District Court of Lancaster County, Nebraska

Steven Banks, et al., **and** **County of Knox, State of Nebraska** **Plaintiffs,** **v.** **Dave Heineman, Governor; Don Stenberg; State Treasurer, and Douglas A. Ewald, Tax Commissioner, All Executive Officials of the State of Nebraska,** **Defendants.** **Jon Bruning, Attorney General of the State of Nebraska, Notified.**	**Case No. CI 11-662** **Hon. Paul D. Merritt, Jr.** **Plaintiffs' Reply Brief** **Notice of Constitutional Challenge**

Contents

Statement of the Case

1. Plaintiffs challenge the *tax credit* created by *Neb Rev Stat* § 77-6203(5)(b), not the entire nameplate tax. Defendants defend the tax itself, but have little to say in more than 50 pages about the challenged tax credit.

2. The stipulated facts and agreed-upon description of the issues presented in this case leave no controversy about the nature of the action. Plaintiffs are taxpayers and members of the Knox County Board of Supervisors. Their County suffers a loss of tax collections and they suffer exacerbated tax burdens because *Neb Rev Stat* § 77-6203 improperly commutes taxes due Knox County through the artifice of a credit for taxes of a different kind in years that follow after the year in which the commuted tax was due.

3. The core issues are permissibility of a tax commutation and the lawfulness of a statute empowering its occurrence as special legislation. Defendants also challenge the Plaintiffs' standing, contending they have no special injury, but Defendants correctly perceive, and seek cleverly to obfuscate, the fact that if the Plaintiffs cannot challenge the tax, then nobody can. So, Plaintiffs do have standing to sue.

Issues Presented

4. There is no disagreement about the Statement of Issues presented. They appear in Plaintiffs' Opening Brief at page 2, where they are taken verbatim from the Stipulated Facts and Issues Statements. Defendants add the standing issue.

Standard of Review

5. The parties do not appear to disagree about the Standard of Review governing this Court's work. (Plaintiffs' Open Br p4).

Propositions of Law

6. The Legislature shall not pass special legislation granting any corporation, association, or individual special or exclusive purposes. *Neb Const* Art III § 18.

7. A legislative Act that creates a permanently-closed class is special legislation that violates *Neb Const* Art III § 18. The Court considers the Act's substance, not merely its form, to determine whether it is special legislation. *Haman v. Marsh*, 237 Neb 699, 467 NW2d 836 (1991); *Le v. Latrup*, 271 Neb 931, 716 NW2d 713 (2006).

Statement of Facts

8. Since the facts are stipulated, little needs to be said in response to the Defendants' Brief (p5-17). However, a few comments may inform the Court about the positions of the parties to some extent. First, Plaintiffs challenge the *tax credit* created by *Neb Rev Stat*§ 77-6203(5)(b), not the entire nameplate tax.

9. Defendants' factual theme is that the challenged "nameplate tax," appearing at § 77-6203, is a mathematically precise replacement for the predecessor personal property tax. This theme is a) not relevant since the credit, not the tax, is challenged, and b) not accurate for Knox County, which loses revenue while other political subdivisions do not.

10. The legislative history notes a transformation in the due date of the tax and overlooks the fact that the tax's credit provision, which is challenged here, constitutes a permanent deprivation of tax revenues for Knox County alone. Knox was the only County where a commissioned and operating wind generation facility owed, and was required to pay, personal property taxes before the nameplate tax became the law. Accordingly, legislative history (E4 & E10), quoted at Def Br p8, does not mitigate the constitutional problem; they highlight it! Even if wind farms pay the same tax amounts in the future, the Knox County taxpayer experiences a windfall with a credit, and the credit applies after the tax came due. Factually, this is no different than adopting a surrogate for the income tax and providing a credit for judges or physicians or farmers permitting them to have a credit against next year's taxes by a new name for the amounts paid last year for taxes by an old name, while everyone else must simply pay last year's, this year's, and next year's taxes.

