

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Tony Fulton, Tax Commissioner,

and

Ruth Sorensen, Property Tax Administrator,
Appellants,

v.

Jefferson County Board of Equalization,

and

Bonham Theatre Project,
Appellees.

Case Nos: 13E 018 & 16E 0006

Decision and Order Reversing the
Determinations of the Jefferson County
Board of Equalization

For the Appellants:

Jonathan D. Cannon,
Attorney, Department of Revenue

For Bonham Theatre Project:

Deborah Ebke,
Pro Se

**For Jefferson County Board of
Equalization:**

Jeffrey Goltz,
Jefferson County Attorney

This appeal was heard before Commissioners Steven A. Keetle and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Fairbury, Jefferson County, Nebraska. It is improved with a movie theater originally constructed in 1926 and owned by the Bonham Theatre Project (Project). The legal description of the parcel is found at Exhibit 1. The Property Record Card for the Subject Property was not offered into evidence.

II. PROCEDURAL HISTORY

The Project filed an application for property tax exemption for tax year 2013. The Jefferson County Assessor (County Assessor) recommended that the application be denied, but the Jefferson County Board of Equalization (County Board) determined that the Subject Property

was exempt from taxation and issued a decision to that effect on March 12, 2013. On May 7, 2013, the County Assessor requested a review of this decision by the County Board, which reviewed and affirmed the decision the same day. The Tax Commissioner and the Property Tax Administrator (Department) filed an appeal with the Tax Equalization and Review Commission (Commission) on May 22, 2013. On October 9, 2013, the Commission conducted a jurisdictional show cause hearing and determined that it had jurisdiction to hear the Department's appeal.¹

The Project filed a new application for property tax exemption for tax year 2016. The County Assessor again recommended that the application be denied, but the County Board again determined that the Subject Property was exempt and issued a decision to that effect on February 16, 2016. The Department filed an appeal with the Commission on March 16, 2016.

The Commission held a hearing on September 29, 2017, with Commissioner Keetle presiding. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of Exhibits 1 through 21, 23, and 24. At the hearing, the Commission took notice of its case files without objection. In the course of the hearing, Exhibits 22 and 25 were offered and received, and Exhibits 26 and 27 were offered but not received, for the reasons described on the record.²

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is *de novo*.³ When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.⁴

¹ See Case File.

² Exhibit 22, according to the testimony of Deborah Ebke, contained evidence that other non-profit-owned theaters within the state had been granted tax exempt status. However, the critical portions of the exhibit were redacted due to the Project's concern that the Department would use the information to challenge the exemptions. The Commission admitted Exhibit 22 over the Department's objection, but with the caution that it might be of limited evidentiary value. Due to the extensive redactions, the Commission finds that Exhibit 22 does not constitute competent evidence that tax exemptions have been granted to movie theaters owned by non-governmental organizations.

³ See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁴ *Brenner* at 283, 811.

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented.⁵

In cases where a county board has approved an exemption, the appealing party has the burden of demonstrating, by clear and convincing evidence, that the county board's determination was arbitrary and unreasonable.⁶ If such a showing is made, the burden shifts to the party seeking the exemption to show its entitlement to the exemption.⁷ Only the county assessor, the Tax Commissioner, or the Property Tax Administrator may appeal the granting of an exemption by a county board of equalization; such appeals must be made to the Commission in accordance with Neb. Rev. Stat. §77-5013 within thirty days of the county board's decision.⁸

IV. EXEMPTION

A. Law

The Nebraska Constitution permits the Legislature to classify exempt properties “owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user.”⁹ Pursuant to this authority, the Legislature adopted a statute that exempts from property taxes:

Property owned by educational, religious, charitable, or cemetery organizations ... and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin ... For purposes of this subdivision, charitable organization includes an organization operated exclusively for the purpose of the mental, social or physical benefit of the public or an indefinite number of persons[.]¹⁰

“Exclusive use,” in this context, means the primary or dominant use of property, as opposed to incidental use, and it is the exclusive use of the property that determines the exempt status.¹¹ A property owner's exemption from federal income taxation does not determine whether the

⁵ *Id.* (citations omitted).

