

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

NEBRASKA CITY DOCK BOARD,)	
)	
Appellant,)	CASE NO. 02E-151
)	03E- 23
vs.)	
)	
OTOE COUNTY BOARD OF)	
EQUALIZATION,)	FINDINGS AND ORDER
)	
Appellee.)	

Appearances:

For the Appellant: William F. Davis, Esq.
City Attorney for Nebraska City, NE
804 Central Avenue
Nebraska City, NE 68410

For the Appellee: Max J. Kelch, Esq.
Otoe County Attorney
115 North 10th Street
Nebraska City, NE 68410

Before: Commissioners Hans, Lore, Wickersham and Reynolds.

Reynolds, Chair, for the Commission:

**I.
STATEMENT OF THE CASE**

The Nebraska City Dock Board owns certain tracts of land in Nebraska City, Otoe County, Nebraska. One of the tracts of land is improved with a dock serving barge traffic on the Missouri River; three railroad spurs, one of which is abandoned; four buildings used for commodity handling and storage; concrete paving; and a large truck scale. The property needed more than \$380,000 worth of repairs in 1995. The Nebraska City Dock Board issued revenue bonds totaling \$300,000 to pay for those repairs.

The Dock Board leased the property to DeBruce Fertilizer, Inc., a Missouri Corporation, on December 19, 1995. The lease is for a ten-year term, with an option to renew the lease for an additional ten-year term. The lease also provides for a right of first refusal which survives the lease. The lease payments are used to pay off the revenue bonds. (E14:1). The amount of the lease payment has not changed since the lease was signed. DeBruce Fertilizer's annual rent totals \$50,000 each year. The Dock Board uses \$46,450 of that amount each year to amortize the revenue bonds. (E14:1).

The property was exempt from real property taxation until 2002. The Otoe County Assessor notified the Dock Board on March 1, 2002, that part of the property was subject to real property taxation pursuant to Neb. Rev. Stat. §77-202(1)(a) (Cum. Supp. 2002). (E10). State law requires that this notice "shall contain the legal description of the property." Neb. Rev. Stat. §77-202.12(1) (Cum. Supp. 2002). The Assessor attached a copy of the lease to the notice. The lease did not contain a written metes and bounds legal description of the property leased to DeBruce Fertilizer. The Parties attached to the lease Exhibit "A," a diagram of the property leased by the Dock Board to DeBruce Fertilizer, but that diagram does not contain a written metes and bounds legal description of the leased property.

The Dock Board objected to the Assessor's notice. The Board filed a written protest and alleged that the Assessor's failure to include a legal description deprived the Otoe County Board of Jurisdiction to levy real property taxes on the property. The County Board denied the protest and concluded that part of the leased property was subject to real property taxation for tax year 2002.

The County Board filed an appeal of that decision on May 29, 2002. The Parties moved to continue the hearing on the merits of the appeal pending receipt of judicial decisions in *Brown County Agricultural Society v. Brown County Board of Equalization*, 11 Neb. App. 642, 660 N.W.2d 518 (2003); and *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003); 266 Neb. 305, 664 N.W.2d 452 (2003); 266 Neb. 311, 664 N.W.2d 456 (2003).

The Otoe County Assessor also notified the Dock Board on March 1, 2003, that part of the property was subject to real property taxation pursuant to Neb. Rev. Stat. §77-202(1)(a) (Cum. Supp. 2002). (Case No. 03E-23: E7:11). The Assessor incorporated an abbreviated legal description into the body of the Notice, and again attached a copy of the lease to the Notice.

The Dock Board again objected to the Assessor's Notice for tax year 2003. The Dock Board filed a written protest and alleged that the Assessor's failure to include a clear legal

description deprived the Otoe County Board of jurisdiction to levy real property taxes on the property. The County Board denied the protest and concluded that part of the leased property was subject to real property taxation for tax year 2003.

The Dock Board filed an appeal of that decision on May 21, 2003. The hearing on the merits of this 2003 appeal was also stayed pending receipt of judicial decisions in *Brown County Agricultural Society v. Brown County Board of Equalization*, 11 Neb. App. 642, 660 N.W.2d 518(2003); and *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003); 266 Neb. 305, 664 N.W.2d 452 (2003); 266 Neb. 311, 664 N.W.2d 456 (2003).

The Commission issued a Second Amended Notice of Hearing on September 18, 2003, setting the matter for hearing on November 5, 2003. The Commission called the case for hearing on the day and time scheduled. William F. Davis, Esq., Nebraska City Attorney, appeared on behalf of the Nebraska City Dock Board. The Otoe County Board of Equalization appeared through Max J. Kelch, the Otoe County Attorney.