11. Four (4) pages of Defendants' Brief are devoted to a description of wind generation facilities outside Knox County and not in existence for personal property tax purposes in 2009, at the relevant time. Defendants' Brief (pp12-15) adds nothing to the constitutional analysis required to resolve the legal issues. (Plaintiffs reserve objections to these superfluous parts of the facts of the parties for this reason. The State wanted to offer this evidence, and the parties accommodated the State's desire by noting the Plaintiffs would reserve the right to object to this evidence on relevance. They do, and will, assert objections under *Neb Rev Stat* §§ 27-402 & 403 to Exhibits 1-32's paragraphs dealing with alternate facilities.)

12. Defendants describe the Nebraska Department of Revenue's nameplate capacity tax regulations, 316 *Neb Admin Code* Ch 13. The regulations implement the challenged portion of *Neb Rev Stat* § 77-6203, particularly subpart 5(b). The regulation fails when the statute fails.

13. Plaintiffs live in the only County affected by the challenged tax credit. They will pay more taxes if it stands and their local governments will suffer. If they cannot challenge the tax credit, no one can since the credit applies to a closed class of one taxpayer, affected for a closed tax year – 2008, the year before the credit was applied, impacts one county – Knox, and does not disadvantage any wind power company because only one with tax liability existed in the State in 2008. The credit's unlawfulness cannot be challenged by anyone if it is immune from challenge by Knox County or its residents on standing grounds.

Argument

I. *Neb Rev Stat* § 77-6203(5)(b) Violates *Neb Const* Article XIII § 4 by Commuting the Wind Farm's Tax Liability

14. Careful review of Defendants' Brief discloses that the merits of Plaintiffs' attack on *Neb Rev Stat* 77-6203(5)(b) is not reached by Defendants until the second half of page 32, about 65% of the way through Defendants' Brief. After pages of improvident argument concerning standing (dealt with in Argument V *infra* in this Reply Brief),

Defendants suggest that *Neb Const* Art VIII § 4 "applies only to property taxes, and the nameplate capacity tax is an excise tax." Defendants are wrong. Art VIII § 4 prohibits the Legislature from releasing or discharging "any county, city, township, town, or district whatever or the inhabitants thereof, or any corporation, *or* the property therein from their or its proportionate shares of taxes to be levied for state purposes, or due any municipal corporation, *nor shall commutation for such taxes be authorized in any form whatever*." The prefatory language in the Constitution's Art VIII § 4 excepts from this prohibition real property taxes remaining "delinquent and unpaid for a period of 15 years or longer."

15. The defense concedes the Nebraska Supreme Court has not addressed the scope of Art VIII § 4. It notes the cases addressing Art VIII § 4 have been property taxes, with one exception. The exception *Kiplinger v. Dept of Natural Resources*, 282 Neb 237, 803 NW2d 28 (2011) involved an occupation tax upon the activity of irrigation.

16. But, the nameplate tax is not a tax on activity; it is not a true excise tax. It is a specialized form of property tax calculated not against power output but against the capacity of property to generate electrical power. Instead of basing the tax on property values it bases the tax on capacity of property to generate electricity—whether it does so or not. The nameplate tax uses a hybrid form of calculation for property tax. It is due regardless of the amount of electrical energy generated. It applies to the capacity of the machines to generate power once commissioned, whether they operate in a particular week, month, or year, or sit by idly. The tax is levied because the machines are present and have been commissioned for use, not because of their output.

17. Since the Legislature's sponsors for § 77-6203 took pains to explain that their goal was to simply restructure the property tax on wind generation facilities and keep it uniform and proportionate, but calculated differently, in order to avoid an unduly burdensome front-end tax (E4 at 10), it is clear the Legislature was aware it was adopting a hybrid form to calculate a property tax. It was not adopting an excise tax. E4, p10-11.