⁶ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

⁷ *Id.*

⁸ Neb. Rev. Stat. §77-202.04(1) (2016 Cum. Supp.).

⁹ Neb. Const., Art. VIII, § 2.

¹⁰ Neb. Rev. Stat. §77-202(1)(d) (2016 Cum. Supp.).

¹¹ *Harold Warp Pioneer Village v. Ewald*, 287 Neb. 19, 844 N.W.2d 245 (2013).

owner's property is tax exempt under state law.¹² The alleged exempt property must clearly come within the statutory provision granting the exemption.¹³ The laws governing property tax exemptions must be strictly construed,¹⁴ but courts must give a liberal and not a harsh or strained construction to the terms “educational,” “religious,” and “charitable” in order that the true intent of the constitutional and statutory provisions may be realized, and this interpretation should always be reasonable.¹⁵

B. Summary of the Evidence

The Project was organized and incorporated in 2012 under the Nebraska Nonprofit Corporation Act¹⁶ as a nonprofit corporation for charitable and educational purposes.¹⁷ The Project’s bylaws provide that its principal office shall be located in Fairbury, and that its purpose is to “promote interest and support throughout the community in movie and live entertainment at the Bonham Theater in Fairbury, NE.”¹⁸ The Project’s Articles of Incorporation state:

No part of the net earnings of the corporation shall inure to the benefit of, or be distributed to its members, directors, officers, or private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of [charitable and educational purposes within the meaning of Section 501(c)3 of the Internal Revenue Code].

On or about January 4, 2013, the Project purchased the Subject Property. In order to open the theater to the public, the Project was required to engage in substantial renovations to address issues of safety and accessibility. The Project paid for these renovations through grants and fundraising, and renovations continued through the date of the hearing. During that period, the Project sought to increase its visibility in the community and foster partnerships with other organizations that benefitted the community. It engaged in activities such as providing guides on a local art walk, conducting a joint fundraiser with the Elks’ Club, folding boxes for a local school fundraiser, and providing manpower at a local blues festival.

¹² *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

¹³ *Id.* at 4.

¹⁴ *Nebraska Ann. Conf. of United Methodist Church v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993).

¹⁵ *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

¹⁶ Neb. Rev. Stat. §§ 21-1901 et. seq.

¹⁷ Exhibit 9 at 2.

¹⁸ Exhibit 10 at 1.

In 2014, the Project engaged in significant market research and analysis before adopting a business plan clarifying some of its intentions and purposes. Among other things, this business plan contained the following mission statement: “To acquire, rehabilitate, and reopen the historic Bonham Theatre as a movie, arts, and entertainment center in downtown Fairbury.”¹⁹ The business plan also noted that the Project had discussed, but not finalized, plans to offer services such as projecting an “art film” during a monthly art walk, providing a free matinee at least one Saturday every three months, offering some type of promotion for veterans, and offering the facilities to all area schools at free or cost-based rates for functions requiring seating capacity or services otherwise unavailable to them.²⁰ The business plan indicated that “it is likely the Bonham Theatre will offer second run movies during initial stages, and possibly beyond.”²¹ The Project intends to hold approximately 9 screenings per week and charge rates of \$5 for showings at premium times and \$2 at other times;²² it also intends to sell concessions. The ticket prices are based on the Project’s analysis of pricing in place at its nearest competitors, as well as a desire to keep its shows accessible for low and moderate income individuals while generating the funding necessary to continue operations. The business plan identifies three (relatively) nearby theaters and various streaming media sources as “Competition” and presents analyses of their likely impact on the Project’s operation. The theaters listed include both for-profit theaters and a theater operated by a volunteer organization.

The Project’s exemption application and review of the exemption status of the Subject Property occurred for the 2013 tax year as noted earlier in this opinion. On October 27, 2015, the County Assessor’s office received the Project’s application for exemption for the 2016 tax year. The County Assessor, Mary Banahan, wrote to the Project’s treasurer, Deborah Ebke, requesting evidence of charitable services provided by the Project.²³ The Project did not respond by the January 15, 2016, deadline specified in the letter.²⁴ The County Assessor reviewed newspaper clippings related to the Project that had been collected by her office, and found no evidence of charitable activities. She also concluded, based on the fact that the Project’s primary purpose was the operation of a movie theater, that the Project was being operated for the financial benefit of

¹⁹ Exhibit 20 at 5.

