

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

Immanuel Retirement Communities,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case Nos: 12E 045 & 13E 043

Decision and Order Affirming the  
Determinations of the Douglas County  
Board of Equalization

**For the Appellant:**

Steven D. Davidson,  
Baird Holm, LLPBaird Holm, LLP.

**For the Appellee:**

Malina M. Dobson,  
Deputy Douglas County Attorney.

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property is located at 6803 North 68<sup>th</sup> Street, Omaha, Douglas County, Nebraska.<sup>1</sup> The parcel is improved with a retirement community named Immanuel Village with multiple levels of care ranging from assisted living to independent living apartments.<sup>2</sup> The legal description of the parcel is found at Exhibit 8, page 1. The property record card for the Subject Property is found at Exhibit 8 for tax year 2012 and Exhibit 9 for tax year 2013.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the Subject Property was partially exempt from taxation for tax years 2012 and 2013. Immanuel Retirement Communities (herein referred to as the “Taxpayer”) protested these assessments to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested that the Subject Property be entirely exempt from taxation. The Douglas County Board determined that the Subject Property was partially exempt from taxation for tax years 2012 and 2013.<sup>3</sup>

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<sup>1</sup> E1 and E2.

<sup>2</sup> E8 and E9.

<sup>3</sup> E1 and E2.

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing and received evidence on October 24, 2013, and recessed the hearing until a later date. The hearing was resumed and concluded on November 18, 2013.

### III. STANDARD OF REVIEW

The Commission’s review of the determination of the County Board of Equalization is de novo.<sup>4</sup> “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.”<sup>5</sup> When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”<sup>6</sup>

That presumption 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. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>7</sup>

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

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<sup>4</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

<sup>5</sup> *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>6</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>7</sup> *Id.*

arbitrary.<sup>8</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>9</sup>

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based.”<sup>10</sup> The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”<sup>11</sup>

#### IV. EXEMPTION

##### A. Law

The Nebraska Constitution specifies that the Legislature may classify exempt properties “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.”<sup>12</sup> The following property shall be exempt from property taxes:

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 subject 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;<sup>13</sup>

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<sup>8</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>9</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>10</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>12</sup> Neb. Const., Art. VIII, § 2.

<sup>13</sup> Neb. Rev. Stat. § 77-202(1)(d) (2012 Cum. Supp.).

“Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.”<sup>14</sup>

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.<sup>15</sup> “It is the exclusive use of the property that determines the exempt status. The Constitution and the statutes do not require that the ownership and use must be by the same entity. Ownership and use may be by separate entities.”<sup>16</sup>

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, and that the power and right of the state to tax is always presumed.<sup>17</sup>

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;<sup>18</sup> (2) the alleged exempt property must clearly come within the provision granting the exemption;<sup>19</sup> (3) the laws governing property tax exemptions must be strictly construed;<sup>20</sup> (4) the courts must give a “liberal and not a harsh or strained construction . . . to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order that the true intent of the constitutional and statutory provisions may be realized”;<sup>21</sup> and (5) this interpretation should always be reasonable.<sup>22</sup>

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<sup>14</sup> *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009) (citations omitted).

<sup>15</sup> See, *Harold Warp Pioneer Village v. Ewald*, 287 Neb. 19 (2013).

<sup>16</sup> *Fort Calhoun Baptist Church v. Washington County Board of Equalization*, 277 Neb. 25, 33, 759 N.W.2d 475, 481-82 (2009) (citations omitted).

<sup>17</sup> See, e.g., *Jaksha v. State*, 241 Neb. 106, 112, 486 N.W.2d, 858, 864 (1992); *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs*, 122 Neb. 586, 241 N.W. 93 (1932).

<sup>18</sup> *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

<sup>19</sup> *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

<sup>20</sup> *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)

<sup>21</sup> *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

<sup>22</sup> *Id.* (citing, *Young Men's Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

“Charitable use” is a term incapable of exact definition.<sup>23</sup> Whether or not the use of the Subject Property qualifies as a charitable use may be determined based on the facts and undisputed evidence of “disclosed incidents of operation” of the Subject Property.<sup>24</sup> “The fact that patients that pay are required to do so does not deprive a charitable institution of its eleemosynary character.”<sup>25</sup>

## **B. Summary of the Evidence**

Debra Welk, the Taxpayer’s Vice President of Health Care Services, testified that the following services and amenities are available to residents of the independent living facilities located on the Subject Property: (1) in unit emergency call devices; (2) a community center; (3) social activities; (4) a wellness center; (5) an outdoor walking path and garden; (6) access to staff pastors; (7) church services; (8) tele-health monitoring; (10) transportation services; (11) health coaches; and (12) access to available onsite health professionals.<sup>26</sup> As part of the continuing services for residents, the Taxpayer maintains documentation regarding observed behavioral or health issues, incident reports, and do-not-resuscitate requests.<sup>27</sup>

Welk testified that the Taxpayer does not provide daily care to residents of the independent living portion of the facility such as bathing, dressing, or administering daily medication. Residents can continue to live in the independent living portion of the facility and obtain daily care from an outside source, provided that such care is independently acquired by the resident. Welk testified that the Taxpayer is careful to maintain less than 25% of residents in the independent living facility with daily or 24 hour care in order to comply with state law governing assisted living facilities. She described the independent living facilities as “primarily an apartment.”