18. Uniformity and proportionality are present as issues here. If the nameplate tax is not a property tax, then a special exemption from property taxation was granted to

wind generation facilities. They would be alone among commercial property exempted from the personal property taxes with a statutory exemption format isolated to a unique kind of property. Certainly, exemptions and credits are authorized, but they must be uniform and proportionate. Real and personal property tax exemptions exist for charities and for some kinds of personal property. They must be uniform and proportionate. The Defendants' suggestion (Br p38) that Plaintiffs' position would call into question the system of exemptions and credits under the income and sales taxes is simply not accurate. Commutation is the first and greatest sin of *Neb Rev Stat* § 77-6203(5)(b). Lack of uniformity is its second, separate constitutional transgression.

A Commutation Occurs

19. Defendants argue (Br p39) § 77-6203(5)(b) does not commute a tax. But, Defendants fail to explain why Knox County's tax collections will be reduced by future credits through the taking from Knox County of amounts it lawfully collected as property taxes for 2009. The amount $1,594,026 became due and was collected by Knox County. Now, while other Counties collect taxes on identical wind generation property, under the nameplate tax levy structure, Knox County will be unable to do so with Elkhorn Ridge Wind Farm because Elkhorn Ridge Wind Farm is the special object of a credit what will reimburse it, totally, for the tax it lawfully paid in 2009.

20. The Legislature has no power to forgive taxes after the tax year for which they became due. The Legislature cannot undo a taxpayer's closed, fixed obligation to pay a tax, which obligation came about because of the taxpayer's ownership of an asset on the date the tax was levied. A contrary result would invite political shenanigans and skullduggery. Nebraska's Constitutional Convention Delegates knew this and protected the State and its citizens from that eventuality with a constitutional prohibition.

21. Taxes cannot be commuted. The constitutional prohibition of Art VIII § 4 "prevents the Legislature from releasing persons or property from contributing a proportionate share of the tax" for the year in which the tax came due. *Sarpy County Farm Bureau v. Learning Committee of Douglas & Sarpy Counties,* 283 Neb 212, __NW2d __ (2012). In *Sarpy County Farm Bureau*, the Supreme Court addressed the

scope of *Neb Const* Art VIII § 1A prohibiting a State property tax. *Sarpy County Farm Bureau* observed that tax commutation prevents the Legislature from releasing persons or property from contributing a proportionate share of tax and occurs when tax funds raised in one district are diverted entirely to the benefit of another. The Court noted that *Peterson v. Hancock*, 155 Neb 801, 54 NW2d 85 (1952) "is the only case in which we have found an unconstitutional commutation of taxes." The Court in *Peterson* noted that "the legislature's laudable intention of inducing smaller elementary school districts to consolidate… was unconstitutional because it was 'levied upon one district of the county for the exclusive benefit and local purpose of other districts.' " 283 Neb at 244.

22. Here, the credit created for the benefit of Elkhorn Ridge Wind Farm takes money from Knox County, and political subdivisions where the property is located, and commutes it to the taxpayer by forgiving, through the form of a credit enjoyed by no one except Elkhorn Ridge Wind Farm, the amount of taxes paid in 2009 under statutes in full force and effect, and lawful operation. No other taxpayer gets this benefit. Only Knox County suffers this detriment. The detriment must be made up by either other Knox County taxpayers, or other taxpayers of the State, who help plug the revenue hole left by § 77-6203's credit provisions. This is a commutation of a tax. It is unconstitutional.

II. Section 77-6203 Creates an Unconstitutional Closed Class

23. *Neb Rev Stat* 77-6203(5) applies only to a) wind generators who b) were in operation prior to 2009. As the Defendants concede, this meant one taxpayer only, Elkhorn Ridge Wind Farm, was affected by the challenged tax credit. A taxing statute designed to bestow a credit benefit upon a single taxpayer is not saved from constitutional infirmity by being disguised as open ended. Where the Legislature knows that artifice or subterfuge is used to create a special benefit, special legislation and an unconstitutional closed class is created. A class is closed where there is no reasonable chance another can enter into it.

