

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

DOUG EWALD, TAX COMMISSIONER,)	
)	
Appellant,)	Case Nos. 08E 018 through 08E 030
)	
v.)	DECISION AND ORDER
)	DISMISSING FOR WANT OF
KEITH COUNTY BOARD OF)	JURISDICTION
EQUALIZATION)	(Jurisdiction)
)	(Standing)
and)	
)	
CENTRAL NEBRASKA PUBLIC POWER)	
& IRRIGATION DISTRICT,)	
)	
Appellees.)	
)	

The above-captioned cases were called for a hearing on Order to Show Cause (Jurisdiction) (Standing) why the appeals by Doug Ewald, Tax Commissioner, to the Tax Equalization and Review Commission ("the Commission") should not be dismissed. 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 June 8, 2009, pursuant to an Order to Show Cause (Jurisdiction) (Standing) issued May 27, 2009. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. The proceeding was heard by a quorum of the Commission.

Doug Ewald, Tax Commissioner, ("Commissioner") was not present at the hearing. Jonathan D. Cannon appeared as legal counsel for the Commissioner.

J. Blake Edwards, County Attorney for Keith County, Nebraska, was present by telephone, as legal counsel for the Keith County Board of Equalization ("County Board").

Micheal Klein was present by telephone as legal counsel for Central Nebraska Public Power & Irrigation District (“District”).

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008). The final decision and order of the Commission in the consolidated cases is as follows.

I. ISSUES

Whether the appeals should be dismissed for lack of standing by the Tax Commissioner to bring the appeals depriving the Commission of jurisdiction.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. Protests were filed with the County Board asserting that certain parcels of real estate were “exempt from taxation as is owned by a governmental subdivision and is used or developed for a public purpose.” (E1 - 13).
2. The County Board granted the protests. (E1 - 13).
3. The appeals of the County Board’s decision were timely filed by legal counsel on behalf of Doug Ewald, Tax Commissioner. (Case Files).

III. APPLICABLE LAW

1. An appeal form must be signed by a party, legal counsel for a party or a person authorized by law or the Commission's rules and regulations to sign an appeal. 442 Neb. Admin. Code, ch 5 §001.04 (10/07).
2. Only a person who will be directly affected by the outcome of an appeal is one who has a real interest in the appeal or has a legal or equitable right, title, or interest in the subject of the appeal and may be a party. 442 Neb. Admin. Code, ch 2 §001.37 (10/07).
3. “In order to have standing to invoke a tribunal’s jurisdiction, one must have some legal or equitable, right, title, or interest in the subject of the controversy.” *Douglas County Board of Commissioners v. Civil Service Commission*, 263 Neb. 544, 549, 641 N.W.2d 55, 60 (2002)(Citations omitted).
4. Legal counsel for a party may sign an appeal/petition. 442 Neb. Admin. Code, ch 5 §001.05I (10/07).
5. The County Assessor may determine that real property owned by a governmental subdivision is taxable. Neb. Rev. Stat. §77-202.12 (Supp 2007).
6. The determination of the County Assessor may be protested to the County Board. Neb. Rev. Stat. §77-202.12 (Supp 2007).
7. The Tax Commissioner may intervene in the appeal of a decision of a County Board. Neb. Rev. Stat. §77-202.12 (Supp 2007).
8. Parties cannot confer subject matter jurisdiction on a tribunal by acquiescence or consent nor may it be created by waiver, estoppel, consent, or conduct of the parties. *Creighton*

St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission,
260 Neb. 905, 620 N.W.2d 90 (2000).

IV. ANALYSIS

The appeals by the Tax Commissioner are from decisions of the County Board granting protests seeking the exemption from taxation of property owned by a governmental subdivision. Public property that may be subjected to taxation is described in Section 77-202.11 of Nebraska Statutes. Notice by a county assessor of a determination that property owned by the state or a governmental subdivision is taxable must be given by March 1 of each year. Neb. Rev. Stat. §77-202.12 (Supp 2007). The county assessor's determination may be appealed to the county board. *Id.* An appeal of the county board's decision may be made to the Commission. *Id.* The Tax Commissioner may intervene in a appeal to the Commission. *Id.*

The Tax Commissioner asserts that he is authorized by law to file the appeals based on the provisions of Section 77-701(4) of Nebraska Statutes as follows: "In any litigation pending on July 1, 2007 at 12.01 a.m., in any case in this state, any contested case pending on such date and time under the Administrative Procedure Act, or any appeal pending on such date and time before the Tax Equalization and Review Commission, in which the Property Tax Administrator is a party, the Tax Commissioner shall be substituted for the Property Tax Administrator as the party in such litigation, contested case, or appeal." Neb. Rev. Stat. §77-701(4) (Supp 2007). The Tax Commissioner argues that because a county assessor may appeal the decision of a county board granting an exemption from taxation for property held by the State or a governmental subdivision and because the Property Tax Administrator acts as the county assessor for Keith

County, that he would have been substituted as a party if the Property Tax Administrator had filed appeals of the County Board's decisions.

The Tax Commissioner's argument raises various questions: May a statute that by its plain words is applicable to actions pending on July 1, 2007, at 12.01 a.m. be extended to apply to appeals filed on May 30, 2008? May a statute that provides for substitution of one public official for another in pending actions be construed to confer a right to appeal? May a county assessor appeal a decision of the County Board made pursuant to Section 77-202.12 of Nebraska Statutes?

