

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Immanuel Retirement Communities,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 13E 040

Decision and Order Reversing the
Determination 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 a vacant lot located contiguous to Lakeside Village, a partially exempt retirement community, at 17425 Frances Street, Omaha, Douglas County, Nebraska.¹ The legal description of the parcel is found at Exhibit 14, page 1. The property record card for the Subject Property was not provided as ordered by the Commission in its Order for Hearing and Notice of Hearing dated August 28, 2013.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the Subject Property was not exempt from taxation for tax year 2013. Immanuel Retirement Communities (the Taxpayer) protested this determination to the Douglas County Board of Equalization (the County Board) and requested that the Subject Property be exempt from taxation. The Douglas County Board determined that the Subject Property was not exempt from taxation for tax year 2013.²

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (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

¹ E5.

² E5.

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.³ "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."⁴ 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."⁵

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.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

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."⁹ The commission may also "take notice of judicially cognizable facts and in addition may take notice of general,

³ 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).

⁴ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁵ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

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.”¹⁰

IV. EXEMPTION

A. Law

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation and permits the Legislature to classify other 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.”¹¹ 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. Form 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.¹²

“Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.”¹³

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.¹⁴ “It is the

¹⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹¹ Neb. Const., Art. VIII, § 2.

¹² Neb. Rev. Stat. § 77-202(1)(d) (2012 Cum. Supp.).

¹³ *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009) (citations omitted).

¹⁴ See, *Harold Warp Pioneer Village v. Ewald*, 287 Neb. 19 (2013).

exclusive use of the property that determines the exempt status.¹⁵ 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.”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.¹⁷

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.¹⁸

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;¹⁹ (2) the alleged exempt property must clearly come within the provision granting the exemption;²⁰ (3) the laws governing property tax exemptions must be strictly construed;²¹ (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[;]”²² and (5) this interpretation should always be reasonable.²³

B. Summary of the Evidence

Debra Welk, the Taxpayer’s Vice President of Health Care Services, testified that the Subject Property lies contiguous to Lakeside Village, a retirement community that offers multiple levels

¹⁵ *Id.*

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

¹⁷ *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

¹⁸ 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).

¹⁹ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

²⁰ *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

²¹ *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).

²² *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

²³ *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

of care for the elderly and aging.²⁴ She testified that the Subject Property lies between the retirement community and a lake enjoyed by residents of Lakeside Village.

Welk further testified that the Subject Property contains raised gardens that enable residents to engage in gardening activity without back stress.²⁵ She also stated that produce grown on the Subject Property is made available at a farmer's market located at the retirement community.

Welk further testified that the Subject Property contains walking paths and benches that are available to all Lakeside Village residents.²⁶ The Subject Property also allows access to a dock on the lake that allows residents to sit, fish and feed wildlife.²⁷ Welk testified that the Subject Property allows the residents to enjoy the outdoors and age in dignity.

Mike Goodwillie, Chief Deputy Douglas County Assessor, testified that his exemption denial determination was based upon a phone conversation with an employee of the Taxpayer, who indicated there were no plans to develop the Subject Property. He also indicated his determination was based on his review of the Taxpayer's application, questionnaire, and website. He agreed that the Subject Property was available for use by all residents of the retirement community.

C. Analysis

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; and (2) is the subject property being used to generate profit or financial gain; and (3) is the subject property used for a qualified purpose.²⁸ 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.²⁹

²⁴ See, E10:16 (a satellite photo of the Lakeside Village campus depicting the Subject Property).

²⁵ See, E46:1-2.

²⁶ See, E46:3-4.

²⁷ See, E46:5.

²⁸ *Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002).

²⁹ See, *Id.* at 458, 640 N.W.2d at 402.

Therefore, the only issue in the current case is whether the use of the Subject Property constitutes a charitable use.

Unlike the term “charitable organization,” “charitable use” is not defined by statute.³⁰ A use is not charitable simply because a charitable organization is causing the use.³¹ “Charitable use” is a term incapable of exact definition.³² 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.”³³

Immanuel Retirement Communities operates under the following mission statement: “All people will grow and age with dignity, safety, and wellness.”³⁴ There is no dispute that the Subject Property is used in conjunction with Lakeside Village. Further, there is no dispute that portions of Lakeside Village are exempt and used for a charitable use. Welk testified that the Subject Property was used to further the charitable work of the Taxpayer.

The Commission finds that the amenities associated with the Subject Property, available to all residents of Immanuel Retirement Communities’ exempt properties, helps the Taxpayer fulfill its mission and charitable purposes. The Commission is aware that the independent living facilities located in Lakeside Village are not exempt, and that this Commission has found that they are not used for charitable purposes. The Commission is also aware that residents of the independent living facilities also have access to the Subject Property and its amenities. Nebraska Statutes, however, exempt real property if the predominate use of the property is for charitable purposes.³⁵

The Commission finds that the use of the Subject Property by residents of the independent living facilities at Lakeside Village is incidental. The Commission finds that the Subject Property is used predominantly and therefore exclusively, for the Taxpayer’s charitable purpose.

³⁰ Neb. Rev. Stat. §77-202(d) (2012 Cum. Supp.); Neb. Rev. Stat. §77-202(d) (2011 Supp.).

³¹ See generally, *Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 230 Neb. 135, 430 N.W.2d 502 (1988).

³² See, *Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization*, 230 Neb. 135, 430 N.W.2d 502 (1988).

³³ *Id.* at 140, 403 N.W.2d at 505.

³⁴ 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.

³⁵ See, *Harold Warp Pioneer Village v. Ewald*, 287 Neb. 19, ___N.W.2d ___ (2013).

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 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 decision of the County Board is Vacated and Reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the Subject Property was not exempt for tax year 2013 is vacated and reversed.³⁶
2. The Subject Property is exempt from taxation for tax year 2013.
3. 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.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2013.

³⁶ 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.

7. This Decision and Order is effective for purposes of appeal on June 6, 2014.

Signed and Sealed: June 6, 2014

Thomas D. Freimuth, Commissioner

SEAL

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.