24. Two (2) constitutional sections, *Neb Const* Art VIII § 1 (quoted at Plfs' Open Br 27) and *Neb Const* Art I § 3, the equal protection clause, are applicable.

25. Defendants contend the overall purpose of the nameplate tax was "to provide a more predictable revenue stream for communities." (Def Br p48, citing E4 & E10). But, neither the legislative history, nor the language of the statute, support or justify the tax *credit* provisions of § 77-6203(5) as necessary or germane to the purpose of providing "a more predictable revenue stream." Instead, the credit takes revenue from a single county and its political subdivisions for the benefit of a single taxpayer by giving that single, known, and identified taxpayer a credit unavailable to anyone else.

26. A class consisting of one taxpayer, by any name, is a closed class when the statute credits taxes for that one taxpayer. The part of § 77-6203(5) at issue here is the tax credit at § 77-6203(5)(b). Plaintiffs do not challenge the *entire* nameplate tax. They challenge the credit permitting one taxpayer to recoup what it was lawfully obligated to pay before § 77-6203(5)(b) became the law and exempts them from tax, by giving them a credit for the amounts paid previously, during future years. This is the commutation, and it is the special benefit imposed by the challenged tax credit. There is nothing in the stipulated facts, or the exhibits, to the contrary.

27. Nebraska's Supreme Court made it clear that in determining whether a class is closed for purposes of determining whether a legislative enactment is special legislation, or discriminates invidiously, this rule applies:

> In deciding whether a statute legitimately classifies, the Court must consider the actual probability that others will come under the Act's operation. If the prospect is merely theoretical, and not probable, the Act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment. .... The defendants cannot merely rest on the form of the Act....

Haman v. Marsh, 237 Neb 699, 717-18, 467 NW2d 836, 849 (1991) (striking as special legislation an enactment that would have paid, from the general treasury of the state, the depositors of three (3) failed state-chartered industrial loan and investment companies. Though the statute did not theoretically close the class of depositors and companies that could come within its purview, as the Supreme Court held there was no reasonable probability that others would, and the class was closed as a practical matter.)

28. When the Nebraska Supreme Court decided *Hug v. City of Omaha*, 275 Neb 820, 826, 749 NW2d 884, 890 (2008), it held:

> The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class. A legislative Act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification, or (2) it creates a permanently closed class.

29. *Hug* cites *Le v. Latrup*, 271 Neb 931, 716 NW2d 713 (2006). *Le* challenged the constitutionality of Nebraska's Guest Statute. The case presented equal protection issues, but is not readily comparable to the matters before the Court. The Court recognized that legislative classifications "are often the result of political compromise." It held that "a legislative classification that is the result of political compromise may still be justified by an independent rational basis." But, the Court held it must be one that "related to a legitimate governmental purpose…." *Le v. Latrup*, 271 Neb at 939, 716 NW2d at 721.

30. The *Le* Court cited and quoted *Haman v. Marsh* for its thesis that "by definition, a legislative Act is general, and not special, if it operates a like form for all persons of a class, or on persons who are brought within the relations and circumstances proved for, and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary…." *Le v. Latrup*, 275 Neb at 941, 716 NW2d at 722.

