

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Loup Rivers Scenic Byway,
Appellant,

v.

Garfield County Board of Equalization,
Appellee.

Case No: 13E 002

Decision and Order Affirming the
Determination of the Garfield County Board
of Equalization

This appeal was assigned to Commissioner Robert W. Hotz and Commissioner Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is located in Burwell, Garfield County, Nebraska. The legal description of the parcel is found at Exhibit 4. The property record card for the Subject Property is found at Exhibit 5.

II. PROCEDURAL HISTORY

Loup Rivers Scenic Byway (the Taxpayer) filed an exemption application on December 14, 2012.¹ The Garfield County Assessor (the County Assessor) determined that the Subject Property was not exempt from taxation for tax year 2013.² The Taxpayer protested this assessment to the Garfield County Board of Equalization (the County Board) and requested that the Subject Property be exempt from taxation.³ The County Board determined that the Subject Property was not exempt from taxation for tax year 2013.⁴

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission set the matter for a hearing on January 7, 2014, and later continued the hearing upon the motion of a party to January 24, 2014.⁵ The Commission received a motion to continue from the County Board on January 22, 2014,

¹ See, E2.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See, Case File.

indicating that the parties were willing to stipulate to facts and waive a hearing.⁶ However, the motion was not signed by the Taxpayer.⁷ The Commission continued the matter to allow the parties to reach an agreement.⁸ As of March 25, 2015, the parties had not reached an agreement and the Commission set a new hearing for June 26, 2015.⁹

On June 17, 2015, the Commission received a letter from the Appellant indicating that the parties had resolved to submit the matter to the Commission for a determination without a hearing and based on stipulated facts.¹⁰ On June 23, 2015, all parties agreed in a joint stipulation to submit the matter to the Commission without a hearing and to have the Commission determine the issues based on stipulated facts and submissions which have been numbered and are part of the record.¹¹ Pursuant to 442 Neb. Admin. Code, ch. 5 §015 (06/06/11), the matter is deemed submitted to the Commission as of June 23, 2015.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.¹² "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."¹³ 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."¹⁴

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, Case File.

¹² See, Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

¹³ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

¹⁴ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.¹⁵

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.¹⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹⁷

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.”¹⁸ 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.”¹⁹ The Commission’s Decision and Order shall include findings of fact and conclusions of law.²⁰

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.”²¹ 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

¹⁵ *Id.*

¹⁶ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹⁷ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁸ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹⁹ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

²⁰ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

²¹ Neb. Const., Art. VIII, § 2.

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.²²

“Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.”²³

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.²⁴ “It is the exclusive use of the property that determines the exempt status.”²⁵

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.²⁶

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;²⁷ (2) the alleged exempt property must clearly come within the provision granting the exemption;²⁸ (3) the laws governing property tax exemptions must be strictly construed;²⁹ (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[;]”³⁰ and (5) this interpretation should always be reasonable.³¹

The Commission notes that Department of Revenue revised 350 Neb. Admin. Code, ch. 40 as of July 3, 2013. This appeal concerns the taxable status of real property as of January 1, 2013, and thus the previous version of the Department of Revenue’s rules and regulations control

²² Neb. Rev. Stat. § 77-202(1)(d) (2014 Cum. Supp.).

²³ *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009) (citations omitted).

²⁴ See, *Harold Warp Pioneer Village v. Ewald*, 287 Neb. 19 (2013).

²⁵ *Id.*

²⁶ 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).

²⁷ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

²⁸ *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

²⁹ *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).

³⁰ *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

³¹ *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

the outcome of this appeal, and the rules adopted on July 3, 2013 are not applicable. The controlling rules and regulations are found in 350 Neb. Admin Code, ch 40 (03/15/09). The Department of Revenue's rules and regulations provide factors to be considered when determining if property is used exclusively for an exempt purpose.³² One of these factors states as follows:

Use of the property includes ongoing construction of a building or improvement that, when complete will be used exclusively for exempt purposes. The future use of the completed building or improvement may be ascertained by the actions of the organization owning the property, including but not limited to resolutions of an organization's board of directors, or the amendment of the organization's articles of incorporation or bylaws, that indicate a clear intent to use the parcel for an exempt purpose. For ongoing construction to be sufficient to render the property exempt from tax, such construction must prevent other, nonexempt uses of the property.³³

The Department of Revenue's rules and regulations also provide examples that are intended to be used as general guidelines to aid in applying the other sections of the rules and regulations.³⁴ The following two sections are applicable to this case:

005.04F Example—A qualifying organization buys a vacant lot for future use as a building site. However, the land is held idle for several years. No exemption is allowed for the tax years during which the vacant land sits idle, since during those years the land is not used for exempt purposes.

