

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

FORT CALHOUN BAPTIST CHURCH,)	
)	
Appellant,)	Case No 07E-005
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE WASHINGTON
WASHINGTON COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Fort Calhoun Baptist Church ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 920 S 20th Street, Norfolk, Nebraska, on September 12, 2007, pursuant to an Order for Hearing and Notice of Hearing issued June 12, 2007. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham presided at the hearing.

Darin Wilson, Deacon, and Kenneth E. Begg, Pastor of the Taxpayer were present at the hearing. No one appeared as legal counsel for the Taxpayer.

Edmund Talbot, a Deputy County Attorney for Washington County appeared on behalf of the Washington County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order 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.
ISSUES**

The Taxpayer has asserted that the subject property should be exempt from taxation.

The issues on appeal related to that assertion are:

Whether the decision of the County Board denying an application for exemption of the subject property from taxation is unreasonable or arbitrary; and

Whether the subject property is exempt from taxation.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as CC TL 93 Sec. 11 Township 17, Range 12 in Washington County, Nebraska, ("the subject property").
3. An application for exemption of the subject property from taxation was filed by the Taxpayer.
4. The Assessor recommended disapproval in part determining that the subject property was 20% taxable and 80% exempt.
5. The Assessor's recommendation was affirmed by the County Board.
6. The Property Tax Administrator was served with a Notice in Lieu of Summons and did not exercise the statutory right to intervene.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. “Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law; (2) 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....” *Neb. Const*, Art VIII § 1.
3. Section 1 of Art VIII of Nebraska's Constitution, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such

constitutional provision into effect. *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987).

4. “(1) 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. 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....” Neb. Rev. Stat. §77-202 (Cum. Supp 2006).
5. In reference to subsection (1)(d) of Nebraska Statutes section 77-202, 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).

6. The constitution and statute require that the property be owned for an exempt purpose, but there is no requirement that the ownership and use must be by the same entity. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).
7. Subsection (1)(d) of Nebraska Statutes section 77-202 contains a two-tier approach to property tax exemption: the first tier involves the nature, character, or status of a property owner, and the second tier concerns the use of the property. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
8. To be tax exempt, property must (1) be owned by an organization designated in subsection (1)(d) of Nebraska Statutes section 77-202; (2) be used exclusively for at least one of the purposes specified in subsection (1) (d) of Nebraska Statutes section 77-202; and (3) not be (a) owned or used for financial gain to the property owner or user, (b) used more than 20 hours per week for sale of alcoholic liquors, or (c) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
9. Statutes exempting property from taxation are to be strictly construed, property must come clearly within the statutory provisions granting such exemption, and the burden of proving the right to the exemption is upon the claimant. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).
10. A liberal and not a harsh or strained construction is to be given to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order that the true intent of the constitutional and statutory provisions may be realized. The interpretation should

always be reasonable. *Young Men's Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921).

11. The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominant use is for one of the purposes set out in this section. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971)
Berean Fundamental Church Council, Inc. v. Board of Equalization, 186 Neb. 431, 183 N.W.2d 750 (1971).
12. Regarding "mental" benefit of the public in subsection (1)(d) of section 77-202 of Nebraska Statutes as one of the requisite purposes of a charitable organization, "mental" means "intellectual," which means, among other things, engaged in creative literary, artistic, or scientific labor. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
13. Relative to a charitable organization, "an indefinite number of persons" in subsection (1)(d) of this section means a group of persons with a common characteristic, that is, a class, uncertain in number and composed from the public at large or a community.
Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal., 237 Neb. 1, 465 N.W.2d 111 (1991).
14. "The word "charitable" has been held to mean something more than mere alms-giving or the relief of poverty and distress and it has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits." *Lincoln Woman's Club*, 178 Neb. 357, 363-64, 133 N.W.2d 455, 460 (1965).

15. A tax exemption for charitable use is allowed because those exemptions “benefit the public generally and the organization performs services which the state is relieved pro tanto from performing.” *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 3, 337 N.W.2d 103, 105 (1983).
16. Under subsection (1)(d) of section 77-202 of Nebraska Statutes, 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).
17. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
18. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action 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. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
19. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions

governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted).

20. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
21. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
22. 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).
23. A decision is unreasonable 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).

IV. ANALYSIS

A. EXEMPTIONS, GENERALLY

The Nebraska Constitution and state statutes establish the fundamental requirements for an exemption of property from taxation. The Constitution authorizes an exemption only for educational, religious, charitable or cemetery purposes, and only when the property is neither

owned nor used for financial gain or profit to either the owner or user. *Art. VIII, Nebraska Constitution*, §2(2). State statutes provide a five-part test for determining exemption eligibility. Real property is exempt only when (1) the property is owned by an educational, religious, charitable or cemetery organization; (2) the property is used exclusively for educational, religious, charitable or cemetery purposes; (3) the property is not owned or used for financial gain or profit to either the owner or user; (4) the property is not used for the sale of alcoholic liquors for more than twenty hours per week; and (5) the property is not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. Neb. Rev. Stat. §77-202(1)(d)(Cum. Supp. 2006).

The five requirements stated in section 77-202(1) (d) of Nebraska Statutes requires a two-tier analysis of an application for exemption from taxation: the first tier involves the nature, character, or status of the property owner, and the second tier concerns the use of the property. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). Property may not be exempted from taxation if it is owned or used for financial gain or profit either to the owner or user. Neb. Rev. Stat. §77-202(1)(d)(i) (Cum. Supp. 2006). Property is not used for financial gain or profit to the owner or user if no part of the income from the property is distributed to the owner's or user's members, directors, or officers, or to private individuals. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103, (1983).

The term religious organization has been defined to mean “an organization whose purpose is the dedication to or profession of a sectarian creed and belief in a Divine or superhuman power or powers to be obeyed or worshiped, or the furtherance and enrichment of

spiritual faith involving a code of ethics and a spiritual philosophy.” 350 Neb. Admin. Code, Ch. 40, §005.01B (01/07).

Uses which can qualify property for exemption are educational, charitable, religious, or cemetery uses. Neb. Rev. Stat. §77-202(1)(d)(Cum. Supp. 2006). Use of the property for the statutorily prescribed use must be exclusive. Neb. Rev. Stat. §77-202(1)(d)(Cum. Supp. 2006). An exclusive use is the primary or dominant use of property as opposed to an incidental use. *Neb. Unit. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993). It is possible, however, for property to qualify for exemption through a combination of permitted uses by the owner so long as the combination of permitted uses constitutes an exclusive use of the property. *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965).

The term “charitable uses” has not been defined by the Nebraska Supreme Court. The Court has however discussed the meaning of the word “charity.” Charity has been held to mean a “concrete, practical objective charity, manifested in things done for the relief of the unfortunate and the alleviation of suffering, or in some work of practical philanthropy, as contrasted with the sentimental or ethical viewpoint.” *Appeal of Scottish Rite Bldg. Co. Scottish Rite Bldg. Co. v. Lancaster County et. al.* 106 Neb. 95, 98, 182 N.W. 574, 575 (1921). In an earlier case the Nebraska Supreme Court had cited decisions in other states defining charity to be something more than mere alms-giving or the relief of poverty and distress, and having given the term a significance broad enough to include practical enterprises for the good of humanity operated at a modest cost to those who receive the benefits. *In Re Young men’s Christian Ass’n Assessment. Young Men’s Christian Ass’n of City of Lincoln v. Lancaster County et. al.* , 106 Neb. 105, 182 N.W. 593 (1921). As a further consideration Nebraska’s

Supreme Court has recognized that charitable exemptions are granted on the hypothesis that the association or organization seeking an exemption is of benefit to society, that it promotes the social and moral welfare, and to some extent is bearing burdens that would otherwise be imposed upon the public, to be met by general taxation. *Young Men's Christian Ass'n of Omaha v. Douglas County et. al.* 52 L.R.A. 123, 83 N.W. 924 (1900). That view was cited with approval in *United Way of the Midlands v. Douglas County Board of Equalization*, 215 Neb. 1, 337 N.W.2d 103 (1983).

