

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

CHARLIE M. WILSON REPLACEMENT)		
CARE HOME, INC.,)		
Appellant,)		Case No. 08E 032
v.)		DECISION AND ORDER
LANCASTER COUNTY BOARD OF)		AFFIRMING THE DECISION OF
EQUALIZATION,)		THE LANCASTER COUNTY BOARD OF
Appellee.)		EQUALIZATION
)		

The above-captioned case was called for a hearing on the merits of an appeal by Charlie M. Wilson Replacement Care Home, Inc. ("the Taxpayer") 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 May 28, 2009, pursuant to an Order for Hearing and Notice of Hearing issued March 13, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Wickersham was the presiding hearing officer.

Patty Wilson, President of Charlie M. Wilson Replacement Care Home, Inc., was present at the hearing. Tim Engler appeared as legal counsel for the Taxpayer.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

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

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 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 ("the Subject Property") is Lot 1 Block 1, Big Thompson Creek, First Additon, Lincoln, Lancaster County, Nebraska.
3. An application for exemption of the subject property from taxation was filed by the Taxpayer.
4. The Assessor recommended disapproval.
5. The Assessor's recommendation was affirmed by the County Board.
6. The Tax Commissioner was served with a Notice in Lieu of Summons and exercised the statutory right to intervene.

7. An appeal of the County Board's decision was filed with the Commission.
8. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
9. An Order for Hearing and Notice of Hearing issued on March 13, 2009, set a hearing of the appeal for May 28, 2009, at 11:00 a.m. CDST.
10. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

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. 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).
7. 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)
8. 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).

9. 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).
10. 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).
11. 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).
12. 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).
13. “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).
14. 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).
 15. 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).
 16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
 17. 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).
 18. The presumption disappears if there is competent evidence to the contrary. *Id.*

19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
20. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, 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

The parties stipulated that the sole issue is whether the Taxpayer's use of the subject property is exclusively for charitable purposes. 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 parties submitted both stipulated facts and testimony. The stipulated facts show that the Taxpayer uses the subject property as a residence for 4 young severely handicapped men. Care givers employed by the State of Nebraska provide 24 hour care for the residents. Land for the residence and construction costs for the residence were donated. The residents pay rent. Rent paid allows the home to be self sustaining except for payment of real estate taxes. The Taxpayer's President testified that if a resident did not pay rent of \$550 per month, he could not continue to reside at the subject property.

“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). The Taxpayer provides the four young men residing on the subject property with a residence and food in exchange for rent of \$550 per month. The rent paid may be a modest cost to the young men who reside on the subject property. It is well established that low-income housing is not a charitable use of property. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *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*, 186 Neb. 11, 180 N.W.2d 136 (1970); *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961). *Pittman v. Sarpy County Bd. Of Equalization*, 258 Neb. 390, 603 N.W.2d 447 (1999). The Supreme Court has, however, held that the provision of some housing is charitable. *Young Women's Christian Assn. V. City of Lincoln*, 177 Neb. 136, 128 N.W.2d 600 (1964) and *Young*

Men's Christian Assn. V. Lancaster County, 106 Neb. 105, 182 N.W. 593, (1921). The lines drawn in the noted cases are not readily apparent and perhaps cannot or should not be readily apparent. See. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971). The lines were last distinguished in *Pittman* supra. In *Pittman* the Court emphasized differences in funding streams, membership requirements, supervision, and a limitation on tenancy for a particular purpose. In this case, funding for acquisition of the land and construction of the resident was provided by donations. The Taxpayer's operation of the residence is self supporting except for payment of the real estate taxes. The Taxpayer does not deliver personal care services, those are provided by the State. In this case the primary use of the subject property is to provide a long term residence at a modest cost and that is not a charitable use.

With the exception of any taxes that might be due, the residents of the subject property are paying for the services rendered to them by the Taxpayer. 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). The Taxpayer has not been relieved the State of the obligation to provide care for the residents of the subject property. The State provides 24 hour care to each of the residents. The residents choose to reside at the subject property and pay rent which covers all expenses except taxes. The residents are not receiving charity from the Taxpayer and the Taxpayers use of the subject property is not a charitable use.

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 taxable as of the assessment date January 1, 2008, 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 (Cum. Supp. 2008).
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 2008.
6. This order is effective for purposes of appeal on June 25, 2009.

Signed and Sealed. June 25, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, 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.