Section 77-202.04 of Nebraska Statutes expressly provides for an appeal of a county board's decision by the county assessor. Section 77-202.12 of Nebraska Statutes does not provide for an appeal of a county board's decision by the County Assessor. In *Pittman v. Sarpy County*, 258 Neb. 390, 603 N.W.2d 447 (1999), the court found that a county assessor had a right to appeal decisions of a county board granting or denying exemptions from taxation without the express authority now found in Section 77-202.04 of Nebraska Statutes. The provisions of Section 77-5007.01 of Nebraska Statutes provide for appointment of counsel to represent a county assessor in an appeal and Section 77-5007 of Nebraska Statutes provides for appeals of all county board decisions granting or denying an exemption from taxation of real property. The state or governmental subdivision whose property became taxable by reason of decisions of a county assessor and a county board could appeal a decision that is in effect the denial of an exemption. There is no express provision for the appeal of a decision granting the exemption. The statutory provisions when read together as suggested by the *Pittman* Court round out the statutory framework and allow for appeals of both denials and grants of exemption from taxation

for property owned by the State or a governmental subdivision. The County Assessor for Keith County could have appealed the decisions of the County Board.

As noted, the Property Tax Administrator acts as the County Assessor for Keith County. The Tax Commissioner would have been substituted as a party if the appeals had been filed by the Property Tax Administrator prior to July 1, 2007, at 12.01 a.m. Neb. Rev. Stat. 77-701(4) (Supp 2007). Section 77-701(4) of Nebraska Statutes became law as a provision of LB 334, adopted in the 100th Legislature 1st Session. The bill contained various provisions eliminating the Department of Property Assessment and Taxation and moving its functions to the Property Assessment Division of the Department of Revenue effective July 1, 2007. See e.g., 2007 Neb. Laws, LB 334, §21. LB 334 established the Property Tax Administrator as the chief administrative officer of the Division. 2007 Neb. Laws, LB 334, §43. LB 334 contained provisions transferring employees, budget requirements, appropriations, encumbrances, assets and liabilities from the Department of Assessment and Taxation to the Property Assessment Division. 2007 Neb. Laws, LB 334, §43. Rules and regulations promulgated by the Property Tax Administrator became rules and regulations of the Department of Revenue on July 1, 2007. See, 2007 Neb. Laws, LB 334, §44.

LB 334 transferred responsibility for a variety of decisions made by the Property Tax Administrator to the Tax Commissioner: revocation of a county assessor's certificate, §30 and §66; assessment of a penalty, §33; compelling any officer, agent, or servant of any railroad or railway company having property in this state to attend a hearing and give testimony regarding the property, §34; collect delinquent taxes, §91; correct errors in the assessment of property valued by the state as the result of a clerical error or honest mistake or misunderstanding, §87;

and others. It is clear from a review of LB 334 that responsibility for a variety of decisions was being transferred from the Property Tax Administrator to the Tax Commissioner. The Tax Commissioner was also made responsible, as a substituted party, for adjudicative review of past decisions of the same nature as those being transferred. 2007 Neb. Laws, 334, §43, now codified as Section 77-701(4) of Nebraska Statutes.

LB 334 did not, however, transfer to the Tax Commissioner the authority of the Property Tax Administrator to act as the county assessor in various counties of the State. See, Neb. Rev. Stat. §§77-115 and 77-1340 (Supp 2007). Since the authority of the Property Tax Administrator to act as a county assessor was not transferred the general result of the application of the provision in Section 77-701(4) of Nebraska Statutes as applied to appeals by the Property Tax Administrator from decisions of a county board pursuant to Section 77-202.12 of Nebraska Statutes do not make the person responsible for the future decisions responsible for the adjudicative review of past decisions of the same nature. The specific result produced by the interplay of a general statute with specialized sections applicable only to county assessors is anomalous and cannot be used to reach the result sought by the Tax Commissioner. To the extent that a conflict exists between two statutes on the same subject, the specific statute controls over the general statute. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005).

There is a further difficulty with the position of the Tax Commissioner. By its plain terms Section 77-701(4) of Nebraska Statutes is applicable only to matters pending on July 1, 2007, at 12:01 a.m. The date to which the statute is applicable is unambiguous. The appeals now being considered by the Commission were filed on May 30, 2008. (E1 - 13). The County

Board's decisions were made on April 30, 2008. (E1 - 13). The protests were filed April 1, 2008. (E1 - 13). No part of the proceedings under review in these appeals occurred prior to July 1, 2007. Whatever the application of Section 77-701(4) of Nebraska Statutes might have to an appeal brought by the Property Tax Administrator acting as the County Assessor from a decision of a county board pending on July 1, 2007, at 12:01 a.m. it has no application in these proceedings.

The Property Tax Administrator acting as a county assessor may appeal a county board decision made pursuant to Section 77-202.12 of Nebraska Statutes. The Tax Commissioner has no authority to appeal a decision of a county board made pursuant to Section 77-202.12 of Nebraska Statutes.

The Tax Commissioner asks leave to substitute the Property Tax Administrator as a party in the event he is not found to be a proper party. That request should be denied. It is clear that if an appeal has not conferred jurisdiction on the Commission to consider the merits of the appeals it does not have jurisdiction to allow a substitution. The time for filing an appeal by the Property Tax Administrator was passed. The only action the Commission may take is dismissal. Without jurisdiction, the Commission cannot reform errors by the parties.

V. CONCLUSIONS OF LAW

1. The Commission does not have subject matter jurisdiction in these appeals.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The appeals in Case Nos. 08E 018 through 08E 030 are dismissed.
2. The motion for substitution of the Property Tax Administrator as a party is denied.
3. Each party is to bear its own costs in this proceeding.

Signed and Sealed June 26, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

Wm. R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.