The Commission consolidated the two appeals for purposes of hearing. The Dock Board moved to dismiss the appeals for want of jurisdiction, alleging the defect in the Assessor's Notices deprived the County Board and the Commission of jurisdiction. The Commission heard evidence and argument on the motion, denied

the motion, and thereafter afforded each of the Parties the opportunity to present evidence and argument as required by Neb. Rev. Stat. §77-5015(2003 Supp.). The Commission also afforded each of the Parties the opportunity to cross-examine witnesses for the opposing Party as required by Neb. Rev. Stat. §77-5016(4) (2003 Supp.).

II. ISSUES

The issues before the Commission are:

- (1) Whether the alleged defect in the notices issued pursuant to Neb. Rev. Stat. §77-202.12(1) (Cum. Supp. 2002) deprived the Otoe County Board of Equalization and this Commission of jurisdiction?
- (2) If the Commission retains jurisdiction, whether the property should be exempted from real property taxation as provided by Neb. Rev. Stat. §77-202(1) (a) (Cum. Supp. 2002)?

III. APPLICABLE LAW

The Nebraska City Dock Board is required to demonstrate by clear and convincing evidence (1) that the decision of the Board was incorrect and (2) that the decision of the Board was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002)). The "unreasonable or arbitrary" element requires

clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Dock Board, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the County Board's decision was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001); *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445(2003). If the presumption is extinguished, the Dock Board has the burden to prove that the predominant use of the property is for a public purpose. *City of York, supra*, at 301, 449.

IV. FINDINGS OF FACT

The Commission finds and determines that:

1. The lease between the Dock Board and DeBruce Fertilizer, Inc., did not contain a written metes and bound legal description of the leased property.
2. The Dock Board provided a copy of that lease to the Otoe County Assessor as required by Neb. Rev. Stat. §77-202.11(2) (Cum. Supp. 2002) for tax years 2002 and 2003.
3. The Otoe County Assessor's Notice of Taxable Status for tax year 2002 included as an attachment the entire lease between the Dock Board and DeBruce Fertilizer, Inc. (Case No. 02E-1151: E10). Neither the Notice nor the lease included a

written metes and bounds legal description of the property subject to taxation.

4. The Otoe County Assessor's Notice of Taxable Status for tax year 2003 included a partial legal description of the leased property and reference to an attached lease. (Case No. 03E-23: E7:11).
5. The Dock Board's dock is not leased to DeBruce Fertilizer, Inc. (Case No. 02E-151: E21).
6. The property is predominantly used as a commercial commodity handling and storage facility.

**V.
ANALYSIS**

**A.
ALLEGED DEFECT IN NOTICE**

The Dock Board alleges that the Assessor's Notice of Taxable Status for tax year 2002 is defective in that it fails to contain a legal description of the property. (Case No. 02E-151: E10). The Dock Board also alleges that the Assessor's Notice of Taxable Status for tax year 2003 didn't include a clear written legal description of the leased property. (Case NO. 03E-23: E7:11). State law provides that the notice must include "the legal description of the property." Neb. Rev. Stat. §77-202.12 (Cum. Supp. 2002). Statutes regarding notice by the county assessor are mandatory, and failure to comply with the statute is fatal to

the tax levied on increases in assessed value. *Falotico v. Grant Co. Bd. of Equal.*, 262 Neb. 292, 298, 631 N.W.2d 492, 498 (2001).

The Otoe County Assessor attached the entire lease agreement to her Notice. (E10). The lease doesn't contain a written metes and bounds legal description of the leased property. The only exhibit attached to the lease is a diagram. (E10:14). The diagram doesn't include a written metes and bounds legal description. The Assessor, by attaching a copy of the entire lease to the Notices, substantially complied with the requirement of Neb. Rev. Stat. §77-202.12.

Assuming without deciding that failure to include the legal description, or failure to include a clear legal description violates state law, the Dock Board's contention that the Commission lacks subject matter jurisdiction is not persuasive. The Nebraska Supreme Court considered a similar set of circumstances in *Gamboni v. Otoe County*, 159 Neb. 417, 67 N.W.2d 489 (1954). The Court held:

"We find the statute requires the notice must be given by the assessor and that it must specifically contain all the information the statute requires shall be set forth therein. . . The record also shows that of the 2,304 tracts of real property in the cities and villages of Otoe County, the assessed value of which property the assessor raised in 1952 over what it had

been in 1951, some 501 written protests were filed in regard thereto with the county board of equalization. By doing so such protestants waived the jurisdictional defect in the notice. Nor would the fact that some withdrew their protests affect this waiver."

