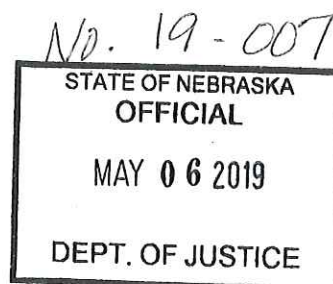




STATE OF NEBRASKA
Office of the Attorney General

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



SUBJECT: Constitutionality of Reducing the Percentage of the Actual Value of Agricultural and Horticultural Land Used in Calculating State Aid Value Under the Tax Equity and Educational Opportunities Support Act

REQUESTED BY: Senator Lou Ann Linehan
Senator Mark Kolterman
Senator Mike Groene
Nebraska State Legislature

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

INTRODUCTION

You are considering legislation that would reduce the percentage of the actual value 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 and Cum. Supp. 2018). Specifically, this potential legislation would amend Neb. Rev. Stat. § 79-1016(3) (Cum. Supp. 2018). You request our opinion on the following three constitutional issues:

1. Does a reduction in adjusted value for agricultural and horticultural property within the TEEOSA formula violate the uniformity requirements of Neb. Const. art. VIII, §1?
2. Does the reduction described herein violate Due Process or Equal Protection under Neb. Const. art. I, § 3?

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3. Does the reduction described herein violate Due Process or Equal Protection under the Constitution of the United States?

ANALYSIS

I. Uniformity Clause

Your first question is whether the proposed amendment to the TEEOSA formula would violate the “uniformity clause” of our State Constitution. Neb. Const. art. VIII, § 1(1) provides: “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises . . . except as otherwise provided in or permitted by this Constitution; . . .” Neb. Const. art. VIII, § 1(4) authorizes the Legislature to provide that agricultural land and horticultural land constitute a separate class of property for purposes of taxation. 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 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) (quoting *County of Gage v. State Bd. of Equal.*, 185 Neb. 749, 755, 178 N.W.2d 759, 764 (1970)). “The rule of uniformity applies to both the rate of taxation and the valuation of property for tax-raising purposes.” *Grainger Bros. Co. v. Lancaster Cty. Bd. of Equal.*, 180 Neb. 571, 574, 144 N.W.2d 161, 164 (1966). The legislation which you are considering would not change the rate of taxation or the valuation of property for “tax-raising purposes.” Rather, it would amend Neb. Rev. Stat. § 79-1016(3), which is part of the statutory formula used in calculating state aid to schools.

TEEOSA was enacted in 1990 to both equalize school funding and provide property tax relief, in part, through use of a formula for the distribution of state aid to public schools. Neb. Rev. Stat. § 79-1002 (2014). That formula takes into consideration both the needs of local systems and school districts and the resources available to those local systems and school districts. In determining the resources available, TEEOSA requires the Property Tax Administrator to “compute and certify to the State Department of Education the adjusted valuation for the current assessment year for each class of property in each school district and each local system.” Neb. Rev. Stat. § 79-1016(2) (Cum. Supp. 2018). “The adjusted valuation of property of each school district and each local school system, for purposes of determining state aid pursuant to [TEEOSA], shall reflect as nearly as possible the state aid value” *Id.*

As you point out in your request letter, “state aid value” is then defined at Neb. Rev. Stat. § 79-1016(3) to mean:

- (a) For real property other than agricultural and horticultural land, ninety-six percent of actual value;
- (b) For agricultural and horticultural land, seventy-two percent of actual value as provided in sections 77-1359 to 77-1363. For agricultural and horticultural land that receives special valuation pursuant to section 77-1344, seventy-two percent of special valuation as defined in section 77-1343; and
- (c) For personal property, the net book value as defined in section 77-120.

You are “considering introducing an amendment to a bill currently in the Revenue Committee that would reduce the range of adjusted valuation for agricultural and horticultural property” for purposes of the statutory state aid formula, while the adjusted valuation for state aid purposes for all other real property would remain at a higher percent.¹ This potential legislation would make a change in the computation of available resources in the TEEOSA formula. However, because it would not change the rate of taxation or the valuation of real property for taxation purposes, there is no question that arises under the uniformity clause.