Charitable use of real property has been found in a variety of contexts. Use as a hospital or assisted living facility has been deemed a charitable use. *In Re St Elizabeth Hospital. St. Elizabeth Hospital v. Lancaster County* 109 Neb. 104, 189 N.W. (1922), *Immanuel, Inc. v. Board of Equalization of Douglas County*, 222 Neb. 405, 384 N.W.2d 266 (1986), *Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002). Use as a meeting place in furtherance of the charitable purposes of a charitable organization has been deemed a charitable use. See, *Lincoln Woman's Club, v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455, (1965). Leases by a charitable organization to other charitable organizations at substantially below market rates have been found to be a charitable use. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983). On the other hand property used for a commercial lease has not been deemed exempt. See, *In Re Young Men's Christian Assn Assessment. Young Men's Christian Ass'n of City of Lincoln v. Lancaster County et. al.* , 106 Neb. 105, 182 N.W. 593 (1921). The provision of housing at or near cost has not been deemed a charitable use. See, *Douglas County v. OEA Senior Citizens, Inc.* 172 Neb. 696, 111 N.W.2d 719 (1961), *OEA Senior Citizens, Inc., v. County of Douglas*, 186 Neb. 593, 185

N.W.2d 464 (1971), *Christian Retirement Homes, Inc., v. Board of Equalization of Lancaster County*, 186 Neb. 11, 180 N.W.2d 136 (1970), *Pittman v. Sarpy County Board of Equalization*, 258 Neb. 390, 603 N.W.2d 447 (1999), *Ev. Lutheran Good Samaritan Society v. Buffalo County*, 230 Neb. 135, N.W.2d 502 (1988). *Ev. Lutheran Good Samaritan Society v. Buffalo County*, 243 Neb. 351, 500 N.W.2d 520 (1993).

The Nebraska Supreme Court has not defined the term “educational use.” It has however discussed the meaning of the term educational. See, *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932), *Bethpage Community Services, Inc., v. County Board of Phelps County*, 221 Neb. 886, 381 N.W.2d 166 (1986). The Court in the *Ancient and Accepted Scottish Rite* case held that the term educational taken in its full sense is a “broad, comprehensive term and may be particularly directed to either mental, moral or physical facilities, but in its broadest and best sense embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training-moral, intellectual, and physical.” *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 593-594, 241 N.W. 93, 95-96 (1932). In *Bethpage* the Court expanded on the definition by stating that “education should not be determined by some quantitative analysis of a formal curriculum but may be measurable in reference to training received as reflected in an individual’s enhanced behavior. Its most basic sense education is simply development, as fully as possible, of an individuals given capacity, preferably for desirable qualities.” *Bethpage Community Services, Inc., v. County Board of Phelps County*, 221 Neb. 886, 890, 381 N.W.2d 166, 170 (1986).

In addition to the statutory tests as interpreted by the Courts other factors and principles have been established for analysis of requests for exemptions. The Courts have spoken of two overriding factors to be considered when a request for an exemption is before them, those factors are: the property tax burden is necessarily shifted from the beneficiary of an exemption to others who own taxable property. *See, e.g., Jaksha v. State*, 241 Neb. 106, 112, 486 N.W.2d 858, 864 (1992); and that the power and right of the state to tax is always presumed. *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs*, 122 Neb. 586, 241 N.W. 93 (1932). In addition several principles have grown to be applied to requests for exemptions. First, an exemption is never presumed. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999). Second, the property which is claimed as exempt must clearly come within the provision granting the exemption. *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991). Third, the laws governing property tax exemptions must be strictly construed. *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). Although a liberal and not a harsh or strained construction is to be given, however, to the terms 'educational,' 'religious,' and 'charitable' in order that the true intent of the constitutional and statutory provisions may be realized. *See, Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965). The interpretation should always be reasonable. *Young Men's Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921). Fourth it is the applicant's burden to prove eligibility for an exemption. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb.

593, 185 N.W.2d 464 (1971) *Berean Fundamental Church Council, Inc. v. Board of Equalization*, 186 Neb. 431, 183 N.W.2d 750 (1971).

