

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”).

Michael 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).

I. ISSUES

Whether the Tax Commissioner lacks standing and should be removed as an appellant.

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, and Ruth Sorensen, Property Tax Administrator. (Case Files).

III. APPLICABLE LAW

1. 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 §001.36 (6/09).
2. “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).
3. Legal counsel for a party may sign an appeal/petition. 442 Neb. Admin. Code, ch 5 §001.05I (06/09).
4. The County Assessor may determine that real property owned by a governmental subdivision is taxable. Neb. Rev. Stat. §77-202.12 (Supp 2007).
5. The determination of the County Assessor may be protested to the County Board. Neb. Rev. Stat. §77-202.12 (Supp 2007).
6. The Tax Commissioner may intervene in the appeal of a decision of a County Board. Neb. Rev. Stat. §77-202.12 (Supp 2007).
7. 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

If an appellant does not have standing the Commission does not have jurisdiction.

Citizens Opposing Indus. Livestock v. Jefferson Cty., 274 Neb. 386, 740 N.W.2d 362 (2007).

Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). The Commission's rules and regulations define a party as someone who will be directly affected by the outcome of an appeal. Neb. Admin. Code, ch 2 §001.36 (1/2009). 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. *Id.* As the explanatory statement to the rule indicates, the rule incorporates the essential elements of standing as defined by the Courts of Nebraska. The Commission is a creature of statute and could not create a different standard. *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). With that understanding, the Commission has sought to determine if the Tax Commissioner has standing on any basis.

The appeals by the Tax Commissioner and the Property Tax Administrator 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 (Cum. Supp. 2008). 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 an appeal to the Commission. *Id.* The issue in this instance is not, however, whether the Tax Commissioner may intervene after an appeal is filed, but whether the Tax Commissioner is a proper party to appeal. If the Tax Commissioner has standing he may appeal.

Standing may be conferred by statute. The provisions of Section 77-701(4) of Nebraska Statutes are 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 a party in such litigation, contested case, or appeal." Neb. Rev. Stat. §77-701(4) (Supp 2007). 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. The Property Tax Administrator acts as the county assessor for Keith County. The Tax Commissioner is the supervisor of the Property Tax Administrator. Neb. Rev. Stat. §77-701(1) (Cum. Supp 2008).

Consideration of the statute in this instance 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 27, 2009? 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 expressly 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, rounds out the statutory framework and allows for appeals of both denials and grants of exemption from taxation for property owned by the State or a governmental subdivision.

Section 77-701(4) of Nebraska Statutes became law as a provision of 2007 Neb. Laws, LB 334. 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, and 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. 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 if pending as of July 1, 2007, at 12:01 a.m. 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 to the Tax Commissioner, 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 does not follow the pattern evidenced in other examples wherein the person

responsible for the future decisions, Tax Commissioner, is 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 and is limited to the facts in this instance. The general pattern matching future responsibility for decisions with the ability to guide review of past decisions of the same nature 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).

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 27, 2009. (E1 - 13). The County Board's decisions were made on April 22, 2009. (E1 - 13). The protests were filed March 24, 2009. (E1 - 13). No part of the proceedings under review in these appeals occurred prior to July 1, 2007. Whatever application 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., has no application in these proceedings.

A decision of a County Board determining the taxability of property owned by the state or one of its political subdivisions may be appealed to the Commission. Neb. Rev. Stat. §77-202.12. The Tax Commissioner may intervene in an appeal brought pursuant to section 77-202.12 of Nebraska Statutes. The statutory right to intervene is not, however, the statutory right to appeal. Unambiguously, the right to appeal is not granted to the Tax Commissioner while the

right to intervene is. If the legislature had wished to confer a right to appeal it would have done so as shown by section 77-202.04 in which the County Assessor is given the right to appeal and the Tax Commissioner is given the right to intervene.

The Tax Commissioner has no statutory authority to appeal a decision of a county board made pursuant to Section 77-202.12 of Nebraska Statutes.

The Tax Commissioner argues that he has standing to appeal as a matter of law and cites *State v. Odd Fellows Hall Ass'n*, 123 Neb 440, 243 N.W. 616 (1932). In *Odd Fellows*, the Court determined that the State of Nebraska was a person within the meaning of applicable statutes and the state could be adversely affected by the actions of a County Board determining the assessability of property. *Id.* The Court then determined that the Tax Commissioner was authorized to appeal on behalf of the State. *Id.* When *Odd Fellows* was decided, the State of Nebraska relied on property tax levy for its general support and operations. See, Section 77-1007 Compiled Statutes of Nebraska. The State of Nebraska is now prohibited from levying a tax on property for its support or operations. *Neb. Const.* art. VIII §1A. There is no showing that the State of Nebraska will be affected in any way by the decision of the Keith County Board of Equalization. Because the State of Nebraska is not affected by the County Board's decision, no one acting on its behalf could have standing. It is then unnecessary to determine if the Tax Commissioner has the authority to act on behalf of the State of Nebraska and appeal the decision of the County Board.