II. Equal Protection and Due Process

Your second and third questions concern the equal protection and due process provisions of both the Nebraska and United States Constitutions. Neb. Const. art. I, § 3 provides: “No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws.” U.S. Const. Amend. XIV, § 1 provides, in pertinent part, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Nebraska Supreme Court has held that the “Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.” *Lingenfelter v. Lower Elkhorn Natural Resources District*, 294 Neb. 46, 77, 881 N.W.2d 892, 914 (2016); *Citizens of Decatur for Equal Educ. v. Lyons-Decatur School Dist.*, 274 Neb. 278, 302, 739 N.W.2d 742, 762 (2007) [*Decatur*]. And, the Court has stated that the language of the due process clauses of the State and Federal Constitutions is similar

¹ We note that AM1572 to LB 289 was filed after we received your opinion request. Section 38 of that amendment would amend Neb. Rev. Stat. § 79-1016(3) to provide that state aid value for agricultural and horticultural lands would be reduced to 62 percent of actual value while state aid value for other real property would be reduced to 86 percent of actual value.

such that they are often discussed together. *Decatur* at 293, 739 N.W.2d at 756; *Marshall v. Wimes*, 261 Neb. 846, 850, 626 N.W.2d 229, 234 (2001). Therefore, we will discuss your second and third questions together.

In 2015, this office addressed whether LB 280, which also included a provision to lower the percentage of agricultural and horticultural land used in determining state aid value, violated the special legislation clause at Neb. Const. art. III, § 18 by creating a totally arbitrary and unreasonable method of classification. Op. Att'y Gen. No. 15002 (February 17, 2015). We will briefly summarize that opinion here. "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). The question we discussed, therefore, was "whether the distinction between the percentages of agricultural and horticultural lands and other real property, utilizing a percentage below the midpoint of the range for agricultural and horticultural lands and land subject to special valuation while retaining the midpoint of the range for other real property, establishes an arbitrary and unreasonable classification." Op. Att'y Gen. No. 15002 at 3-4.

In that opinion, we also looked back at the legislative history of an earlier 2011 bill (LB 440), which was similar to LB 280, and the purposes articulated in support of that bill. Those purposes included providing more state aid to more rural school districts and to "help neutralize the effect of soaring agricultural land values and resulting decrease in state aid that burdens our rural communities in supporting K-12 school districts." Committee Records on LB 440, 102nd Leg., 1st Sess. 1-2 (February 1, 2011) (Statement of Sen. Heidemann). It was also noted that the number of school districts not receiving equalization aid under TEEOSA had risen considerably. *Id.* at 2 (Statement of Sen. Heidemann). In our 2015 opinion, we stated that the purposes articulated in support of LB 440 also provided an adequate basis for the distinction between agricultural and horticultural lands and other real property in LB 280. "Given the substantial increase in the valuation of agricultural and horticultural lands statewide in recent years, which has outpaced increases in the valuation of other real property, utilizing a different, lower percentage of agricultural land value in the calculation of state aid is not arbitrary or unreasonable, as it is based on real substantial differences between such lands and other real property." Op. Atty Gen. No. 15002 at 4. We concluded that such a provision in LB 280 did not result in an improper classification in violation of the special legislation clause of our State Constitution.

Subsequent to the issuance of that Attorney General opinion, a committee hearing was held on LB 280. A review of the legislative history of LB 280 reveals that similar reasons were articulated in support of that bill. "[T]oday, two-thirds of all school districts in Nebraska receive no TEEOSA and must rely completely on taxes assessed on local property owners to meet the needs of the district." Committee Records on LB 280, 104th Leg., 1st Sess. 34 (February 18, 2015) (Statement of Sen. Davis). LB 280 "lowers the

percentage of agricultural land valuation from 75 percent to 65 percent in the resources side of the TEEOSA formula.” *Id.* at 35. Examples were provided of a “disproportionate property tax burden being felt by rural Nebraskans.” *Id.* at 34-35. We expect that the purposes articulated in support of both LB 440 and LB 280 will also apply to your proposed legislation. In addition, your request letter states one of the goals of the legislation is “to reduce the reliance on local property taxes to fund public schools.”

