

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

PETER W. KATT,	)	
	)	
Appellant,	)	CASE NO. 05S-001
	)	
vs.	)	
	)	
LANCASTER COUNTY BOARD OF	)	FINDINGS AND ORDER AFFIRMING
EQUALIZATION AND LANCASTER	)	ACTIONS OF THE LANCASTER
COUNTY SCHOOL DISTRICT 001,	)	COUNTY BOARD OF EQUALIZATION
	)	
Appellee.	)	

The above-captioned case came before the Commission for a hearing on merits of an appeal by Peter W. Katt, from a decision of the Lancaster County Board of Equalization determining a levy for the Lancaster County School District 001, a/k/a Lincoln Public Schools, on June 9, 2006. The hearing was conducted in the Tax Equalization and Review Commission's Hearing Room on the sixth floor of the State Office Building in the City of Lincoln, Lancaster County, Nebraska. Commissioners Wickersham, Warnes and Hans were present. Commissioner Wickersham presided at the hearing.

Peter W. Katt, ("the Appellant") was present with Jason L. Scott his counsel. The Lancaster County Board of Equalization ("the County Board") appeared through counsel, Douglas D. Cyr., a Deputy County Attorney for Lancaster County Nebraska. Lancaster County School District 001, a/k/a Lincoln Public Schools ("LPS") appeared through counsel James B. Gessford, and Shawn P. Dontigney. The Commission took statutory notice, received exhibits and heard testimony. Briefs were submitted after the hearing.

### **FINDINGS OF FACT**

1. The Taxpayer's appeal alleges that property taxes levied as requested by a resolution of LPS exceed the levy limitations imposed pursuant to Neb. Rev. Stat. §77- 3442 (Supp 2005); that LPS had wrongfully requested a levy of property taxes in excess of the statutory limitation based on its exclusion of expenditures from its Special Building Fund; that no current or future project of LPS to be funded from the Special Building Fund qualified for the exemption found in Neb. Rev. Stat. §7-3442(2)(a) (Supp 2005); and that the levy made by the County Board of Equalization for the LPS Special Building Fund was for an unlawful purpose or in excess of legal requirements.
2. The Commission by a Consent Order and Dismissal dated January 29, 2003, ("2003 Order") determined that certain projects of LPS were within the scope of those denominated by its Board as the "IAQ-Codes Project consistent with FTA-IAQ Documentation" and were qualified for the levy exemption found in Neb. Rev. Stat. §7-3442(2)(a) (Supp 2005).
3. The Commission's 2003 Order approved and adopted a Joint Stipulation for Consent Order entered into by the parties.
4. Parties to the action in which the Commission's 2003 Order was entered, are identical to the parties in the current appeal.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter of this appeal.

2. The Commission is required to issue findings of fact and conclusions of law in support of its order. Neb. Rev. Stat. §77-5018 (Supp. 2005) .
3. A building fund levy not exceeding \$.14 may be made by a school district for the purposes of acquiring sites for school buildings or teacherages, purchasing existing buildings for use as school buildings or teacherages, including the sites upon which such buildings are located, and the erection, alteration, equipping, and furnishing of school buildings or teacherages and additions to school buildings for elementary and high school grades and for no other purpose. Neb. Rev. Stat. §79-10,120 (Reissue 2003).
4. School districts and multiple district school systems in the State of Nebraska may levy a maximum of one dollar and five cents per one hundred dollars of taxable value for the fiscal years 2003-04 through 2007-08. Neb. Rev. Stat. §7-3442(2)(a) (Supp 2005).
5. Amounts levied by a school district to pay for special building funds established for projects commenced prior to April 1, 1996, for construction, expansion, or alteration of school district buildings are excluded from the general levy limit. Neb. Rev. Stat. §7-3442(2)(a) (Supp 2005).
6. A project is “commenced” for purposes of the exclusion if the school board had taken action on the record committing the board to expend district funds in planning, constructing or carrying out the project. Neb. Rev. Stat. §77-3442(2)(a) (Supp 2005).
7. The Commission is authorized by statute to hear appeals from actions of a County Board of Equalization making a levy. Neb. Rev. Stat. §77-5007 (6)(Supp. 2005)
8. A Taxpayer may appeal the action of a County Board of Equalization making a levy to the Commission. Neb. Rev. Stat. §77-1606 (Cum. Supp. 2004).