31. The Knox County residents and the County, who seek a declaration that § 77-6203(5)(b) grants an unconstitutional tax credit, recognize, and ask the Court to recognize, these things about the statutory tax credit they challenge:

	31.1 When the credit was enacted, the tax year for which the credit was granted was over. The statute was enacted in 2009. It applies to taxes paid in 2008. *Chronologically, the class was closed.*

	31.2 Only one commercial wind farm required to pay property taxes existed in Nebraska as of the date for the imposition of the property tax in 2008. That taxpayer was Elkhorn Ridge. The class was closed to this one taxpayer when § 77-62-3(5) was enacted. The Defendants concede this fact, and the Legislature knew this was the case. (Stip E3, p 25-27). *Numerically, the class was closed.*
	31.3 Only Knox County is affected. The other 92 counties are not. Neither is any other wind generator as no others are deprived of the tax. There were no others in 2008. So the class of "victims' of the credit was also closed when the credit was enacted. This consequence has been recognized as sufficiently narrow to strike legislation, though it comes up rarely, as nearly as Plaintiffs' counsel can tell. West Virginia's Supreme Court dealt with the problem, as noted below. *The victim class was closed.*
	31.4 Only Knox County taxpayers and political subdivisions suffered, and therefore, only they care about the challenged credit as only they must pay more, budget less, and enjoy or provide fewer services due to lost revenues in tax credit years. *The class of potential plaintiffs to challenge the §77-6203(5) credit is also closed.*

32. In 1895, the West Virginia Supreme Court dealt with a challenge to a statute governing locating the county seat of a single county. The statute, drafted so it would sound like it might apply to a class of more than one, included a peculiarity that limited its reach to a single county with a singular and unique history in the state. The West Virginia Supreme Court struck the statute noting:

> So that no other county could get into this particular class of counties except by repealing or overruling § 39 of Article 6 of the State Constitution; and it would be a strange construction to hold that a statute because of the class of one must be treated as a class of two potentially, because it may be possible for county No. 2 in that way to break into this closed circle of classification..... And no matter what disguise or circumlocution of apparent generality may be used, it is idle to talk about the creation of a class which expressly takes as the class characteristic, to designate the members of the class, the idiosyncrasy or peculiarity of the one county of Grant, as a mark of apparent classification, when in fact that mark distinctively distinguishes and sets apart in that regard the county of Grant from all other counties, both in the present and for the future; for, as we have seen, the time is past, the circle is closed tight around the solitary county of Grant ....

Groves v. County Court of Grant County, 42 W Va 587, 26 SE 460, 462 (1896).

33. The challenged credit suffers other infirmities, too. The credit bears no reasonable relationship to legitimate government purposes. While there may have been sound reasons for the Legislature to adopt the nameplate tax, and while all the legislative rationale for the tax expressed in the legislative history may be completely sound, none of the justifications for the new tax have anything to do with the credit for the old taxes paid previously. Plaintiffs' Complaint challenges the tax credit (§ 77-6203(5)(b)), not the entire nameplate tax.

34. There is no legitimate governmental purpose for the credit within the nameplate tax. Every legislative purpose is achieved by the tax itself. The credit is simply a favor granted to a taxpayer who went into business knowing that property taxes would be due for the assets the taxpayer purchased and put in place in Knox County for the purpose of generating wind energy in 2008. *Neb Const* Art III, § 18 prevents tax credit cronyism.

35. On the other hand, the credit frustrates the public budgeting process. Knox County, and its political subdivisions, built their budgets depending on the personal property taxes due to the County in 2008. They cannot retreat from their budgets to subtract the taxes that will be commuted in future years because of budgetary restrictions

imposed on political subdivisions. Services will suffer, and budgetary problems are inevitable. The taxpayers in Knox County will have to pay more because the credit shifts money due under the nameplate tax from the County and its political subdivisions, as recipients, to a single, specially-treated taxpayer, Elkhorn Ridge Wind Farm.

36. The Supreme Court explained the special legislation analysis, and its similarity to an equal protection analysis, in *Gourley, ex rel Gourley v. Nebraska Methodist Health System*, 265 Neb 918, 939, 663 NW2d 43, 66 (2003):

> We note that a special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. See generally, *Pfizer v. Lancaster County Bd of Equal*, 260 Neb 265, 616 NW2d 326 (2000)... [L]anguage normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. *Id.* But, the focus of each test is different. 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 expedience of diverse legislation. This is different from an equal protection analysis under which the state's interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose. Under an equal protection analysis, differing levels of scrutiny are applied depending on if the legislation involves a suspect class....

