

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Platte River Whooping Crane Maintenance
Trust, Inc.,
Appellant,

v.

Hall County Board of Equalization,
Appellee.

Case Nos. 15E 0072, 15E 0073, 15E 0074,
15E 0075, 15E 0076 & 15E 0077

Decision and Order Affirming the Denial of
Exemption Applications by the Hall County
Board of Equalization

For the Appellant:

Jordan W. Adam,
Fraser Stryker PC LLO

For the Appellee:

Timothy L. Moll,
Rembolt Ludtke LLP

Heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property consists of six parcels located along the Platte River in Hall County, Nebraska. Each of the parcels is owned by the Appellant, Platte River Whooping Crane Maintenance Trust, Inc. (the “Crane Trust”). All combined, the parcels total 829.68 acres. The legal descriptions of the parcels are found at Exhibits 1:2, 2:2, 3:2, 4:2, 5:2, and 6:2 respectively. The Property Record Cards for the Subject Properties are found at Exhibits 15:1, 10:1, 11:1, 12:1, 13:1, and 14:1 respectively.

II. PROCEDURAL HISTORY

On December 30, 2014, the Crane Trust filed an Exemption Application (Form 451) for tax year 2015 with the Hall County Assessor (the County Assessor) for each of the Subject Properties.¹ The Hall County Board of Equalization (the County Board) determined that the Subject Properties were not exempt from property taxes for tax year 2015.² The Crane Trust appealed the denial to the Tax Equalization and Review Commission (the Commission), and an evidentiary hearing was held on October 16, 2016.

¹ E1:1, E2:1, E3:1, E4:1, E5:1, E6:1.

² E1:1, E2:1, E3:1, E4:1, E5:1, E6:1.

Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. At the inception of the hearing, the parties stipulated to the receipt of Exhibits 1 through 6 (except for any characterization that any of the Subject Properties were utilized as cropland), Exhibits 10 through 15, Exhibit 17 (except pages 97 through 106), and Exhibits 21 through 23. The parties also stipulated that the Crane Trust does not use any of the Subject Properties for the sale of alcoholic liquors,³ and that the Subject Properties are not owned or used by an organization that discriminates in membership or employment based on race, color, or national origin.⁴

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board is de novo.⁵ 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."⁶

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.⁷

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

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. § 77-202(1)(d)(ii).

⁴ See, Neb. Rev. Stat. § 77-202(1)(d)(iii).

⁵ 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).

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

⁷ *Id.*

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

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 LAW

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation and the Legislature may 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 Pursuant to that Constitutional authorization, the Legislature has required the exemption of the following 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 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....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 Exclusive use means the primary or dominant use of property, as opposed to incidental use.¹⁴ The exclusive use of the property is what determines the exempt status.¹⁵ Further, a property owner's exemption from federal income taxation does not determine whether the owner's property is tax exempt under state law.¹⁶

There are two overriding factors Courts consider when a request for an exemption is before them. The first is that the property tax burden is necessarily shifted from the beneficiary of an

¹⁰ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹¹ Neb. Const., Art. VIII, § 2(1).

¹² Neb. Rev. Stat. § 77-202(1)(d) (2014 Cum. Supp.).

¹³ *United Way v. Douglas Cty. Bd. of Equal.*, 215 Neb. 1, N.W.2d 103(1983). *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009). *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁴ *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).

¹⁵ See, *Nebraska Conf. Assn. of Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965).

¹⁶ *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

exemption to others who own taxable property, and the second is that the power and right of the state to tax is always presumed.¹⁷

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed but must be applied for;¹⁸ (2) the alleged exempt property must clearly come within the provision granting the exemption;¹⁹ (3) the laws governing property tax exemptions must be strictly construed;²⁰ (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”;²¹ and (5) this interpretation should always be reasonable.²²

In accordance with Neb. Rev. Stat. §77-369, the Tax Commissioner has promulgated rules concerning the exemption of real property. The rules and regulations establish that “[t]he five mandated criteria are ownership, exclusive use, no financial gain or profit, restricted alcoholic liquor sales, and prohibited discrimination. The property must meet all five criteria for the exemption to be allowed.”²³

V. STIPULATIONS & ISSUES

The parties have stipulated that: (1) The Crane Trust does not use any of the Subject Properties for the sale of alcoholic liquors, thereby satisfying the requirement of Neb. Rev. Stat. §77-202(1)(d)(ii); and (2) the Subject Properties are not owned by an organization which discriminates in membership or employment based on race, color, or national origin, as required by Neb. Rev. Stat. §77-202(1)(d)(iii). The parties have not stipulated to any resolution of the issues of whether the Crane Trust is a charitable organization, whether the Subject Properties were used exclusively for charitable purposes by a charitable organization, or whether the Subject Properties were used for financial gain or profit to either the owner or user.