...

005.04H Example—A qualifying organization begins construction of a building on its previously nonexempt property that will, when completed, be exclusively used for an exempt purpose. The construction effectively precludes other uses of the property. An exemption for the property under construction will be permitted.

B. Findings of Fact and Analysis

The parties stipulated that the Taxpayer is a nonprofit corporation organized for charitable purposes.³⁵ The submissions indicate that the Taxpayer is involved in educational and museum activities.³⁶ The County Board granted the Subject Property a tax exemption for subsequent

³² See, 350 Neb. Admin. Code, ch. 40 §005.03B (03/15/2009).

³³ See, 350 Neb. Admin. Code, ch. 40 §005.03B(4) (03/15/2009)(emphasis added).

³⁴ See, 350 Neb. Admin. Code, ch. 40§005.04 (03/15/2009).

³⁵ See, Case File (stipulation of facts).

³⁶ See, E10-E12.

years.³⁷ The Commission determines that for tax year 2013 the Taxpayer is a qualified organization under exemption law.³⁸

The evidence indicates that the Taxpayer purchased the Subject Property on October 11, 2011.³⁹ The purchase was contingent upon the Taxpayer commencing construction of an office building and principal office location within 24 months, and the Taxpayer occupying that building.⁴⁰ In its December 14, 2012 exemption application the Taxpayer contended that the Subject Property was the future home of the Loup Rivers Scenic Byway: Interpretive Center, Butterfly Pavilion, and Museum.⁴¹ The Taxpayer's submissions indicate that the Subject Property was used for temporary parking and short term storage for companies, including the Nebraska Central Telephone Company.⁴² Photographs indicate that the temporary parking and short term storage were occurring as of January 2, 2013.⁴³

The Taxpayer asserts that because the Subject Property was purchased with the intent of developing it for future exempt use that the Subject Property should have been exempt as of the date of the application in December 14, 2012. The record indicates that the Taxpayer placed a historic schoolhouse on the property in April 2013 and that the Taxpayer began holding events and utilizing the Subject Property for qualified purposes from April 2013 through the end of the year.⁴⁴ The parties have stipulated that as of January 1, 2014, the Subject Property qualified for exemption.⁴⁵ The disagreement stems from the County Board's assertion that the taxable status of the Subject Property changed after January 1, 2013, and the Taxpayer's assertion that the intended development of the Subject Property was sufficient to make the Subject Property tax exempt as of January 1, 2013, and that the later actual use of the Subject Property for the intended purposes, therefore, had no effect on the taxable status of the Subject Property because it already qualified for an exemption.

The Commission notes that the law requires a Taxpayer to file a separate application if it is seeking tax exempt status due to a change in the use of real property after January 1 and before

³⁷ See, Case File (stipulation of facts).

³⁸ See, Neb. Rev. Stat. § 77-202(1)(d) (2014 Cum. Supp.).

³⁹ See, E4.

⁴⁰ See, E4.

⁴¹ See, E2.

⁴² See, E10 (submission also notes that Nebraska Central Telephone Company's use of the property is associated with the installation of the fiber optic cables in the region).

⁴³ See, E5.

⁴⁴ See, E10-E12.

⁴⁵ See, Case File (stipulation of facts).

August 1 of the tax year.⁴⁶ The filing of the appropriate application and a determination of a change of use to an exempt use would exempt the real property from taxation for the entire year.⁴⁷ However, a failure to file the application prevents the real property from obtaining an exemption for that tax year based upon a change of use.⁴⁸ The application for exemption that is on appeal to the Commission is for the exempt status of the Subject Property as of January 1, 2013, and there is no evidence of a subsequent application being filed by August 1, 2013, by the Taxpayer alleging a change to an exempt use. The Commission therefore limits its analysis to whether the Subject Property qualified for an exemption as of January 1, 2013, and will not reach the issue of whether the Subject Property's use changed to an exempt use as late as August 1, 2013.