9. The burden is on the Taxpayer to prove that the appealed levy is for an unlawful purpose or in excess of legal requirements. *Werth v. Buffalo County Board of Equalization*, 187 Neb. 119, 188 N.W.2d 442 (1971).
10. A levy will not be found to be in excess of the requirements of the authority making the levy request if it is reasonable in light of the contingencies to which regard is required to be given. *C. R. T. Corporation v. Board of Equalization. Douglas County*, 172 Neb. 540, 110 N.W.2d 194 (1961).

### **DISCUSSION**

The Taxpayer's appeal states that the levy imposed by the Lancaster County Board of Equalization to fund the property tax request of LPS for its special building fund is for an unlawful purpose and in excess of legal requirements. (Case File, Appeal para 6). The appeal is brought pursuant to section 77-1606 of Nebraska Statutes.

Several Nebraska Statutes can affect a building fund levy request made by a public school district. No public school district building fund levy can exceed \$.14. Neb. Rev. Stat. §79-10,120 (Reissue 2003). The aggregate of all levies for the benefit of a school district may not exceed \$1.05 unless an exclusion or exception is applicable. Neb. Rev. Stat. §77-3442 (Supp 2005). An exclusion to the general levy limit of \$1.05 is made for "amounts levied to pay for special building funds and sinking funds established for projects commenced prior to April 1, 1996". Neb. Rev. Stat. §77-3442 (2)(a) (Supp 2005). The term "commenced" for purposes of the exclusion is to mean "any action taken by the school board on the record which commits the

board to expend district funds in planning, construction, or carrying out the project”. Neb. Rev. Stat. §77-3442 (2)(a) (Supp 2005).

The purposes for which a building fund may be levied are acquiring sites for school buildings or teacherages, purchasing existing buildings for use as school buildings or teacherages, including the sites upon which such buildings are located, and the erection, alteration, equipping, and furnishing of school buildings or teacherages and additions to school buildings for elementary and high school grades and for no other purpose. Neb. Rev. Stat. §79-10,120 (Reissue 2003).

There is no evidence that any part of the appealed levy was not made for the purposes specified in Neb. Rev. Stat. §79-10,120 as it existed on the levy date. The evidence is that the levy of LPS for its Special Building Fund is \$.107052, less than \$.14. E1:3). The aggregate levy for LPS does exceed \$1.05. (E1:3). The basis for the Taxpayer’s appeal is therefore narrowed to the exclusion provided for in Neb. Rev. Stat. 77-3422 (2)(a). The provisions of Neb. Rev. Stat. 77-3442(2)(a) require a discussion of the meaning to be given to two words “commenced” and “project”.

The meaning to be given the word “commenced” within section 77-3442 of Nebraska Statutes was uncertain at its adoption in 1996. (Floor Debate LB 1114, 1996, general file debate pgs 13,623-13,626 select file debate, pgs 15,098-15,1050). Legislation in 1997 sought to clarify the meaning of the word “commenced”. See. Neb. Laws 1997, L.B. 269 §38. An example of what the word “commenced” could mean which is pertinent to this appeal is the comment of legal counsel for the revenue committee of the Nebraska Legislature as he introduced LB 269.

Counsel offered the opinion that hiring an architect “commenced” a project. See. Legislative history, LB 269 Committee hearing pg 6.

The Taxpayer in 2003 signed an agreement in settlement of an appeal challenging the 2002 levy of LPS for its special building fund. (E4:2-41). In that action the Taxpayer specifically agreed that certain projects funded by LPS in whole or in part from its special building fund had been “commenced” within the meaning of Neb. Rev. Stat. 77-3442 (2)(a) prior to April 1, 1996. (E4:7). The projects were those identified in “FTA-IAQ Documentation”. FTA being an abbreviation of the name for the architectural firm advising the district and IAQ being an abbreviation for Indoor Air Quality.