37. In this case, the special legislation and equal protection analyses are similar. The same facts resolve both. But, their focus is different.

38. Defendant claim the legislative purpose to be considered in the necessary special legislation legal analysis was to create a more reliable revenue stream from wind generating facilities. Under the special legislation analysis, one must ask if the Legislature created classes for which there was "a substantial difference of circumstances" to suggest the expediency of diverse legislation. Both on the face of § 77-6203(5)(b), and in its legislative history, it is clear there was no such purpose and no such substantial difference in circumstances. The only difference between Elkhorn Ridge's wind farm and the wind farms of the others, suggested by anything in the

evidence, is that Elkhorn Ridge's wind farm was in operation in 2008 and the others were not. Accordingly, Elkhorn Ridge owed taxes for 2008 and the others did not. So the *nameplate tax* might do what Defendants claim, but the *tax credit* absolutely does not.

39. The challenged statute applies to 2009 and subsequent years, it does not apply to 2008. The statute creates two (2) classes. It extends a credit to taxpayers who paid tax in 2008. It extends no credit to taxpayers who did not. In 2008, the taxpayer who owns Elkhorn Ridge Wind Farm received government services. Other taxpayers, who owned taxable property in 2009 and subsequent years, did not receive government services because they did not have any property requiring government services then.

40. The Legislature's classification, granting a credit to one taxpayer and withholding it from all others, has no rational basis to its announced purpose of providing a more dependable revenue stream to political subdivisions during years in which the nameplate tax applies. Granting a credit to one taxpayer does not help ensure a revenue stream during the years in which the nameplate tax applies. Instead, it simply grants a special legislative benefit to a single taxpayer by paying back, in the form of a credit or commutation, the taxes owed for the year before the statute was enacted.

41. Under an equal protection analysis, one taxpayer gets a benefit, one county and its political subdivisions suffer a detriment, and a closed class is created chronologically, numerically, and under known circumstances as they existed when the challenged tax credit was enacted.

42. The legislation at issue is unconstitutional. It confers a special legislative benefit contrary to *Neb Const* Art III § 18. It denies equal protection of the law to others contrary to *Neb Const* Art I § 3. The tax credit should be stricken.

III. 42 *USC* § 1983 Injunctive Relief is Necessary

43. Injunctive relief is in order to preclude enforcement of a tax following its declaration of constitutional infirmity. Nebraska has no statute prohibiting or permitting a Court to enjoin enforcement of unconstitutional enactments. Accordingly, injunctive relief's basis must be found under federal law. It is provided by

42 *USC* § 1983. These authorities cited in Plaintiffs' Opening Brief (pp19-31) are controlling.

IV. Attorney Fees are Appropriate

44. While Defendants argue that attorney's fees are not due to Plaintiffs upon prevailing in this case, they know fees have been awarded and paid in similar cases repeatedly, and they fail to distinguish those matters identified in Plaintiffs' Brief (pp31-32, ¶¶ 88-91). As Plaintiffs' counsel pointed out, the State paid fees by agreement in similar circumstances in *Bernbeck v. Gale*, 2011 WL3841602 (D Neb 2011).

V. The Plaintiffs Have Standing to Maintain this Action

45. Defendants raise standing as an issue not addressed in Plaintiffs' Opening Brief. Defendants' Brief, served March 1, 2012, preceded by one day the Nebraska Supreme Court's decision in *Project Extra Mile v. Nebraska Liquor Control Com'n*, 283 Neb 379, __NW2d __ (2012). *Project Extra Mile* explores taxpayer standing to challenge Agency action and informs the Court concerning the issue of the Plaintiffs' standing to challenge § 77-6203. On March 13, the defense provided a supplemental letter. As the Supreme Court noted:

> A Complaint's allegations are normally insufficient to confer taxpayer standing if the taxpayer alleges a general interest common to all members of the public. Our decision in *Chambers v. Lautenbaugh*, [263 Neb 920, 644 NW2d 540 (2002)]... supports a conclusion that a resident taxpayer has standing to challenge a state action that allegedly violates statutory law as an unlawful expenditure or waste of public funds.