The law allows the future or intended use of the Subject Property to be considered in determining the exempt status of the real property if there is ongoing construction of projects or improvements that are intended to be used for an exempt purpose.⁴⁹ However, the nature of the construction has to be such that it prevents the Subject Property from being used for a nonexempt purpose.⁵⁰ An example found in the Department of Revenue's rules and regulations is useful:

005.04H Example—A qualifying organization begins construction of a building on its previously nonexempt property that will, when completed, be exclusively used for an exempt purpose. The construction effectively precludes other uses of the property. An exemption for the property under construction will be permitted.

The example indicates that real property under construction for future exempt uses is exempt when the construction is of such a nature that the construction precludes other nonexempt uses.⁵¹ The Commission acknowledges that part of any construction project may include waiting; especially waiting for the right season of the year to perform certain aspects of a project, including foundation work. However, holding a lot vacant and waiting to change the nature of the use of the lot is insufficient to meet the legal requirement for exclusive use under the applicable law.

Again, an example from the Department of Revenue's rules and regulations is helpful:

⁴⁶ See, 350 Neb. Admin. Code, ch. 40 §007.01 (03/15/2009).

⁴⁷ See, *id.*

⁴⁸ *Id.*

⁴⁹ See, 350 Neb. Admin. Code, ch. 40 §005.03B(4) (03/15/2009).

⁵⁰ *Id.*

⁵¹ See, 350 Neb. Admin. Code, ch. 40 §004.03H(4) (03/15/2009).

005.04F Example—A qualifying organization buys a vacant lot for future use as a building site. However, the land is held idle for several years. No exemption is allowed for the tax years during which the vacant land sits idle, since during those years the land is not used for exempt purposes.

This example indicates that holding vacant land for development for an exempt purpose is insufficient. The Commission will not determine when construction begins on a project sufficient to determine that there is “ongoing construction” on real property because it is irrelevant until the nature of the construction precludes or prevents nonexempt uses.⁵² Prevent is defined as, “To hinder, frustrate, prohibit, impede, or preclude; to obstruct; to intercept.”⁵³ It is meaningful that the applicable law requires the very nature of the ongoing construction to prevent the nonexempt use of the real property.⁵⁴ This standard is not met by the owning entity simply refusing to allow nonexempt uses on the Subject Property.

Multiple nonexempt uses could occur on a vacant lot. As of January 1, 2013, the Subject Property more closely resembles the Department of Revenue’s example of a vacant lot held for future development than the Department of Revenue’s example of a parcel under construction for an exempt use wherein the nature of the construction precludes nonexempt uses. The Commission does not reach the consideration of whether a nonexempt use did occur on the Subject Property as of January 1, 2013, but instead finds that while the Taxpayer’s use of the Subject Property may be considered part of ongoing construction, the nature of the construction was not sufficient to prevent nonexempt uses on the Subject Property as of January 1, 2013. The Commission therefore finds there is not sufficient evidence that the application for exemption clearly comes within the legal requirements of qualifying for an exemption.

V. CONCLUSION

The Commission finds that there is not 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.

⁵² See, 350 Neb. Admin. Code, ch. 40 §§005.03B(4) and 005.04H (03/15/2009).

⁵³ *Black’s Law Dictionary 6th Edition*, West Group, p. 118 (1990).

⁵⁴ See, 350 Neb. Admin. Code, ch. 40 §005.03B(4) (03/15/2009).

For all of the reasons set forth above, the decision of the County Board should be affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Garfield County Board of Equalization determining the taxable status of the Subject Property for tax year 2013 as not qualifying for an exemption is affirmed.
2. This Decision and Order, if no appeal is timely filed, shall be certified to the Garfield County Treasurer and the Garfield County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
3. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
4. This Decision and Order shall only be applicable to tax year 2013.
5. Each party is to bear its own costs in the proceeding.
6. This Decision and Order is effective for purposes of appeal on August 25, 2015.⁵⁵

Signed and Sealed: August 25, 2015

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

⁵⁵ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.