

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

TONY FULTON, TAX  
COMMISSIONER AND RUTH  
SORENSEN, PROPERTY TAX  
ADMINISTRATOR  
APPELLANT,

V.

SCOTTS BLUFF COUNTY  
BOARD OF EQUALIZATION,

AND,

C W YOUNT FOUNDATION,  
INC.  
APPELLEE(S).

CASE NOS: 20E 0046, 20E  
0049, 20E 0050, 20E 0051, 20E  
0052, 20E 0053, 20E 0054, 20E  
0055, 20E 0056, 20E 0057, 20E  
0058, 20E 0059, 20E 0060, 20E  
0061, 20E 0062 & 20E 0063

DECISION AND ORDER  
REVERSING THE DECISION  
OF THE SCOTTS BLUFF  
COUNTY BOARD OF  
EQUALIZATION

**For the Appellants:**

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Division

**For Morrill County:**

Kirk M. Fellhoelter,  
Deputy Scotts Bluff County  
Attorney

**For C W Yount Foundation,  
Inc:**

Andrew W. Snyder,  
Holyoke, Snyder, Longoria,  
Reichert & Rice PC

These appeals were heard before Commissioners Steven Keetle and  
James Kuhn.

## I. THE SUBJECT PROPERTY

The Subject Properties are 16 parcels located in Scotts Bluff County, Nebraska. The legal descriptions of the Subject Properties are found at Exhibits 1 through 16. The Property Record File (PRF) of each of the Subject Properties are found at Exhibits 63 through 78.

## II. PROCEDURAL HISTORY

The C W Yount Foundation, Inc. (the Foundation) filed Exemption Applications (Form 451) for sixteen parcels of real property with the Scotts Bluff County Assessor (the County Assessor) for tax year 2020.<sup>1</sup> The County Assessor recommended approval of the exemption applications and the Scotts Bluff County Board of Equalization (the County Board) determined that the Subject Properties were exempt for tax year 2020.<sup>2</sup> Tony Fulton, Tax Commissioner and Ruth Sorensen, Property Tax Administrator (collectively the Department) appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission).

The Commission held a hearing on October 7, 2022. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1 through 80 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.<sup>3</sup> When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board of

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<sup>1</sup> Exhibits 1-16.

<sup>2</sup> Exhibits 1-16

<sup>3</sup> 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 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, 759 N.W.2d 464, 473 (2009).

equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> The Commission's Decision and Order shall include findings of fact and conclusions of law.<sup>10</sup>

#### IV. RELEVANT 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 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

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

<sup>5</sup> *Id.*

<sup>6</sup> Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

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

<sup>8</sup> Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

<sup>9</sup> Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

<sup>10</sup> Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

property is not owned or used for financial gain or profit to either the owner or user.”<sup>11</sup> 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....<sup>12</sup>

Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.<sup>13</sup> Exclusive use means the primary or dominant use of property, as opposed to incidental use.<sup>14</sup> The exclusive use of the property is what determines the exempt status.<sup>15</sup> Further, a property owner's exemption from federal income taxation does not determine whether the owner's property is tax exempt under state law.<sup>16</sup>

There are two overriding factors Courts consider when a request for

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<sup>11</sup> Neb. Const., Art. VIII, § 2(1).

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

<sup>13</sup> *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).

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

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

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

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.<sup>17</sup>

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;<sup>18</sup> (2) the alleged exempt property must clearly come within the provision granting the exemption;<sup>19</sup> (3) the laws governing property tax exemptions must be strictly construed;<sup>20</sup> (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”;<sup>21</sup> and (5) this interpretation should always be reasonable.<sup>22</sup>

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

## V. SUMMARY OF THE ISSUES

The two unresolved issues in this appeal are (a) whether the Subject Property is owned by a charitable organization, and (b)

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<sup>17</sup> 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).

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

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

<sup>20</sup> *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).

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

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

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

whether the Subject Property is used exclusively for charitable purposes.

## VI. FINDINGS OF FACT AND ANALYSIS

The Facts in these appeals are largely undisputed. The Subject Properties are sixteen separate parcels located in Scotts Bluff County Nebraska totaling approximately 2,900 acres owned by the C.W. Yount Foundation, Inc (the Foundation.)<sup>24</sup> The Foundation is a Nebraska Nonprofit corporation incorporated in 1977.<sup>25</sup> The Foundation “is organized exclusively for charitable, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue law).”<sup>26</sup>

James Emery, Foundation Manager, testified that the Foundation fulfills its purpose by making financial distributions to approximately 43 exempt entities and scholarships. The Foundation made over \$210,000 in charitable contributions and grants in tax year 2020 alone.<sup>27</sup> Emery testified that in order to maintain the Foundation’s 501(c)(3) status, contributions and grants in the amount of five percent of the Foundations assets had to be made annually and that was accomplished with “passive income” received from the Subject Properties as well as transfers to the Foundation from a separate taxable trust.