B.
THE SUBJECT PROPERTY

In this appeal it is not necessary to make determinations in the first tier of analysis, the nature, character or status of the property owner, because the issue of whether the Taxpayer or its tenant were qualified organizations was not raised in proceedings before the County Board. *See, Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002). Further, there is no evidence that the issue of financial gain or profit to the owner or user of the subject property was raised before the County Board and that issue cannot be considered by the Commission. *Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002).

The Taxpayer in its application for exemption declared that the subject property was not used for the sale of alcoholic liquors for more than 20 hours per week and that neither the Taxpayer or a user of the subject property discriminate on the basis of race, color, or national origin. There is no evidence to contradict those assertions and they will not be considered further by the Commission.

Prior to its application for exemption the Taxpayer, Abiding Faith Baptist Church of Fort Calhoun Nebraska, leased a portion of its church to the Fort Calhoun Community School District ("School") for the period of August 1, 2006, to May 30, 2008, on July 31, 2006. (E11:7 and 8). The portion leased included the Church Fellowship Hall, restrooms and areas for ingress and egress. (E11:7). A drawing showing various areas subject to the lease was received

as Exhibit 7. Use of the leased premises was restricted. (E11:7). Use of the restrooms and ingress egress area was nonexclusive. Use of the Fellowship Hall was limited to five days per week, Monday through Friday. (E11:7). The School's use of the Fellowship Hall was further limited if use by the school would interfere with use of the space by the Taxpayer for a funeral, wedding, or election. (E11:7). The Taxpayer also retained use of the Fellowship Hall on Wednesday evenings. (11:8). The School was obligated to donate to the Taxpayer the sum of \$13,250.00 at the rate of \$1,325.00 per month payable on the second Tuesday of each month for ten months during the lease term. (E11:7). The Taxpayer was obligated to pay all utilities, deliver custodial services and keep the leased premises in repair. (E11:7). The Taxpayer was obligated to place various improvements on the premises. (E11:8). The improvements relate to handicapped access and fire safety concerns. (E11:1). The cost of the improvements was born in part by the School. (E14:1). Improvements will become the property of the Taxpayer at the end of the lease term. The terms of the lease were negotiated by the parties over an extended period of time. (E11:4-6).

The Taxpayer in this appeal asks that the subject property be entirely exempted from taxation. The County Assessor and the County Board determined that 80% of the subject property should be exempt from taxation. (E1). In this appeal the Taxpayer in its application for exemption claimed that the subject property would be used for educational or religious uses. (E1). The Taxpayer in its application for exemption also declared that a portion of the property for which an exemption was sought was leased to Fort Calhoun Schools. (E1). The lease of a portion of the Taxpayer's property necessarily raised the issue of whether that use, leasing of a

portion of its property, was a qualified charitable use. See, *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103, (1983).

C.
QUALIFIED USE

Exclusive use of property for a qualified use is required for exemption from taxation. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971) *Berean Fundamental Church Council, Inc. v. Board of Equalization*, 186 Neb. 431, 183 N.W.2d 750 (1971). 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). The portion of the subject property leased to the School is used by the Taxpayer for religious purposes on weekends, Wednesday evenings and other times when necessary. The leased portion of the subject property is also used for a significant amount of time as a leased property used by a school. The leased premises are not used exclusively for a religious use by the Taxpayer. There is no evidence that the School used the subject property for religious purposes.

There is no evidence that the Taxpayer made any educational use of the leased premises except in conjunction with its religious use and that was not an exclusive use. Use of the leased premises by the Taxpayer was not exclusively an educational use.