Id. at 427-428, 497-498. The Commission concludes that by filing its protests the Dock Board waived any jurisdictional defect in the County Assessor's Notices.

**B.
USE OF LEASED PROPERTY FOR A PUBLIC PURPOSE**

The Dock Board must demonstrate by clear and convincing evidence that the County Board's decision was incorrect, and either unreasonable or arbitrary. Once the Dock Board meets this burden, the Dock Board must then demonstrate that the leased property is used for a "public purpose" under a lease that is for fair market value.

The County Board determined that the following items were not put to public use for tax years 2002 and 2003: a portion of the land that is 300 by 700 square feet in size; a truck-scale; concrete paving; and four commodity storage and handling buildings. (Case No. 02E-151: E20:3). The dock, from the exhibits before the Commission, is not leased to DeBruce Fertilizer, Inc. (E10:13:13; E21). The dock is not being assessed as taxable real property. (E20:3).

State law defines "public purpose" as "use of the property (I) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose." Neb. Rev. Stat. §77-202 (Cum. Supp. 2002).

The uncontroverted evidence establishes that the lease is not for fair market value.

The uncontroverted evidence also establishes that the public does not have access to any of the four buildings, other than the office in one building. The uncontroverted evidence establishes that the predominant use of the property is as a commodity storage and handling facility for DeBruce Fertilizer, Inc. This predominant use does not meet the definition of "public purpose" set forth in law. The evidence does establish that the public has access to the river, and some individuals have fished from the river. This use, however, is incidental to the

predominant use of the property as a commercial commodity storage and handling facility.

**VI.
CONCLUSIONS OF LAW**

1. The Assessor, by attaching a copy of the entire lease to the Notice for tax year 2002, substantially complied with the requirement of Neb. Rev. Stat. §77-202.12 (Cum. Supp. 2002).
2. The Assessor, by including a partial legal description of the leased property in the Notice for tax year 2003, and by attaching a copy of the entire lease, substantially complied with the requirement of Neb. Rev. Stat. §77-202.12 (Cum. Supp. 2002).
3. The Dock Board, by filing its protests in tax year 2002 and 2003, waived any jurisdictional defect in the County Assessor's Notice of Taxable Status for either tax year.
4. The Commission has jurisdiction over the Parties and over the subject matter of these appeals.
5. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the action of the Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002).
6. The lease between the Dock Board and DeBruce Fertilizer, Inc., is not for fair market value.

7. The Dock Board's property which is leased to DeBruce Fertilizer, Inc., is not used for a public purpose.
8. The Dock Board has failed to demonstrate by clear and convincing evidence that the County Board's decisions was incorrect.
9. The Dock Board has failed to demonstrate by clear and convincing evidence that the County Board's decisions were either unreasonable or arbitrary.
10. The County Board's decisions to deny the Dock Board's requested exemptions for tax year 2002 and 2003 were correct.
11. The County Board's decisions to deny the Dock Board's requested exemptions for tax years 2002 and 2003 were neither unreasonable nor arbitrary.
12. The County Board's decisions must accordingly be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Nebraska City Dock Board's motions to dismiss on jurisdictional grounds are denied.
2. The Otoe County Board of Equalization's decision denying the Nebraska City Dock Board's protest for tax year 2002 is affirmed.

3. The Otoe County Board of Equalization's decision denying the Nebraska City Dock Board's protest for tax year 2003 is affirmed.
4. The actual or fair market value of the Nebraska City Dock Board's real property, pursuant to the stipulation of the Parties, was as follows for tax years 2002 and 2003:

Land	\$ 63,000
Improvements	\$178,450
Total	\$241,450
5. Any request for relief by any Party not specifically granted by this order is denied.
6. This decision, if no appeal is filed, shall be certified to the Otoe County Treasurer, and the Otoe County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002).
7. This decision shall only be applicable to tax year 2002 and tax year 2003.
8. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Lore made and entered the above and foregoing Findings and Orders in this appeal on the 5th day of November, 2003. The same were approved and confirmed by Commissioners Hans and Wickersham are therefore deemed to be the

Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5)
(Cum. Supp. 2002).

Signed and sealed this 6th day of November, 2003.

SEAL

Mark P. Reynolds, Chair