Welk also testified that independent living facility applicants are required to complete financial paper-work and demonstrate ability to pay. She further testified that some independent living facility residents were required to move to less expensive facilities in the Taxpayer’s

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<sup>23</sup> See, *Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 230 Neb. 135, 430 N.W.2d 502 (1988).

<sup>24</sup> *Id.* at 140, 403 N.W.2d at 505.

<sup>25</sup> *Id.* at 141, 403 N.W.2d at 505 (citations omitted).

<sup>26</sup> Welk provided extensive testimony concerning these amenities and the qualifications of employees. See also, E26, E28, E29, E30, E33, E34, E35, and E39.

<sup>27</sup> The forms for these services are found at E20, E21, E22, E31, and E32.

system for financial reasons. Additionally, Welk testified that as the abilities of the residents to live independently diminishes, the residents move from the independent living portion of the facility to areas of the facility that provide a higher level of care.

Scott Bear, Director of Finance for Immanuel Retirement Communities, testified that the Taxpayer is a 501(c)(3) non-profit organization under the Internal Revenue Code, and is recognized as a non-profit organization by the State of Nebraska.<sup>28</sup> According to Bear, a residence assistance fund called the Immanuel Community Foundation is maintained for purposes of aiding residents with financial needs, and that the current fund exceeds \$1,000,000.

Bear also described the admission process for the independent living facility. Immanuel Retirement Communities conducts a financial review of all applicants to its independent living facilities. Options may be available in the case where applicants are financially unable to qualify for some of the Taxpayer's independent living facilities, including low-income independent living located at Immanuel Community Courtyard, which is contiguous with Immanuel Community Village. The size and location of the independent living unit within the Immanuel Retirement Communities system is based upon the ability to pay.

Bear testified that although the contract with residents allows for eviction for failure to pay, he was unaware of any instances where residents have been forced to leave the Immanuel Retirement Communities. Bear did testify, however, that he was aware of a "handful" of instances where residents were unable to continue to pay the monthly cost of independent living facilities, and following a discussion with administrators concerning their finances, the residents were then moved to low-income facilities or other facilities within Immanuel Retirement Communities.

Eric Gurley, the Taxpayer's Chief Executive Officer, testified that Immanuel Retirement Communities should be viewed as a single continuing care facility, and not separate facilities with different levels of care. He testified that Immanuel Retirement Communities maintains a separate departmental budget for those amenities that are exclusively used by the residents of the independent living facilities. In contrast, he testified that costs for food, wellness centers,

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<sup>28</sup> See, E15.

activities, pastors, health professionals, and housekeeping were part of the Taxpayer's comprehensive budget because these services and amenities are used in all levels of care.

Mike Goodwillie, Chief Deputy Douglas County Assessor, testified concerning the process used by the County Assessor's Office for purposes of determining applicant exemption status and rendering recommendations to the Douglas County Board of Equalization. He testified that beginning in tax year 2012, the County Assessor issued questionnaires to exemption applicants requesting additional information. Immanuel Retirement Communities returned completed questionnaires for the Subject Property.<sup>29</sup> Goodwillie indicated that a review of the Taxpayer's application, questionnaire, website, and conversations with employees formed the basis of the County Assessor's opinion that the Subject Property was not exempt.

### **C. Analysis**

The Commission finds that the Subject Property was not targeted for inquiry by the County Assessor's office. Rather, the evidence indicates that the County Assessor treated all exemption applicants similarly. The credibility of this position is enhanced by a review of the County Assessor's questionnaires. The questionnaires for both tax years 2012 and 2013 demonstrate a comprehensive effort by the County Assessor to obtain detailed property information in terms of use and otherwise.<sup>30</sup>

Nebraska Statutes section 77-202(d) contains the following three-part test for purposes of determining whether a property is exempt from taxation: (1) is the owning organization a qualified organization; (2) is the subject property being used to generate profit or financial gain; and (3) is the subject property used for a qualified purpose.<sup>31</sup> The parties concurred that Immanuel Retirement Communities is a charitable organization and that the Subject Property is not being used to generate profit or financial gain. Thus, because the first two parts of the test are not disputed, the Commission has no authority to make a determination on those issues.<sup>32</sup> Therefore, the only issue in the current case is whether the use of the independent living portion of Immanuel Village constitutes a charitable use.

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<sup>29</sup> E6:6-14 and E7:8-16.

<sup>30</sup> *Id.*

<sup>31</sup> *Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002).

<sup>32</sup> See, *Id.* at 458, 640 N.W.2d at 402.