D.
LEASING AS A QUALIFIED USE

The remaining use for consideration is the Taxpayer's lease of a portion of the subject property. The Supreme Court in a number of contexts has determined that a lease of property is not a qualified use. See, eg. *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248

(1961). The critical factor is not the production of income but the use of the property. See, e.g., *Doan, Supra*. In *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983) Nebraska's Supreme Court considered whether a lease by one charitable organization to other charitable organizations at substantially below market rates could be a qualified use of property. The Stipulated facts in *United Way, Supra*, were as follows:

“United Way is a nonprofit, charitable organization as defined by the laws of Nebraska and the United States. It owns real estate in Omaha known as the A.C. Nelson Center for Community Services. United Way acquired the property with donated funds subject to certain terms and conditions, including one condition that prohibits the building from being used for commercial purposes. The building contains approximately 27,704 square feet of space. In 1978 United Way leased 5,256 square feet of space in separate leases to Omaha Council of Campfire Girls and Greater Omaha Community Action. These organizations are recognized as nonprofit, charitable organizations under the laws of Nebraska and the United States. The lease rental was \$3 a square foot which was about one-half the fair market rental value for similarly constructed and situated properties. The lease obligated United Way to provide air conditioning, heat, water, janitor and elevator service, and repainting for the leased space. Gross rental income in 1978 was \$20,008. The cost of services United Way was obligated to furnish for the leased space was \$11,600. United Way occupied and used 14,948 square feet of space for its charitable purposes. It had 6,258 square feet of vacant space which it held for lease to charitable or nonprofit agencies as required by a condition of the grant. The remaining 1,250 square feet was common area.” *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 2, 337 N.W.2d 103, 104-105 (1983).

The lease in *United Way* was for substantially less than market value and made by one charitable organization to another. The lease rental at \$3.00 per square foot was about one-half of the fair market rental value for comparable space. The stipulated facts however show that United Way did not incur a loss based on services included. The lease gross rent was \$20,008. The cost of services United Way was obligated to furnish for the leased space was \$11,600. The margin over cost of service was \$8,408.00 (\$20,008 - \$11,600).

The Court however determined that the real issue was “whether United Way’s ‘use’ of the leased space by leasing it to a charitable corporation at substantially less than fair market rental rates is an exclusive use of that space for charitable purposes by United Way” *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 5-6, 337 N.W.2d 103, 106 (1983). The Court also determined “[t]he result of the lease (at or below market rates) was financial assistance to the charitable organizations, which aided them in the performance of their charitable activities.” *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 6, 337 N.W.2d 103, 107 (1983). It is clear that the difference between a fair market rental rate and the rent received by United Way was deemed to be contributed to the tenants and that contribution rendered the lease a charitable use. The below market lease had simply become a means through which a charitable contribution was made.

The issue in this appeal is whether the lease to a school for school purposes without proof that the rent is below market rates may be deemed to be a charitable use by the Taxpayer. A representative of the Taxpayer testified that one of the Taxpayer’s objectives in its negotiations with the School for the lease was to ensure that the Taxpayer did not incur a financial loss due to the lease. That position was also stated to the School during lease negotiations. (E11:5). The Taxpayer’s representative also testified that a second objective in its negotiation of lease terms was that the lease should not be seen by the community at large as too advantageous to the Taxpayer.

The Taxpayer produced evidence of lease terms for commercial space in a effort to show that its lease to the School was for less than market value. Comparable rentals as submitted by the Taxpayer are found in Exhibit 13 at page 20. An analysis of the information provided for the

two leases follows. The first lease is a lease of 800 square feet shown as renting for \$360 per month at a rate of \$5.40 per square foot; however a lease of 800 square feet at \$5.40 per square foot equals a monthly rental of \$4,320 not \$360 as stated. The information concerning the lease can be reconciled if the lease is annualized ($\$360 \times 12 = \$4,320 \div 800 \text{ square feet} = \5.40). The second lease is a lease of 2,400 square feet shown as renting for \$8.00 per square foot or \$1,600 per month; however a lease of 2,400 square feet at \$8.00 per square foot requires a rental of \$19,200 per month not \$1,600 as stated. Again the lease information can be understood if it is annualized ($\$1,600 \times 12 = \$19,200 \div 2,400 \text{ square feet} = \$8.00 \text{ per square foot}$). The rental rate per month per square foot of the two leases can then be understood to be \$0.450 per square foot per month ($\$360 \text{ monthly rent} \div 800 \text{ square feet} = \$0.45 \text{ per square foot per month}$) for the first lease and \$0.667 per square foot per month ($\$1,600 \text{ monthly rent} \div 2,400 \text{ square feet} = \$0.667 \text{ per square foot}$) for the second lease.

