disasters that might be used to justify the separate classification of destroyed property for tax purposes. Op. Att'y Gen. No. 19006 at 4. The committee hearing transcript and floor debate relating to LB 165 are not yet available, but we note that the reasons articulated in support of the bill may also become important in a court's analysis.

CONCLUSION

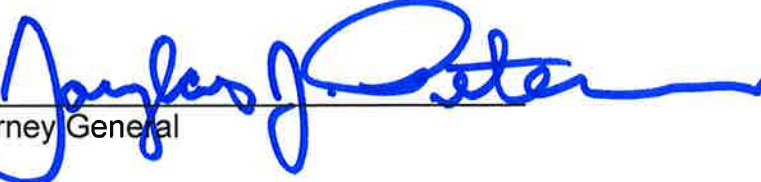
In our prior opinion concerning LB 512, we concluded that, while Neb. Const. art. VIII, § 1 raised some concerns regarding the constitutionality of that bill, the bill did not clearly contravene the uniformity clause. For the reasons discussed above, it is our view that the changes in terminology found in LB 165 would not alter that conclusion. In other words, we cannot say that the statutory amendments proposed by LB 165 plainly violate Neb. Const. art. VIII, § 1.

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