²⁰ *Id.* at 7, 8.

²¹ *Id.* at 7.

²² Exhibit 20 at 27.

²³ See Exhibit 8.

²⁴ Exhibit 13.

the Project's members. The County Assessor recommended denial of the Project's application on the basis of "No documentation of charitable services provided."²⁵

Prior to a hearing before the County Board, Ms. Ebke provided the County Assessor with a list of ostensibly charitable functions including those described above. She also sent the County Assessor a letter in which she stated that the Project's purpose "includes rehabilitating and reserving the historic cultural entertainment venue for generations to come, and promoting interest and support throughout the community in movies and live entertainment at the theatre."²⁶ The County Assessor continued to believe that the Project's application should be denied because the Project was supporting other organizations in their charitable functions, rather than providing charitable services of its own.

There is no evidence to show, and the Department concedes, that the Subject Property is not used for the disqualifying sale of alcoholic liquors and is not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.²⁷

C. Analysis

The parties generally agreed as to the material facts of the case, but disagreed about their legal significance. The Project asserts that renovating the theater and showing movies confers social and mental benefits upon the public sufficient to qualify as charitable use (and render itself, as the non-profit provider of those services, a charitable organization); the County Board concurs. The Department argues that the social and mental benefits conferred by the Project's activities are incidental to its primary purpose of operating a movie theater, and that the operation of any business in Fairbury, charitable or not, would provide similar benefits.

As a threshold matter, the Subject Property was not in operation as a theater for tax years 2013 or 2016 because the Project had to renovate it to meet required standards for safety and accessibility. Nebraska Administrative Code (NAC) Title 350, Chapter 40, § 005.03B(3) provides, in relevant part:

Exclusive use of the property includes ongoing construction of a building or improvement that, when complete, will be used exclusively for exempt purposes. The future use of the completed building or improvement may be ascertained by the actions of the organization owning the property, including, but not limited to, resolutions of an organization's board of directors, or the amendment of the organization's articles of

²⁵ Exhibit 6.

²⁶ Exhibit 13 at 1.

²⁷ See Appellant's Post-Hearing Brief at 6.

incorporation or bylaws, that indicate a clear intent to use the property for an exempt purpose.

As a result, the fact that the theater itself could not be used during the tax years in question is not dispositive. Instead, the Commission must examine the intent of the Project, as expressed in its Articles of Incorporation, its Bylaws, and the business plan it adopted in 2014, to determine the theater's future use.

Between the time the present appeal was heard and the time it was decided, the Nebraska Supreme Court issued its opinion in *Platte River Crane Trust v. Hall Cty. Bd. of Equal.*, 298 Neb. 970, ___ N.W.2d ___ (2018). In that case, the Crane Trust appealed a decision of the Commission finding that the Crane Trust was not exempt from property taxes because it was not a charitable organization. The Supreme Court disagreed.

As in the present appeal, the parties to *Crane Trust* conceded that the subject properties were not used for the disqualifying sale of alcohol and were not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. Like the Project, the Crane Trust applied for exemption as a charitable organization; it did not argue that it qualified as an educational, religious, or cemetery organization. As a result, the Supreme Court wrote, the issues were limited.

For Crane Trust to be entitled to a property tax exemption for its [property], it must show (1) that the parcels are owned by a charitable organization; (2) that the parcels are used exclusively for educational, religious, charitable, or cemetery purposes; and (3) that the parcels were not owned or used for financial gain or profit to either the owner or the user.²⁸

Charitable Organization

Neb. Rev. Stat. § 77-202(1)(d) provides that “charitable organization” includes an organization operated exclusively for the purpose of the mental, social or physical benefit of the public or an indefinite number of persons.²⁹ According to the mission statement contained in the Project's business plan, its mission is “[t]o acquire, rehabilitate, and reopen the historic Bonham Theatre as a movie, arts, and entertainment center in downtown Fairbury.” Under certain circumstances, tax incentives and refunds may be available to organizations which redevelop historically significant properties pursuant to the Nebraska Advantage Transformational Tourism

²⁸ *Platte River Crane Trust v. Hall Cty. Bd. of Equal.*, 298 Neb. 970 at 974, ___ N.W.2d ___ (2018).