Emery testified that the Subject Properties together contained approximately 2,300 acres of pastureland and 515 acres of farm ground that were leased at market rates to for profit businesses or individuals. Emery further testified that a house on the Subject Properties was rented for residential use and an outbuilding and garage were leased for commercial uses. Emery testified that there were two producing oil

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<sup>24</sup> Exhibit 63-78.

<sup>25</sup> Exhibit 33 and Exhibit 79.

<sup>26</sup> Exhibit 33:1.

<sup>27</sup> Exhibit 35:1.

wells remaining on the Subject Property and the Foundation received income from oil production from these wells. Emery conceded that the Subject Property is leased for farm and ranch use, leased for residential use, leased for commercial uses, and used for commercial oil production, but that the income received by the Foundation from these uses of the Subject Properties finance the Foundation's donations, grants, and scholarships to exempt organizations.

Based on the evidence before the Commission these appeals can be determined based on an analysis of the use of the Subject Properties.

**A. The Subject Properties are not used for an exempt purpose**

For purposes of real property tax exemption, the exclusive use of the property is what determines the exempt status.<sup>28</sup> Exclusive use means the primary or dominant use of property, as opposed to incidental use.<sup>29</sup>

The Foundation argues that the primary or exclusive use of the Subject Properties is to generate revenue for the Foundation to distribute to exempt organizations. The Foundation compares the present set of facts to the facts in *Platte River Whooping Crane Maint. Trust, Inc. v. Hall Cty. Bd. of Equalization*.<sup>30</sup> In both cases revenue was received by leasing out portions of the properties for cattle grazing.

The facts in the *Crane Trust* case are however distinguishable from the present appeals in that the primary use of the land in *Crane Trust* was not the generation of income from the lease but rather conservation efforts devoted to protecting natural habitat for whooping Cranes, sandhill Cranes, and other migratory birds along the Platte River in central Nebraska. Crane Trust argued grazing was part of the

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<sup>28</sup> See, *Nebraska Conf. Assn. of Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965); *Bethesda Found. v. Buffalo County Bd. of Equalization*, 263 Neb. 454, 459, 640 N.W.2d 398, 403

<sup>29</sup> *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).

<sup>30</sup> 298 Neb. 970, 906 N.W.2d 646 (2018).

Crane Trust's habitat management program—that the grazing and hoof compaction on the soil provides a natural disturbance on the grassland that helps promote and sustain different species on the parcels, cycle nutrients on the prairie, open up the grassland for the crane to use, and keep invasive species of plants at bay and the court found that the generation of income by the cattle grazing was an incidental use. The Court agreed that the Crane Trust's *use* of the exempted property met the requirements of an exempt use, stating:

Because the Legislature views the conservation of endangered species as a policy of the state, and conservation groups like the Crane Trust relieve the state of that burden, we conclude that the Legislature intended for those groups, provided they otherwise meet "charitable organization" criteria, to be considered "charitable organizations" under [§ 77-202\(1\)\(d\)](#).<sup>31</sup>

In this case, the Crane Trust's status as a charitable organization and its use of the Subject Properties are closely related issues. For this reason, the parties largely repeat their arguments or incorporate them by reference. For the same reasons that we found the Crane Trust qualified as a charitable organization, we find that the Subject Properties were used exclusively for charitable purposes.<sup>32</sup>

Ultimately, the Court found the Crane Trust properties to be exempt because the properties were used as conservation areas, that the use of cattle to graze the conservation areas was beneficial to further conserve the properties, and any revenue gained from that grazing was incidental to the properties' use as conservation areas.

Here, the *use* of the Subject Properties is for agricultural and horticultural uses, residential uses, commercial oil uses, and other commercial uses, as Emery conceded in his testimony. These are the

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<sup>31</sup> *Platte River Whooping Crane Maint. Trust, Inc. v. Hall Cty. Bd. of Equalization* 298 Neb. 970, 976, 906 N.W.2d 646, 652 (2018).

<sup>32</sup> *Id.* at 978, 652.



uses the Commission must examine to determine whether the Subject Properties meet the requirements of Neb. Rev. Stat. § 77-202(1)(d).