The appeal was brought by Doug Ewald in his capacity as Tax Commissioner. It is unnecessary to determine whether Doug Ewald as an individual has standing.

There is no showing that the Tax Commissioner has standing as a matter of law. The

foregoing discussion shows that the Tax Commissioner does not have standing as a matter of right. Since the Tax Commissioner does not have standing, it is unnecessary to determine whether the Tax Commissioner is authorized by the Constitution or statutes to appeal.

The Tax Commissioner should be removed as a party.

The parties stipulated that the Property Tax Administrator is acting as the Keith County Assessor. The case caption should be amended to reflect that fact.

The Tax Commissioner does not have standing to appeal. The Tax Commissioner does have the statutory right to intervene. Neb. Rev. Stat. §77-202.12 (Cum. Supp. 2008). The Tax Commissioner's rights as a potential intervener are not affected by this order.

V. CONCLUSIONS OF LAW

1. The Tax Commissioner does not have standing in these appeals.

VI. ORDER

IT IS ORDERED THAT:

1. The Tax Commissioner is removed as an appellant in Case Nos. 09E 002 through 09E 014.
2. The case caption is amended to reflect the fact that the Property Tax Administrator is acting as the Keith County Assessor.
3. A Notice of Appeal shall be served on the Tax Commissioner notifying him of the captioned appeals.

4. Each party is to bear its own costs in this proceeding.

Signed and Sealed January 11, 2010.

Nancy J. Salmon, Commissioner

Wm. R. Wickersham, Commissioner

SEAL

Commissioner Hotz, dissenting.

I respectfully dissent from the Decision and Order (Decision) that the Tax Commissioner does not have standing in this appeal. I reject the notion that the holding in *State v. Odd Fellows Hall Ass'n*, 123 Neb. 440, 243 N.W. 616 (1932), hinged in some unexplained way upon the fact that the State levied a property tax. In my view, a more careful reading of *Odd Fellows* is that the Tax Commissioner was granted standing not because the State levied a property tax, but because the Tax Commissioner had jurisdiction over the administration of the revenue laws of the state.

Odd Fellows was decided based upon a statute which generally granted the right to appeal, *Comp. St. 1929 Section 77-1705*, and a provision of the State Constitution relating to the authority of the Tax Commissioner which stated, "...[t]he Tax Commissioner ... shall have jurisdiction over the administration of the revenue laws of the state..." *Neb. Const. Art IV, Section 28*.

At issue in *Odd Fellows* was whether the Tax Commissioner had standing to appeal a

decision of the District Court from an appeal of a decision of the county board of equalization. The applicable statute stated, “[a]ppeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county.” *Comp. St. 1929 Section 77-1705*. Regarding this statutory language the court stated, “the general language of this section neither enumerates the persons or classes of persons entitled to appeal, nor does it expressly, or in terms, attempt to limit or preclude the exercise of that right by any person, representative, or entity, whose interest may have been adversely affected by the action appealed from.” *Odd Fellows*, 243 N.W. at 619.

The applicable statute in this appeal states, “[t]he decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission on or before June 1. The Tax Commissioner in his or her discretion may intervene in an appeal pursuant to this Section.” *Neb. Rev. Stat. Section 77-202.12(3)* (2008 Cum.Supp.). Not unlike the statute that was construed in *Odd Fellows*, Section 77-202.12(3) does not expressly enumerate the persons entitled to appeal, nor does it expressly limit the right of any person, representative, or entity whose interest may have been adversely affected by the action appealed from. In following *Odd Fellows*, I would read the first sentence as a general grant of a right to appeal decisions of the county boards of equalization. Further, I do not read the second sentence, granting the Tax Commissioner the right to *intervene*, as a limitation or preclusion on the exercise of the right to *appeal* in the first sentence. Intervention is “[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome.” *Black’s Law Dictionary, Seventh Edition*, West Publishing (1999). I find no

authority to support the view that a statutory grant of a right to intervene should be construed as a limitation on a right to appeal. Therefore, I would find that the express language of *Section 77-202.12* does not preclude the Tax Commissioner from the right to bring an appeal. However, the Tax Commissioner must still have standing to appeal by having “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, 641 N.W.2d 55 (2002). More particularly, the Tax Commissioner must have standing as being “directly affected by the outcome” of this appeal. *442 NAC 2, Section 001.36*.