Project Extra Mile at 388, at *7.

46. The Supreme Court explained:

> We have held that taxpayers have an equitable interest in public funds, including state public funds. And we have held that a taxpayer can challenge the tax-exempt status of another property when the taxpayer can show that public officials have a clear duty to tax the property. Most important, denying taxpayer standing here

> would mean that a government entity's unlawful failure to impose taxes, or collect taxes from, favored individuals or organizations is unreviewable in court. The only persons or groups directly affected by the government action would have no incentive to challenge it.
>
> We hold that a taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax.

Id at 390-391, at *7, *8.

47. The Plaintiffs met this burden here. First, they reside in the only County in the State affected by the challenged tax credit. Second, they are taxpayers whose individual taxes will go up because of the credit. Third, they comprise the entire membership of the County Board of Supervisors—the organization responsible for levying property taxes on Knox County real and personal property. Finally, they are joined by the County itself as a party.

48. If the Plaintiffs cannot challenge the tax credit at issue, it "is unreviewable in Court." "The only persons or groups directly affected by the [credit in § 77-6203(5)(b)] would have no [standing] to challenge it." *Id.* (paraphrasing as indicated.) *Project Extra Mile* lays aside the standing issue in its entirety. It leaves nothing lingering in, or of, the issue.

49. Authorities relied upon by the Supreme Court during the course of deciding *Project Extra Mile* are illustrative. *Rath v. City of Sutton*, 267 Neb 265, 673 NW2d 879 (2004) (holding a taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrarily to law in order to establish an irreparable injury.) (Citing favorably *White v. Davis*, 30 Cal 4th 528, 556, 68 P3d 74, 93, 133 Cal Rptr 2d 648, 671 (2003)) ("the taxpayer's general interest in not having public funds spent unlawfully is sufficient to avoid standing to bring a taxpayer's action… and to obtain a permanent injunction….").

50. As *Project Extra Mile* held, "a taxpayer's interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing

obedience to the law." But, the Supreme Court continued in *Project Extra Mile*… "The reason for permitting taxpayer actions challenging an unlawful expenditure of public funds exists here. A good deal of unlawful government action would otherwise go unchallenged." 283 Neb at 390, at *7, citing *Sprague v. Casey*, 520 PA 38, 550 A2d 184 (1988).

51. Defendant's Supplemental Authority submitted March 13, argues that *Project Extra Mile*'s expanded taxpayer standing only applies where an expenditure of public funds and a statutory duty to collect taxes are present. They claim a tax credit is not an expenditure. Generally, where a special favor is conferred in the form of tax credits similarly situated, deprived property owners might be able to challenge the credit. Here, there are no such taxpayers as explained in ¶¶ 31 above. This closed class credit takes money from Knox County and its taxpayers, and only they stand in a position to be harmed by the financial hail falling from the tormenting credit. Only they are hurt. Only they care. So, only they can sue. *Project Extra Mile* stands for the proposition that where there are no others to challenge unconstitutional acts, those hurt can do so. It does not build an artificial barrier to the courthouse to protect tax credit recipients or the Legislatures that erroneously confer special privileges.