²⁹ Neb. Rev. Stat. §77-202(1)(d) (2016 Cum. Supp.).

and Redevelopment Act, but the Act does not provide for property tax exemptions.³⁰ Other statutes provide special rules for the valuation of qualifying historically significant real property, but these statutes do not exempt such properties from taxation.³¹

The Commission has no doubt that movies and live entertainment have an intrinsic mental and artistic value; we also acknowledge that the rehabilitation of an otherwise-vacant building inevitably confers some social and economic benefit upon the public. Valuable as these benefits may be, however, they are incidental to the Project's primary purpose of operating the theater as an entertainment venue. Similarly, the Project's intended charitable activities, such as allowing local schools the free or cost-based use of its facilities, are ancillary to its primary purpose and represent only a small fraction of its total activity.

In finding that the Crane Trust qualified as a charitable organization, the Supreme Court relied heavily on the "considerable evidence of its efforts to provide educational, scientific, and recreational benefits to the general public," its "numerous endeavors to educate the public about the habitat, the wildlife on the habitat, and conservation in general," and the fact that "[t]he Crane Trust's land, including the Subject Properties, is also open for and subject to scientific study." There is no evidence that the Project has engaged or intends to engage in this type of sustained, systematic endeavor to educate the public about the intellectual aspects of film or live theater; the majority of its activities to date consist of fundraising and building renovations, and the majority of its planned future activities involve showing second-run movies at affordable rates. For these reasons, the Commission finds that the Project is not a charitable organization under Neb. Rev. Stat. §77-202(1)(d).

Charitable Use

As noted above, it is the exclusive use of the property that determines tax exempt status, and "exclusive use" means the primary or dominant use of property, as opposed to incidental use.³² Whatever incidental mental and social benefits the showing of movies and renovation of buildings may confer, the Project's primary or dominant uses of the property fall into the categories of culture, recreation, and community development. Neb. Rev. Stat. §77-202 contains separate provisions for exemption for government property and property owned by educational,

³⁰ See Neb. Rev. Stat. §§ 77-1001 et seq.

³¹ See Neb. Rev. Stat. §§ 77-1385 through 77-1394.

³² See *Pioneer Village*.

religious, charitable, or cemetery organizations. Property owned by charitable organizations must be used exclusively for educational, religious, charitable, or cemetery purposes to qualify for an exemption. Government property, in contrast, must be used for “a public purpose,” which can include culture, recreation, and community development.³³

The rules of statutory interpretation require the Commission to attempt to give effect to each word or phrase in a statute, and to avoid reading language out of a statute.³⁴ Components of a series or collection of statutes pertaining to a certain subject matter are in *pari materia* and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.³⁵ In this instance, culture, recreation, and community development purposes are specified as public purposes that justify an exemption in the section of Neb. Rev. Stat. §77-202 relating to government property. The section of the same statute relating to property owned by charitable organizations does not address these three uses. If the Legislature had intended culture, recreation, and community development to be included among permissive charitable uses, it would have included those terms in §77-202(1)(d) as it did in §77-202(1)(a)(ii). By excluding the terms, the Legislature has effectively reserved cultural, recreational, and community development uses for the government in relation to property tax exemptions. The Project presented evidence that movie theaters owned and operated by governmental subdivisions receive exemptions, but the Project is not a governmental subdivision and therefore its exemption application is not reviewed under the same sections of statute. Additionally, the Project did not present evidence of the use of these movie theaters owned by governmental subdivisions, charitable or otherwise. For these reasons, the Commission finds that the Project’s use of the Subject Property for cultural, recreational, and community development purposes does not constitute a charitable use.

Financial Gain or Profit & Summary

For the sake of completeness, we consider whether the Project meets the final criterion described by the Supreme Court in *Crane Trust*. As discussed above, the Project’s Articles of Incorporation state that no part of the net earnings of the corporation shall inure to the benefit of, or be distributed to, its members, directors, officers, or private persons. Nothing in the record

³³ Neb. Rev. Stat. §77-202(1)(a)(ii) (2016 Cum. Supp.).

