

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

WWII LIBRARY & MUSEUM, INC.)	
)	
Appellant,)	CASE NO. 04E-2
)	
vs.)	FINDINGS AND ORDER
)	REVERSING THE DECISION OF THE
CASS COUNTY BOARD OF)	CASS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of the appeal by WWII Library & Museum, Inc., to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on October 25, 2004, pursuant to a Notice and Order for Hearing issued June 30, 2004. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Joe Meehan, Chairman of WWII Museum & Library, Inc., appeared at the hearing on behalf of WWII Museum & Library Inc., ("the Taxpayer"). The Cass County Board of Equalization ("the County Board") appeared through counsel, Nathan Cox, Esq., the County Attorney for Cass County, Nebraska. The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2003) to state its final decision concerning an appeal, with findings of fact and conclusions of law, on the record or in

writing. The final decision and order of the Commission in this case is as follows.

**I.
STANDARD OF REVIEW**

The appellant, in order to prevail, is required to demonstrate by clear and convincing evidence that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. § 77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws L.B. 973, §51). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

**II.
FINDINGS**

The Commission finds and determines that:

**A.
PROCEDURAL FINDINGS**

1. The Taxpayer is the owner of record of certain real property described in the appeal as TL 5 NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 35, Township 12 North, Range 9 East, 6th P.M. Cass County, Nebraska. ("the subject property").

2. The Taxpayer timely filed an Exemption Application, Form 451, with the Cass County Assessor seeking exemption of the subject property from taxation for tax year 2004. (E1:1)
3. The Assessor on January 19, 2004, recommended partial approval. (E1:1)
4. The County Board on February 17, 2004, determined that the subject property should, in part, be subject to taxation. (E1:1)
5. The Taxpayer timely filed an appeal of that decision to the Commission. (Appeal Form - Case File)
6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Summons.
7. A Notice and Order for Hearing issued on June 30, 2004, set a hearing of the Taxpayer's appeal for October 25, 2004 at 1:00 p.m. CDST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property is owned by the Taxpayer.
2. The subject property is not owned or used for financial gain of either the owner or users.
3. The subject property is not used for the sale of alcoholic liquors for more than 20 hours per week.

4. The subject property is not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.
5. The subject property is owned by an educational organization for the exclusive benefit of the organization.
6. The subject property is used exclusively for educational purposes as a museum.
7. The Taxpayer has adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
8. The decision of the County Board should be vacated and reversed.

**III.
CONCLUSIONS OF LAW**

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Board of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commissions rules and regulations or Section 77-5016 (3).

Neb. Rev. Stat. § 77-5016(3) (Reissue 2003, as amended by 2004 Neb. Laws L.B. 973, §51).

4. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws 973, §51). The Nebraska Supreme Court, in considering similar language, has held that "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary." *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
5. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
6. The term "unreasonable" can be applied to a decision of an administrative agency only if the evidence presented leaves no room for differences of opinion among reasonable minds.

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

7. "The Legislature by general law may classify and exempt from taxation property 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." *Art. VIII, Nebraska Constitution, §2 (2)*
8. "The following property shall be exempt from property taxes:
... (d) 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, 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."

Neb. Rev. Stat. §77-202 (1)(d) (Cum. Supp. 2002)

9. "Exemptions from taxation are to be strictly construed, and their operation is never to be extended by construction, the power and the right of the state to tax are always presumed, and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the law-makers and the legislature, but rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption." *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs* 122 Neb. 586, 598, 241 N.W. 93, 97, (1932).
(Citations Omitted).
10. The Nebraska Supreme Court has held that "exclusive use" means the primary or dominant use of property, as opposed to incidental use. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543, (1993).
11. If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation. *Masonic*

Temple Craft v. Board of Equalization, 129 Neb. 293, 261 N.W. 569, on rehearing, 129 Neb. 827, 263 N.W. 150 (1935).

12. A property owner's exemption from federal income taxation does not determine whether the owner's property is tax-exempt under state law. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

IV. DISCUSSION

A statutory test in five parts is prescribed for determining eligibility for property tax exemption. Neb. Rev. Stat. §77-202 (d) (Reissue 2003). The five parts are: (1) exclusive ownership and use by a qualified organization; (2) an exclusive qualified use; (3) no financial gain from use to the owner or users; (4) limited sales of alcoholic liquor, if any; and (5) no discrimination in employment or membership based on race, color, or national origin. *Id.* Each part of the test must be proven by the Taxpayer. *Nebraska State Bar Association v. Lancaster County Board of Equalization et al.*, 237 Neb. 1, 465 N.W.2d 111, (1991). The only part of the five part test about which there was disagreement is the exclusive use of the property for educational purposes. The County denied exemption to a portion of the premises it considered to be used for the benefit of individuals rather than the public. It is permissible to consider part of the subject property as exempt and a portion as taxable. *Masonic*

Temple Craft v. Board of Equalization, 129 Neb. 293, 261 N.W. 569, on rehearing, 129 Neb. 827, 263 N.W. 150 (1935). The testimony of the Taxpayer's Chairman established however that no portion of the subject property was used for the benefit of an individual or individuals and that the subject property was used entirely for museum purposes. The County relied, for rebuttal, on a document submitted during tax year 2003. A prior year's use of the property is not relevant to a consideration of the use the subject property has in tax year 2004 unless there is some showing that a change of use is not possible. No such showing has been made. The county also contended that no application or information concerning a change in use was submitted to the Assessor. The evidence is that an application was filed for exemption of the entire subject property. If the assessor believed that a portion of the property was used for residential purposes the application was notice to the contrary. The county also contended that inquires on behalf of the Taxpayer concerning an application for homestead exemption show an intention to use all or a portion of the subject property for residential purposes. The Taxpayer's Chairman testified that whatever options for use of the property were considered the only one acted on was use of the entire subject property for museum purposes. That testimony was supported by two other witnesses. The Taxpayer has met its burden of proof with regard to each

component of the five part test specified by the Legislature for the exemption of its property from taxation.

**V.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the Cass County Board of Equalization determining the subject property was partially subject to taxation as of the assessment date, January 1, 2004, is reversed.
2. That the real property described in the appeal as TL 5 NW¹/₄NW¹/₄, Section 35, Township 12 North, Range 9 East, 6th P.M. Cass County, Nebraska, for the tax year 2004 is exempt from taxation.
3. That this decision, if no appeal is timely filed, shall be certified to the Cass County Treasurer, and the Cass County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2003).
4. That any request for relief by any party which is not specifically provided for by this order is denied.
5. That each party is to bear its own costs in this matter.
6. That this decision shall only be applicable to tax year 2004.

7. This order is effective for purposes of appeal October 27, 2004.

IT IS SO ORDERED.

Dated October 27, 2004.

Wm R. Wickersham, Chairperson

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

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