It is necessary to give a liberal meaning to the word “commence” to carry out legislative intent regarding the exclusion found in Neb. Rev. Stat. 77-3442 (2) (a). A reading of the legislative history supports that conclusion as does the language of the exclusion. For example, projects eligible for the exclusion are projects for which a district has committed funds for planning. See. Neb. Rev. Stat. §77-3442 (2)(a). Projects which are being planned cannot have a great deal of definition. To hold that projects which were merely being planned should be held to a different standard than a project at some other phase would encourage the kind of gamesmanship for which a fear was expressed during legislative debate. It is clear that gamesmanship was not an intended result. It is therefore necessary to give a liberal construction to other words in the exclusion.

The Taxpayer contends that the documentation referred to in the 2003 settlement as the FTA-IAQ Documentation is controlling in all respects. The Taxpayer contends that if the work to be done as part of a project changes too much from that documentation it is no longer a project or

part of a project eligible for the exclusion. In the same vein the Taxpayer contends that if costs change too much from estimates in the FTA-IAQ Documentation that costs as finally determined are not eligible for the exclusion. That is a restrictive application of the word “project”. The response of LPS is that the FTA-IAQ Documentation described projects to be undertaken by LPS in its effort to meet several objectives concerning indoor air quality and that the work performed to carry out the projects would vary with changes in code requirements, available technology, design changes and other factors. Costs would also change from original estimates both as the work to be done for a project changed and with finally determined contract cost as opposed to the architects estimates.

The purposes of the work to be described by the architect for LPS were to obtain mechanical and electrical code compliance, fresh air issues and possible air conditioning, energy savings, and updating of systems at various buildings operated by LPS. (E4:70). There is no evidence that the levy for LPS levy special building fund is to be used for different purposes. Levies for those purposes are lawful pursuant to Neb. Rev. Stat. § 77-79-10,120 (Reissue 2003).

The Taxpayer contends that LPS is bound by cost estimates received prior to April 1, 1996. A project in the planning stage may be “commenced” for purposes of the exclusion in Section 77-3442(2)(a). If the Taxpayer’s position were adopted then a project at the planning phase but without a cost estimate or without a sufficient cost estimate could not be accomplished because expenditures which could be funded through the exclusion would be zero or too low. Qualification or use of the exclusion of funding for a project should not be dependent on the quality of the planning effort or its precise stage as of April 1, 1996. The statute requires that a project be commenced prior to April 1, 1996. The Taxpayer acknowledged in 2003 and again at

the hearing on the merits that projects were commenced by LPS described by the FTA IAQ Documentation prior to April 1, 1996. The exclusion has to be read in a way to avoid creation of unnecessary differences between “projects” at various phases of development. A “project” for purposes of the exclusion includes those being planned but without fixed cost estimates and likewise allows for changes in costs after estimates have been made. The Taxpayer’s strict interpretation of the word “project” is not supported by an analysis of the statutory language.

The evidence is that some indoor air quality work has been completed, some was in progress, and some was still in the planning phase as of the levy date for buildings identified in LPS’s 1996 FTA-IAQ Documentation. The evidence also shows that various changes have been made to recommendations contained in the 1996 FTA-IAQ Documentation due both to fluctuating costs for specific items, changes in the scope of work, and changes in the kind of work to be done to address indoor air quality at a building. Those are all contingencies or factors to be considered by a levying authority. There is no evidence that the challenged levy is unreasonable if consideration is given to those factors and the record before the Commission.

The Commission cannot find that the appealed levy was for either an unlawful purpose or in excess of requirements.

## **ORDER**

### **IT IS THEREFORE ORDERED THAT:**

1. The levy of the Lancaster County Board of Equalization for the special building fund of Lancaster County School District 001 is affirmed.



2. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
3. Any request for relief which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This decision shall only be applicable to tax year 2005.
6. This order is effective for purposes of appeal July 25, 2006.

**Signed and Sealed.** July 25, 2006.

**SIGNED AND SEALED** July 25, 2006.

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Wm. R. Wickersham, Commissioner

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William C. Warnes, Commissioner

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Robert L. Hans, Commissioner

**SEAL**

**ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.**