

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW
COMMISSION**

TONY FULTON, TAX
COMMISSIONER,

AND

RUTH SORENSEN,
PROPERTY TAX
ADMINISTRATOR ,
APPELLANT(S),

V.

SHERIDAN COUNTY BOARD
OF EQUALIZATION,

AND

GORDON COMMUNITY
THEATER, INC.,
APPELLEE(S).

CASE NO: 20E 0017

DECISION AND ORDER
REVERSING THE DECISION
OF THE SHERIDAN COUNTY
BOARD OF EQUALIZATION

For the Appellants:

Debra L. Williams,
Attorney, Property Assessment
Division

For Sheridan County:

Jamian Simmons,
Deputy Sheridan County
Attorney

For Gordon Comm. Theater:

Patty Faulk, Vice President,
Gordon Comm. Theater, Inc.

This appeal was heard before Commissioners Steven Keetle and James Kuhn. Commissioner Keetle presided.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Sheridan County, Nebraska. The Subject Property is improved with a movie theater owned by Gordon Community Development Corporation. The legal description and Property Record File (PRF) of the Subject Property is found at Exhibit 2.

II. PROCEDURAL HISTORY

Gordon Community Development Corporation and Gordon Community Theater, Inc. filed an Exemption Application (Form 451) with the Sheridan County Assessor (County Assessor) for tax year 2020.¹ The County Assessor recommended approval of the exemption application and the Sheridan County Board of Equalization (County Board) determined that the Subject Property was exempt for tax year 2020.² Tony Fulton, Tax Commissioner and Ruth Sorensen, Property Tax Administrator (collectively the Department) appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission).

The Commission held a hearing on October 5, 2022. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference report, as ordered by the Commission. Exhibits 1 through 52 were admitted into evidence by stipulation of the Parties.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determination is de novo.³ When the Commission considers an appeal of a decision of a

¹ Exhibit 1

² Exhibit 1

³ See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the

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 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.⁵

The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

In an appeal, the Commission may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based.⁸ The Commission may take notice of judicially cognizable facts, may take notice of general, technical, or scientific facts within its specialized knowledge, and may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.⁹ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹⁰

IV. EXEMPTION LAW

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation and the Legislature may classify other exempt

earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁴ *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

⁵ *Id.*

⁶ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁷ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁸ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

⁹ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹⁰ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

properties “owned by and used exclusively for agricultural and horticultural societies and property 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.”¹¹ Pursuant to that Constitutional authorization, the Legislature has required the exemption of the following from property taxes:

Property owned by educational, religious, charitable, or cemetery organizations, or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, 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 means an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons....¹²

Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.¹³ Exclusive use means the primary or dominant use of property, as opposed to incidental use.¹⁴ The exclusive use of the property is what determines the exempt status.¹⁵ Further, a property

¹¹ Neb. Const., Art. VIII, § 2(1).

¹² Neb. Rev. Stat. § 77-202(1)(d) (2014 Cum. Supp.).

¹³ *United Way v. Douglas Cty. Bd. of Equal.*, 215 Neb. 1, N.W.2d 103(1983); *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁴ *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).

¹⁵ See, *Nebraska Conf. Assn. of Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965).

owner's exemption from federal income taxation does not determine whether the owner's property is tax exempt under state law.¹⁶

There are two overriding factors Courts consider when a request for an exemption is before them. The first is that the property tax burden is necessarily shifted from the beneficiary of an exemption to others who own taxable property, and the second is that the power and right of the state to tax is always presumed.¹⁷

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed but must be applied for;¹⁸ (2) the alleged exempt property must clearly come within the provision granting the exemption;¹⁹ (3) the laws governing property tax exemptions must be strictly construed;²⁰ (4) the 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”;²¹ and (5) this interpretation should always be reasonable.²²

In accordance with Neb. Rev. Stat. §77-369, the Tax Commissioner has promulgated rules concerning the exemption of real property. The rules and regulations establish that “[t]he five mandated criteria are ownership, exclusive use, no financial gain or profit, restricted

¹⁶ *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

¹⁷ See, e.g., *Jaksha v. State*, 241 Neb. 106, 112, 486 N.W.2d, 858, 864 (1992); *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com’rs*, 122 Neb. 586, 241 N.W. 93 (1932).

¹⁸ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

¹⁹ *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

²⁰ *Nebraska Annual Conference of United Methodist Church v. Scotts Bluff County Board of Equalization*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993).

²¹ *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

²² *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

alcoholic liquor sales, and prohibited discrimination. The property must meet all five criteria for the exemption to be allowed.”²³

V. SUMMARY OF THE ISSUES

The parties have stipulated that the three unresolved issues in this appeal are (a) whether the subject property is owned by an educational organization, (b) used for financial gain or profit to either the owner or user, and (c) whether the Subject Property is used exclusively for educational purposes.