52. Defendant's cite *Manzara v. State of Missouri*, 343 SW2d 656 (Mo 2011) and *Arizona Christian School Tuition Org. v. Winn*, __ US __, 131 S Ct 1436 (2011) as support, but neither case is useful analytically here. Both cases involves situations where potential plaintiffs existed who suffered special injuries. Neither case is helpful to Defendants or harmful to Plaintiffs. *Manzara* challenged a state distressed lands tax credit. The plaintiffs who sued did not claim to be deprived of funds, or the credit, as a result of a special injury or an improper classification. The *Manzara* Court's fractured decision, and multiple opinions, does not provide helpful authority for an understanding of the single-taxpayer, single-victim nameplate tax credit challenged here.

53. In *Arizona Christian School*, the issue was a credit given to individual taxpayers who paid into a "student tuition organization." The Plaintiff sought an injunction on First Amendment grounds. 131 S Ct 1436 (2011). First Amendment cases

provide no corollary here because they have long involved special standing rules, including a narrow requirement of a "logical link" between the alleged First Amendment interest and the tax or tax credit, and not merely general interest as a taxpayer. Second, a nexus between the plaintiff taxpayer's status and the "precise nature of the constitutional infringement alleged" must be shown. Neither was present in *Arizona Christian School.* And, these issues are not present here because this is not a First Amendment case. The Arizona tax credit applied to any private citizen who contributed to an STO and anyone could do so. *Id.* at 1448. Here, the tax credit only applies to one taxpayer and harms only people in one county, and it applies only for one closed year which passed before the law was enacted. These unique facts were not present in *Arizona School.*

54. In this case, the *expenditure* of public funds comes in the form of a tax credit that prevents collection. The prevention of collection from a single taxpayer is tantamount to a legislative appropriation to that favored taxpayer, at the expense of the Plaintiffs and Knox County. It credits, therefore prevents collection of, funds from a specific taxpayer who has already paid taxes which are used to determine the amount of his future credit. Shakespeare's Juliet knew as a teenager what Defendants fail to acknowledge, "What's in a name? that which we call a rose [b]y any other name would smell as sweet…." *Romeo & Juliet,* Act II, sc ii.

55. The issues presented by the Plaintiffs here evade judicial review if these Plaintiffs lack standing. Defendants failed to identify who has standing to challenge the statute at issue if the Plaintiffs do not. This oversight is simple to explain: unless these Plaintiffs can sue, no one can. Standing to challenge § 77-6203 is present. Defendants' contrary arguments are not persuasive. Juliet knew. So will this Court.

Conclusion

56. Plaintiffs, who have standing to do so, correctly challenge *Neb Rev Stat* § 77-6203(5)(b) as an unconstitutional statute. The credit for property taxes paid before enactment of the statute against future tax obligations under the statute is an unconstitutional commutation of tax liability. It violates *Neb Const* Art VIII § 4.

57. The statute applies to only one taxpayer. The Legislature knew this was so when it enacted the tax credit. An unconstitutional closed class is created. *Neb Const* Art III § 18 prohibiting special legislation, and *Neb Const* Art I § 3 assuring equal protection of the law, are both violated by the special and closed class aspect of the statute. An injunction to prevent the tax commutation and special treatment of a single taxpayer is necessary.

58. A judgment declaring § 77-6203(5)(b) unconstitutional, an injunction against its enforcement, attorney's fees for the prevailing Plaintiffs, and costs are respectfully sought.

March 15, 2012.

Steven Banks, et al, and
County of Knox, Plaintiffs,

By: _____

David A. Domina, #11043
Domina Law Group pc llo
2425 South 144th Street
Omaha, NE 68144-3267
402-493-4100
ddomina@dominalaw.com

and

John Thomas, #15176
Knox County Attorney
302 Main Street
Center NE 68723-0123
402 288 4284
jtlaw@gpcom.net

Plaintiffs' Lawyers

Certificate of Service

On March 15, 2012, a copy of Plaintiff's Reply Brief was served by email to:

L. Jay Bartel, Esq.
Assistant Attorney General
2115 State Capitol, P.O. Box 98920
Lincoln, NE 68509-8920
jay.bartel@nebraska.gov

David A. Domina