When the Nebraska Courts have considered the exempt status of properties that have generated income for exempt organizations, for leases at market rates the Court has always found that the primary use of the property was something other than the lease, whether that be operation of a museum<sup>33</sup> or educational use by a separate entity.<sup>34</sup> This is also consistent with the Nebraska Administrative Code which states that “using income from the property for exempt purposes under federal and state income tax laws does not qualify the property for a property tax exemption. It is the use of the property that establishes whether the property is exempt. If an organization is organized under section 501(c)(3) of the Internal Revenue Code, it will not necessarily be exempt from Nebraska property taxes.”<sup>35</sup>

The primary use of the Subject Properties is for agricultural or horticultural lease, commercial lease, residential lease, or oil production. These leases are at market rates and are made to for-profit businesses or other non-exempt entities. The Foundation does not use the Subject Properties for educational, religious, charitable, or cemetery purposes, but instead leases the Subject Properties solely to generate revenue from these non-exempt uses, and there is no exempt use of the Subject Properties by another exempt entity.

It is clear that the Foundation uses income from the Subject Properties to support many charitable organizations in the area that do things that benefit the community such as feed people or provide educational scholarships. While certainly laudable, Neb. Rev. Stat. § 77-202(1)(d) requires a parcel to be exclusively used for an exempt purpose to warrant a permissive property tax exemption. Department of Revenue regulations, which have the force of law,<sup>36</sup> provide that the

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<sup>33</sup> See, *Harold Warp Pioneer Vill. Found. v. Ewald*, 287 Neb. 19, 844 N.W.2d 245 (2013).

<sup>34</sup> See, *Fort Calhoun Baptist Church v. Wash. County Bd. Of Equalization*, 277 Neb. 25, 759 N.W.2d 475 (2009).

<sup>35</sup> Title 350 Neb. Admin. Code ch 40 §005.03B(3).

<sup>36</sup> See generally, *Saylor v. State*, 306 Neb. 147, 944 N.W.2d 726 (2020).

use of income derived from a property, even if for exempt purposes, does not mean the property itself is exempt from property tax.

The Commission finds the Department has met its burden to demonstrate, by clear and convincing evidence, that the County Board's decision to grant property tax exemption for the Subject Properties for tax year 2020 was arbitrary and unreasonable. The Commission finds the use of the Subject Properties was not used exclusively for an educational, religious, charitable, or cemetery purpose and is therefore not eligible for permissive property tax exemption under Neb. Rev. Stat. § 77-202(1)(d).

Because the Subject Property is not used exclusively for charitable or other exempt uses the use of the Subject Property is determinative in resolving these appeals. It is not necessary for the Commission to determine if the Foundation is a charitable organization to resolve these appeals.

The Subject Property does not qualify for exemption from property taxes and should be placed on the tax rolls for tax year 2020. Nothing in this order shall be construed as determining the assessed value of the Subject Properties for tax year 2020.<sup>37</sup>

## 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.

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<sup>37</sup> Neb. Rev. Stat §77-5016(10) (Reissue 2018).

## VIII. ORDER

### IT IS ORDERED THAT:

1. The decisions of the Scotts Bluff County Board of Equalization determining the taxable status of the Subject Properties for tax year 2020 are vacated and reversed.
2. The Subject Properties are not exempt from real property taxation and shall be placed on the tax rolls for the 2020 tax year 2020.
3. The County Board shall determine the taxable value of the Subject Properties pursuant to Neb. Rev. Stat. § 77-1507, send notice of the taxable value pursuant to Neb. Rev. Stat. § 77-1507 within ninety days after the date the Commission's order is certified pursuant to Neb. Rev. Stat. § 77-5018, and apply interest at the rate specified in Neb. Rev. Stat. § 45-104.01, but not penalty, to the taxable value beginning thirty days after the date the Commission's order was issued, or the date the taxes were delinquent, whichever is later.<sup>38</sup>
4. This Decision and Order, if no appeal is timely filed, shall be certified to the Scotts Bluff County Treasurer and the Scotts Bluff County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018)
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax year 2020.

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<sup>38</sup> Neb. Rev. Stat. § 77-5017(2) (Laws 2024, LB1317, § 93).

8. This Decision and Order is effective for purposes of appeal on August 21, 2024.<sup>39</sup>

Signed and Sealed: August 21, 2024

SEAL



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Steven A. Keetle, Commissioner

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James D. Kuhn, Commissioner

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<sup>39</sup> 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.