The potential legislation which you describe is similar to the provisions proposed in 2011 (LB 440) and 2015 (LB 280). While we previously concluded that such a provision would not violate the Nebraska special legislation clause, you have now inquired whether it would violate state and federal equal protection clauses. While “[s]pecial legislation analysis is similar to an equal protection analysis . . . , the focus of each test is different.” *Hug v. City of Omaha*, 275 Neb. 820, 826, 749 N.W.2d 884, 890 (2008). “The analysis under a special legislation inquiry focuses on the Legislature’s purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation.” *Id.* “This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose.” *Id.* It is important to note that the “test for validity under the special legislation prohibition is more stringent than the traditional rational basis test” employed in equal protection clause analysis. *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 846-47 (1991). In other words, if legislation to reduce the percentage of the actual value of agricultural and horticultural lands used in determining state aid value under TEEOSA meets the test for validity under the special legislation clause, it follows that it will meet the less stringent rational basis test of the equal protection clause.

A potential challenger would need to first demonstrate that he or she was treated differently than others similarly situated. The equal protection clause “does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Decatur*, 274 Neb. at 303, 739 N.W.2d at 762. Even if that first requirement is met, if “the classifications involved in a statute do not create any suspect class or address any fundamental right, the court applies only minimal scrutiny under the equal protection analysis.” *Staley v. City of Omaha*, 271 Neb. 543, 553, 713 N.W.2d 457, 468 (2006). “[T]he burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Decatur*, 274 Neb. at 303, 739 N.W.2d at 763.

There is also a substantial overlap between the tests applied under a due process and an equal protection analysis. As stated by the Nebraska Supreme Court in *Decatur*, “[I]n both equal protection and due process challenges – when a fundamental right or suspect classification is not involved – a government act is a valid exercise of police power if it is rationally related to a legitimate governmental purpose.” *Id.* at 293-94, 739 N.W.2d at 756. In that case, a coalition of parents and taxpayers argued that the free instruction clause at Neb. Const. art. VII, § 1 guarantees a fundamental right to equal and adequate

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funding of schools within the same school district. The Court held that the free instruction clause does not confer a fundamental right to equal funding of schools so that the appropriate level of scrutiny was the rational basis test. Further, the school board's actions, taken because the school board was faced with increasing budget deficits and needed to reduce costs, "were rationally related to its legitimate goal of providing an education to all children in the district." *Id.* at 302, 739 N.W.2d at 762.

As we pointed out in Op. Att'y Gen. No. 15002, the Legislature has been given broad discretion in determining the proper means to fund our schools. *Id.* at 5. "Nebraska's constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature's discretion." *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 550, 731 N.W.2d 164, 179 (2007). If the legislation which you describe is enacted for the purposes of getting more state aid to rural school districts and reducing the reliance on local property taxes to fund public schools, we think that a court would find that the legislation is rationally related to these goals.

Finally, to the extent a constitutional challenge might be made to the legislation you propose by a county or school district, we note that both U.S. Const. Amend. XIV and Neb. Const. art. I, § 3 prohibit the State from depriving any "person" of life, liberty, or property without due process of law or from denying any "person" the equal protection of the laws. Therefore, counties, school districts and other political subdivisions have no due process or equal protection rights against the State. "A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person Accordingly, a county cannot invoke the protection of the 14th amendment against the State." *Rock County v. Spire*, 235 Neb. 434, 448, 455 N.W.2d 763, 771 (1990). "In the instant case, the [school] district, as a creature and political subdivision of the state, is neither a natural nor an artificial 'person' and, therefore, cannot invoke due process protection against the state." *Loup City Public Schools v. Nebraska Dep't of Revenue*, 252 Neb. 387, 394, 562 N.W.2d 551, 556 (1997).

CONCLUSION

You are considering legislation that would change that part of the statutory TEEOSA formula which takes into consideration the resources available to local systems and school districts. In particular, the legislation would reduce the percentage of the actual value of agricultural and horticultural lands used in calculating state aid value in Neb. Rev. Stat. § 79-1016(3). As the uniformity clause of our State Constitution requires uniformity in both the rate of taxation and the valuation of property for tax-raising purposes, and your proposed legislation would only make a change in the value of agricultural and horticultural lands for purposes of the TEEOSA formula, there is no constitutional question that arises under the uniformity clause. Also, for the reasons stated above, we do not believe that the proposed legislation would contravene equal

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protection or substantive due process requirements. We expect that the reasons articulated in support of such legislation would provide a rational basis for the reduction in value for purposes of the TEEOSA formula.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Assistant Attorney General
Lynn A. Melson
Assistant Attorney General

Approved by:



Attorney General

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

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