The subject property is leased for \$0.414 per square foot ($\$1,325 \text{ monthly} \div 3,200 \text{ square feet} = \$0.414 \text{ per square foot per month}$). The subject property however has limited use and the lease rate needs to be adjusted for that fact. Without a precise accounting it is possible to calculate an adjustment factor to make a 5 day per week lease equivalent to a 7 day a week lease. The calculation is as follows: A full year of 365 days \div 12 months equals 30.417 days in each month; There are 52 weeks in a year with 104 days for two day week ends ($52 \times 2 = 104$); The week end days per month are then $104 \div 12 = 8.667$; The school is then entitled generally to use the subject property 21.75 days per month ($30.417 \text{ a full month} - 8.667 \text{ weekend days per month}$); The adjustment factor to convert a 5 day a week lease to a 7 day per week lease is 1.398 ($30.417 \text{ a full month} \div 21.75 \text{ days in five day weeks per month} = 1.398$). Applying the

adjustment factor to the lease of the subject property shows an adjusted per square foot per month lease of \$.578 ($1.398 \times \$.414 = \$.578$). That is higher than one of the leases submitted as a comparable and lower than the other. The lease that is higher than the Taxpayer's lease to the School is for a restaurant building with equipment. (E13:20). A representative of the Taxpayer testified that the cost of material for improvements to be made for the leased premises was included in the monthly rent, prorated over 20 months the cost was \$300.00 per month. (E14:1) The Taxpayer at the end of the lease will obtain the full benefit of the improvements. There is no evidence that the commercial leases identified by the Taxpayer required contributions by the tenant to the cost of improvements necessary for use of the leased premises. There is no evidence that either lease submitted as a comparable is in fact comparable to the subject property. The evidence does not support a finding that the lease by the Taxpayer to the School is at a below market rate.

It is the applicant's burden to prove eligibility for an exemption. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971) *Berean Fundamental Church Council, Inc. v. Board of Equalization*, 186 Neb. 431, 183 N.W.2d 750 (1971). The Taxpayer has failed to demonstrate that the lease of the subject property to the School was for less than market value or that its lease of the subject property to the School represents a contribution of any manner in aid of a charitable, religious or educational use by the School. The evidence does not support a finding that Taxpayer's use of the leased portion subject property constitutes a charitable use of the subject property within the principles found in *United Way, Supra*.

**E.
PARTIAL EXEMPTION**

The County Board determined that the subject property was exempt in part and taxable in part. A determination that part of a parcel is exempt while another part is taxable is permissible. See, *In Re Young Men's Christian Ass'n of City of Lincoln v. Lancaster County et. al.*, 106 Neb. 105, 182 N.W.2d 593 (1921).

The decision of the County Board should be affirmed.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property is partially (20%) taxable as of the assessment date January 1, 2007, is affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Washington County Treasurer, and the Washington County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).

3. Any request for relief, by any party, 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 2007.
6. This order is effective for purposes of appeal on January 2, 2008.

Signed and Sealed. January 2, 2008.

Wm. R. Wickersham, Commissioner

William C. Warnes, Commissioner

Nancy J. Salmon, Commissioner

Commissioner Hotz, dissenting.

I respectfully dissent. The issue in this appeal is whether a church should lose a portion of its property tax exemption when it rents classroom space to the local public school. As the majority opinion states, a proper review requires the employment of a five-element test; all five of which must be satisfied in order for an exemption to be proper: (1) the property is owned by an educational, religious, charitable or cemetery organization; (2) the property is used exclusively for educational, religious, charitable or cemetery purposes; (3) the property is not owned or used for financial gain or profit to either the owner or user; (4) the property is not used for the sale of alcoholic liquors for more than twenty hours per week; and (5) the property is not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. Neb. Rev. Stat. §77-202(1)(d)(Cum. Supp. 2006).

“Statutes exempting property from taxation are to be strictly construed.” *United Way of the Midlands v. Douglas County Board of Equalization*, 215 Neb. 1, 337 N.W.2d 103 (1983).