In *Odd Fellows*, the Court determined that the Tax Commissioner had standing because he had jurisdiction over the administration of the revenue laws of the state by virtue of the language of *Art IV, Section 28*. It is important to note that the Court deemed *Art IV, Section 28* to be self-executing. In regard to the provision being self-executing, the Court stated, “Nothing appears in [the] provision that indicates that the matter is referred to the Legislature for further action.” 243 N.W. at 621. Further, the court said, “Constitutional provisions are self-executing where it is the manifest intention that they should go into immediate effect and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty or a liability imposed.” *Id.*

Had *Art IV, Section 28* remained unchanged from the time *Odd Fellows* was decided until this present appeal, no further analysis would appear to be necessary. However, *Art IV, Section 28* was amended in 1995 to state, “The Tax Commissioner *may* have jurisdiction over the administration of the revenue laws of the state and such other duties and powers *as provided by law*.” *L.R. 3CA (1995), Neb. Const. Art IV, Section 28* (emphasis added). Therefore, it

should be determined whether those changes would require a different result.

The first question in this standing analysis is whether *Art IV, Section 28*, with the change made in 1995, is no longer self-executing. In the determination of whether a provision is self-executing: “[T]he question in every case is whether the language of a constitutional provision is addressed to the courts or to the legislature. Constitutional provisions to the effect that laws may be passed by the legislature for particular purposes are not self-executing, and a provision that the legislature should make suitable provisions for carrying a constitutional amendment into effect is obviously addressed to the legislature and is indicative of the intention that such amendment should not become effective until made so by an act of the legislature. Thus, a provision that a thing shall be done ‘as provided by law,’ ... is not self-executing.” *16 Am.Jur.2d Constitutional Law, Section 105*. The Nebraska Supreme Court has determined that “[a] constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.” *Indian Hills Community Church v. County Board of Equalization of Lancaster County*, 226 Neb. 510, 516, 412 N.W.2d 459, 516 (1987), See also *16 C.J.S. Constitutional Law, Section 46* (1984). Based upon these authorities it would appear that due to the changes made by L.R. 3CA, *Art IV, Section 28* is no longer self-executing since “shall” has been changed to “may” and, the phrase “as provided by law” indicates the legislature is authorized to make suitable provisions for carrying the constitutional amendment into effect. In other words, *Art IV, Section 28* authorizes the Legislature to enact

statutory schemes granting the Tax Commissioner jurisdiction over the administration of the revenue laws of the state. If such statutory language has not been enacted the Tax Commissioner would not be directly affected by the outcome of this appeal as he was in *Odd Fellows*. Likewise, if such language has been enacted, one would reasonably conclude the Tax Commissioner would be directly affected by the outcome of the appeal as he was in *Odd Fellows*.

Having concluded *Art IV, Section 28* is not self-executing, it must be determined whether the Legislature has enacted statutory language putting into effect the Constitutional language which states: “The Tax Commissioner may have jurisdiction over the administration of the revenue laws of the state and such other duties and powers as provided by law.” A review of the statutory schemes relating to the revenue laws of the state and to the role the Tax Commissioner has in many of these schemes seems to indicate that is precisely what the Legislature has done: “The Tax Commissioner shall appoint or employ deputies [and others] as he or she deems necessary to administer and effectively enforce all provisions of the revenue and property tax laws of this state.” *Neb. Rev. Stat. Section 77-366 (2008 Cum.Supp.)* (emphasis added). It is noteworthy that the phrase “and property tax” was amended to this section by the Legislature in 2007. *2007 Neb. Laws, LB334, Section 24*. It is clear from this section alone that in the absence of a self-executing Constitutional provision, the Legislature, as recently as 2007, statutorily granted the Tax Commissioner authority regarding the administration and enforcement of the revenue laws of the state, particularly the property tax laws, as are at issue in the present appeal. A second example of the statutorily-granted authority of the Tax Commissioner over the administration of the revenue laws of the state is *Neb. Rev.*

Stat. Section 77-369 (Reissue 2003), which authorizes (and requires) that the Tax Commissioner “shall make, adopt, and publish such rules and regulations as he or she may deem necessary and desirable to carry out the powers and duties imposed upon him or her and the Department of Revenue.” Both of these statutes, as permitted by the Constitution and granted by the Legislature, authorize “the tax commissioner, for and on behalf of the state of Nebraska, in intervening in tax proceedings, prosecuting appeals from county boards of equalization, and carrying on such other proceedings as may be expedient or necessary to secure a proper and uniform determination of questions of taxation” as are involved in this appeal. *Odd Fellows*, 243 N.W. at 621.

The Court determined in *Odd Fellows* that the language of *Art IV, Section 28* had “no uncertain meaning;” that “jurisdiction over the administration of all the revenue laws of the state necessarily embraces jurisdiction of [these] proceedings...” 243 N.W. at 621.

Contrary to the finding in the Decision above, that “[t]here is no showing that the state will be affected in any way by the decision,” I would find that by virtue of his statutory role in relation to *Art IV, Section 28*, the Tax Commissioner has “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, 641 N.W.2d 55 (2002), and is “directly affected by the outcome” of this appeal. *442 NAC 2, Section 001.36*. Therefore, I would find that the Tax Commissioner has standing to appeal.

Robert W. Hotz, Commissioner