VI. FINDINGS OF FACT AND ANALYSIS

The Subject Property is a movie theater located in Gordon, Nebraska. The Subject Property was purchased by the Gordon Community Development Corporation in 2010 and Gordon Community Development Corporation owned the Subject Property during all times relevant to this appeal.²⁴ Gordon Community Development Corporation is not a 501(c)(3) entity but rather a 501(c)(6) entity under the Internal Revenue Code.²⁵ This is an exemption from federal taxes for “Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.”²⁶ Filings with the Nebraska Secretary of State show that Gordon Community Development Corporation is a public benefit non-profit corporation “to promote develop or assist and encourage new and expanded business.”²⁷

During the time relevant to this appeal the Subject Property was leased to Gordon Community Theater., Inc..²⁸ Under the terms of the lease Gordon Community Development Corporation did not collect rent

²³ 350 Neb. Admin. Code, ch. 40, § 005.01 (7/3/2013).

²⁴ Exhibit 52.

²⁵ Exhibit 52, Exhibit 47:1

²⁶ 26 U.S.C.A. § 501(c)(6).

²⁷ Exhibit 40:1

²⁸ See Exhibit 29

but required Gordon Community Theater, Inc. to pay for and provide all necessary renovations and improvements, as well as all maintenance and upkeep, including all costs, fees, and expenses during the lease term. Gordon Community Theater, Inc was the user of the Subject Property during the time relevant to this appeal.

Gordon Community Theater, Inc is:

“[a] public benefit corporation. It is organized for charitable purposes, and to transact any lawful activity pursuant to Nebraska Non-Profit Corporation Act and is hereby exclusively for educational, charitable or religious purposes within the meaning of 501(c)(3) of the Internal Revenue Code of 1954, as amended. The corporation shall establish and operate a movie theater and provide associated entertainment services.”²⁹

According to the testimony of Patty Faulk, the Vice President of Gordon Community Theater, Inc.,³⁰ Gordon Community Theater, Inc. operates the Subject Property as a movie theater. The Subject Property is used to show first run family-oriented movies on Friday and Saturday night and Sunday afternoons and sells concessions at affordable prices. Ms. Faulk testified that 75% of the time the Subject Property was used for showing movies. For the remaining 25% of the time the Subject Property was used to host school events such as fundraisers, workshops for student athletes, and shown movies as rewards for students for goals achieved. The Subject Property has hosted motivational workshops and concussion workshops open to the public, hosted a safety film for the local Coop, as well as Easter and Christmas services for local churches and church youth group activities.

Gordon Community Development Corporation and Gordon Community Theater, Inc, applied for a real property exemption as an educational organization. The Parties generally agreed as to the

²⁹ Exhibit 33:1

³⁰ Ms. Faulk is also an officer and director of Gordon Community Development Corporation.

material facts of the case but disagreed about their legal significance. The County Board and Gordon Community Theater, Inc. assert that renovating the theater and showing movies confers social and mental benefits upon the public sufficient to qualify as educational use. 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 Gordon, for profit or not, would provide similar benefits.

Educational Organization.

Neb Rev Stat §77-202(1)(d) provides that “educational organization” means “(A) an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or assisting students through services relating to the origination, processing, or guarantying of federally reinsured student loans for higher education or (B) a museum or historical society operated exclusively for the benefit and education of the public.”³¹ The evidence presented shows that Gordon Community Development Corporation exists to promote, develop, assist, or encourage new and expanded business. The evidence presented shows that Gordon Community Theater, Inc. exists to restore the movie theater and provide entertainment through media as well as establish and operate a movie theater and provide associated entertainment services. For these reasons, the Commission finds that neither Gordon Community Development Corporation nor Gordon Community Theater, Inc. are educational organizations under Neb. Rev. Stat. §77-202(1)(d).

Financial Gain or Profit

Next, we consider whether Gordon Community Development Corporation or Gordon Community Theater, Inc. operate the Subject Property for financial gain or profit. Gordon Community Theater, Inc.'s Articles of Incorporation state that no part of the net earnings of the

³¹ Neb Rev Stat §77-202(1)(d)

corporation shall inure to the benefit of, or be distributed to, its members, directors, officers, or private persons. Nothing in the record indicates that Gordon Community Development Corporation or Gordon Community Theater, Inc. had income from the Subject Property during the relevant tax year, 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.

Educational 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 The evidence before the Commission is that 75% of the use of the Subject Property is for the showing of movies. This evidence establishes that the primary use of the Subject Property is for operating a movie theater for the showing of movies. Commission finds that Gordon Community Theater, Inc’s use of the Subject Property for the showing of movies does not constitute an educational use.

In summary, the Subject Property is not owned or used for financial gain or profit to the user or the owner. However, Gordon Community Development Corporation and Gordon Community Theater, Inc. are not educational organizations under the language of the statutes and the use of the Subject Property to show movies is not an educational purpose or use 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

³² *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993). See, *Nebraska Conf. Assn. of Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965).

unreasonable *per se*. The decision of the County Board must be reversed.

VII. 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 determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the determination of the County Board is vacated and reversed.

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Sheridan County Board of Equalization determining the Subject Property is exempt from taxation for tax year 2020 is vacated and reversed.
2. The Subject Property is not exempt from real property taxation for tax year 2020, and shall be placed on the tax roll for tax year 2020.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sheridan County Treasurer and the Sheridan County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018)
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2020.

7. This Decision and Order is effective for purposes of appeal on December 13, 2023.³³

Signed and Sealed: December 13, 2023

SEAL



Steven A. Keetle, Commissioner

James D. Kuhn, Commissioner

³³ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.