However, “A liberal and not a harsh or strained construction is to be given to the terms ‘educational,’ ‘religious’ and ‘charitable’ in order that the true intent of the constitutional and statutory provisions may be realized.” *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455, (1965).

Element one was stipulated to by the parties at the hearing. In addition, the parties also stipulated to an aspect of element two: that the school's use of the classroom space was a qualified use. I have no disagreement with the majority opinion on elements four or five. What must be proven, therefore, in order for an exemption to be proper is element three, that the use did not result in a financial gain or profit, and part of element two, that the church's use of the leased space was for a qualified purpose.

Regarding the third element, financial gain or profit, the Nebraska Supreme Court has stated the following: “... we deduce the rule to be that property is not used for financial gain or profit to either the owner or user if no part of the income from the property is distributed to the owner’s or user’s members, directors, or officers, or to private individuals.” *United Way, Supra* at 4-5. The evidence in this appeal indicates all rental income was accounted for in the church’s financial statements, and no such distributions were made. Exhibit 6 page 1, and testimony of the Taxpayer’s representative. Therefore, the third element was satisfied.

What remains in the analysis of this appeal, therefore, is the part of element two involving the church’s use of the rented classrooms in leasing the space to the school. Particularly, the analysis should focus on whether the church’s use of the lease was for business purposes. *United*

Way, at 6. If the church's use of the lease was for business purposes, then the decision of the Washington County Board of Equalization should be affirmed.

The evidence in this appeal clearly demonstrates the purposes of both the church and the school. Exhibit 11 pages 5 and 6, consist of an ex-post facto timeline prepared by the school (not the church) in July 2007. The time line reveals several important factors in relation to the purposes of the use of the church's classrooms. The timeline indicates that the school, not the church, initiated discussions regarding the potential use of the classrooms in February, 2006; that the school was experiencing "budget constraints" and looking for "cost containment" in relation to providing services for seven to ten special needs students; that the school's costs in relation to these students involved transporting the students to Omaha; and that providing services to these students locally had the "potential of cost saving due to less contract services and transportation costs." It is noted that in its analysis of the church's use of the lease, the majority opinion makes no specific mention of this evidence.

In the majority's view, even when the church and the school fashioned a lease agreement with the express purpose to both cover the church's costs and result in savings for the school, the exemption is not proper. The majority opinion pays little attention to what the school gained in the bargain; that by entering into the lease the church assisted the school in its attempt to avoid otherwise unavoidable tax burdens: "exemptions are granted on the hypothesis that the association or organization is of benefit to society, that it promotes the social and moral welfare, and, to some extent, is *bearing burdens that would otherwise be imposed upon the public*, to be met by general taxation, and that from these considerations the exemption is granted." *Y.M.C.A. of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900) (emphasis added).

Regarding this use element, the facts in *United Way* and the facts in this appeal differ only in degree. In *United Way*, the lease involved rental payments that were “substantially less than fair market rental rates.” *United Way, Supra* at 6, 106. The facts in this appeal indicate the intentions of the church that the rental agreement result in “an amount [that would] cover operating costs and the cost of facility modifications or upgrades.” (E11:5). The majority finds this difference to be distinguishable, resulting in 20% of the church property not qualifying for exemption. Whether a lease by one qualified organization to another exempt organization involves “substantially less than fair market rental rates,” or an amount that covers “operating costs and the cost of facility modifications or upgrades” for the benefit of the lessee, I would conclude that there is no business purpose. Therefore, I would find that the church’s use of the lease in this appeal was for a qualified charitable purpose.

Since competent evidence has been adduced that the Washington County Board of Equalization’s action was contrary to law, and since there is clear and convincing evidence that the Board was arbitrary or unreasonable, the church has met its burden to prove its right to an exemption regarding the property leased to the school. Therefore, I respectfully dissent from the majority's decision. I would instead reverse the decision of the Washington County Board of Equalization that 20 percent of the subject property is taxable and find that the subject property should be 100% exempt from taxation for tax year 2007.

Robert W. Hotz, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.