Unlike the term “charitable organization,” “charitable use” is not defined by statute.<sup>33</sup> A use is not charitable simply because a charitable organization is causing the use.<sup>34</sup> “Charitable use” is a term incapable of exact definition.<sup>35</sup> Whether or not the use of the Subject Property qualifies as a charitable use may be determined based on the facts and undisputed evidence of “disclosed incidents of operation.”<sup>36</sup>

Immanuel Retirement Communities operates under the following mission statement : “All people will grow and age with dignity, safety, and wellness.”<sup>37</sup> In furtherance of this mission, residents of the Immanuel Retirement Communities independent living apartments have access to several useful amenities and services including: (1) in unit emergency call devices; (2) a community center; (3) social activities; (4) a wellness center; (5) an outdoor walking path and garden; (6) access to staff pastors; (7) church services; (8) tele-health monitoring; (10) transportation services; (11) health coaches; and (12) access to available onsite health professionals.<sup>38</sup> Residents also benefit from regular observation and evaluation by staff, and a community organized around a holistic approach to the health of the individual.

According to the testimony of Mr. Bear, the Taxpayer’s Director of Finance, occupancy in the Immanuel Village independent living facility is dependent upon the applicant’s ability to pay. Additionally, the contract that is signed upon acceptance of an applicant grants the Taxpayer the right to remove a resident for failure to pay.<sup>39</sup>

The size and location of the apartment within the Taxpayer’s independent living system is based on the ability of the resident to pay. Whether a resident remains in the independent living

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<sup>33</sup> Neb. Rev. Stat. §77-202(d) (2012 Cum. Supp.); Neb. Rev. Stat. §77-202(d) (2011 Supp.).

<sup>34</sup> See generally, *Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 230 Neb. 135, 430 N.W.2d 502 (1988).

<sup>35</sup> See, *Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 230 Neb. 135, 430 N.W.2d 502 (1988).

<sup>36</sup> *Id.* at 140, 403 N.W.2d at 505.

<sup>37</sup> Ms. Welk testified of the mission for Immanuel Retirement Communities, and Welk and Bear testified that the services provided were an attempt to adhere to the Taxpayer’s mission statement.

<sup>38</sup> Welk provided extensive testimony concerning these amenities and the qualifications of employees. See also, E26, E28, E29, E30, E33, E34, E35, and E41.

<sup>39</sup> E18:4. The contract states in relevant part: “2.9 **Delinquent Payment.** If Immanuel does not receive payment of the Monthly Fee by the last day of the month in which payment is due, then Resident shall be in breach of this Agreement, and Immanuel may deliver to Resident a notice that his Agreement and Resident’s right to occupy the Apartment will terminate thirty (30) days after the date of the notice, unless Resident pays the Monthly Fee within twenty (20) days of receipt of such notice. Resident will not be permitted to cure a breach by making payment during the notice period more than two (2) times in any calendar year.”



units or is transferred to another facility within the Immanuel Retirement Communities is not solely dependent upon the individual's needed level of physical, social, or mental care, but also on the resident's financial ability to pay. Bear testified that the Immanuel Community Foundation has never been used to allow an individual to stay in the independent living facility when they could not afford it.

While the Supreme Court has held that an entity does not lose its tax exempt simply because it requires residents to pay if they can, in the current case, the evidence suggests that those who cannot pay the cost of the independent living facilities cannot stay. The programs provided to residents of the Subject Property undoubtedly provide ample benefits. The definition of a charitable use, however, is not satisfied simply because a benefit is conferred upon another.<sup>40</sup> Under contract, Immanuel Retirement Communities provides these benefits as consideration for payment received from the residents.<sup>41</sup> If payment is not received, these benefits are not conferred.<sup>42</sup>

The mission of Immanuel Retirement Communities is laudable, and it is undisputed that the Immanuel Village independent living facilities are desirable and that residents are generally satisfied with the product they receive.<sup>43</sup> The undisputed facts concerning the operations in the independent living facilities, however, indicate that the use of the apartments is not charitable.

## **V. CONCLUSION**

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

## **VI. ORDER**

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<sup>40</sup> See, *See, Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 230 Neb. 135, 430 N.W.2d 502 (1988).

<sup>41</sup> E18.

<sup>42</sup> E18.

<sup>43</sup> Testimony at the hearing indicated that many independent living residents choose to move to assisted living when necessity dictates instead of moving to another community. Additionally, testimony indicated that many residents decide to stay permanently in the independent living facility if possible.

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the Subject Property was partially exempt for tax years 2012 and 2013 are affirmed.<sup>44</sup>
2. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
3. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This Decision and Order shall only be applicable to tax years 2012 and 2013.
6. This Decision and Order is effective for purposes of appeal on June 6, 2014.

Signed and Sealed: June 6, 2014

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Thomas D. Freimuth, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.

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<sup>44</sup> Assessed value, as determined by the County Board of Equalization, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.