³⁴ See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

³⁵ See, e.g., *In re Trust of Shire*, 299 Neb. 25, ___ N.W.2d ___ (2018).

indicates that the Project had income aside from grants and tax-exempt donations during the relevant tax years, much less that any earnings were distributed to its members for financial gain. The Commission finds that the Subject Property is not owned or used for financial gain or profit to either the owner or the user.

In summary, the Subject Property is not owned or used for financial gain or profit to the user or the owner. However, the Project is not a charitable organization and its use of the Bonham Theater to show movies is not a charitable purpose under Neb. Rev. Stat. §77-202(1)(d). The Department has proven by clear and convincing evidence that the decision of the County Board granting the exemption relied upon an incorrect interpretation of the statutory requirements, and was thus unreasonable *per se*. The decisions of the County Board must be reversed.

Intervening Years

In its post-hearing brief, the Department asserted that the Project should be subject to taxation, not only for tax years 2013 and 2016, but also for tax years 2014, 2015, and 2017.

Under the current statutory scheme, organizations may apply for property tax exemptions in the year they become eligible. If the exemption is properly granted, it continues for a period of four years, beginning with years evenly divisible by four.³⁶ In each intervening year, the organization must file a statement of reaffirmation with the county assessor; such filing maintains the tax-exempt status of the property with further action of the county.³⁷ The Department filed appeals with the Commission in 2013 and 2016, but it did not file any appeal or petition for tax years 2014, 2015, and 2017. The Department asserts that it was unaware that the statements of reaffirmation were filed and that it lacks statutory authority to appeal reaffirmations under Neb. Rev. Stat. §77-202.04.³⁸

The Commission is not a court of general jurisdiction; its jurisdiction is limited to the matters expressly described in Neb. Rev. Stat. §77-5007. Those matters include decisions of any county board granting or denying tax-exempt status, as well as any other decision of any county board of equalization, but they do not include reaffirmations submitted to a county assessor. Furthermore, for the Commission to obtain jurisdiction over any matter, an appeal or petition must be timely and properly filed.³⁹ A county assessor has the authority to cause a review of any

³⁶ Neb. Rev. Stat. §77-202.03(1) (2016 Cum. Supp.).

³⁷ Neb. Rev. Stat. §77-202.03(2) (2016 Cum. Supp.).

³⁸ Appellant's Post-Hearing Brief at 25.

³⁹ Neb. Rev. Stat. §77-5013(1) (2016 Cum. Supp.)

exemption in any year to determine whether the exemption is proper; the review results in a decision of the County Board which is appealable to the Commission under the provisions of Neb. Rev. Stat. §77-202.04.⁴⁰ Notably, the present appeal for the 2013 tax year arises from such an assessor-initiated review, although the review was initiated before any reaffirmation statement was due.⁴¹

The record contains no information as to whether the County Assessor sought a review of the exemption in 2014, 2015, and 2017 or whether the County Board issued appealable decisions for those tax years. Moreover, neither the hearing record nor the records of the Commission indicate that appeals or petitions related to the Project were filed with the Commission by any party for tax years 2014, 2015, or 2017. As a result, the Commission has no jurisdiction over the Project's tax exempt status for those years, so that status must be left undisturbed.

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board are vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Jefferson County Board of Equalization determining the Subject Property is exempt are vacated and reversed.
2. The Subject Property is not exempt from taxation for tax year 2013.
3. The Subject Property is not exempt from taxation for tax year 2016.

⁴⁰ Neb. Rev. Stat. §77-202.03(4) (2016 Cum. Supp.), see also Order Finding Jurisdiction (Case File).

⁴¹ See Exhibit 1, Exhibit 4, Order Finding Jurisdiction.

4. This decision and order, if no appeal is timely filed, shall be certified to the Jefferson County Treasurer and the Jefferson County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2016 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision shall only be applicable to tax years 2013 and 2016; the exemption status of the Subject Property for 2014, 2015, and 2017 remains undisturbed.
8. This order is effective for purposes of appeal on March 27, 2018.⁴²

Signed and Sealed: March 27, 2018.

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

⁴² Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.