¹⁷ 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).

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

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

²⁰ *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).

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

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

²³ 350 Neb. Admin. Code, ch. 40, § 005.01 (2009).

In sum, a taxpayer must satisfy a five-part test to prove real property is entitled to a charitable tax exemption.²⁴ The property (1) must be owned by a charitable organization, (2) must be used exclusively for charitable purposes, (3) cannot be used for financial gain or profit to the owner or user, (4) cannot be used for the sale of alcoholic liquors for more than twenty hours per week, and (5) cannot be owned or used by an organization which discriminates in membership or employment based upon race, color, or national origin. As noted above, the parties do not dispute whether the Subject Properties satisfy parts four or five of the aforementioned test. The dispute concerns whether the Subject Properties satisfy the first three parts of the test.

VI. SUMMARY OF THE EVIDENCE

The evidence adduced at the hearing before the Commission was largely undisputed. The Crane Trust was created from the settlement of a 1970s federal court lawsuit concerning the construction of the Gray Rocks Dam and Reservoir near Fort Laramie, Wyoming.²⁵ The Crane Trust elicited testimony from Charles Cooper, the President and CEO of the Crane Trust. He testified that the Crane Trust owns approximately 4,500 acres of wetlands and grassland along the Platte River in Hall County. The Trust was established for the purpose of protecting migratory bird habitat in the Big Bend area of the Platte River between Overton, Nebraska and Chapman, Nebraska.

The Subject Properties are located on both sides of a branch of the Platte River in the Big Bend area. During the peak season, Sandhill Cranes and other migratory birds move through the Big Bend area. The migratory birds feed on grains in the farm fields in the area and return to the river area at night. During certain times, visitors use the Subject Properties and other areas of the Big Bend area to view the migrating birds.

The Crane Trust has used the Subject Properties to enable the public to explore and learn about nature and has established a series of walking trails throughout some of the parcels. It has also used some of the parcels to gather and establish a herd of bison to attempt to demonstrate how the prairie may have looked sometime in the past when, it is believed, buffalo was a dominant species in the area. The Subject Properties are associated with an 8 acre parcel with a visitors' center, and with a 40 acre parcel which includes the Crane Trust headquarters building.

²⁴ Neb. Rev. Stat. § 77-202(1)(d)(2014 Cum. Supp.); *Fort Calhoun Baptist Church v. Washington County Bd. of Equalization*, 277 Neb. 25, 759 N.W.2d 475 (2009).

²⁵ E17:40

Neither parcel, including the visitors' center or the headquarters building, is included in these appeals. The Subject Properties are generally open to the public on a daily basis at no charge.

The evidence also reveals that a portion of the Subject Properties was leased to a farming operation for cattle grazing purposes. Pursuant to the leases, some of the property was made available to the lessee for its cow-calf herd. The evidence indicated that the lessee did not exercise its full grazing rights, but the Crane Trust received \$9,300 pursuant to the leases.

A. SUMMARY OF THE ARGUMENT OF THE CRANE TRUST

The Crane Trust asserts it is a charitable organization. It contends that the term "charitable organization," as defined by Neb. Rev. Stat. §77-202(1)(d), includes organizations whose primary purposes include the maintenance or re-establishment of native prairie grass in order to maintain populations of migrating birds. Section 77-202(1)(d) provides, *inter alia*, that "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."

In support of its assertion, the Crane Trust contends that it is dedicated to conserving the habitat for cranes, wildlife, and other species for the benefit of the public. Thousands of people visit the Subject Properties each year and use the properties to exercise, explore the habitat, and watch the cranes. As such, the Crane Trust asserts it operates the Subject Properties exclusively for the mental, social, and physical benefit of the public.

The Crane Trust also contends that the use of the Subject Properties is for a charitable purpose. It argues that such parcels are not used for financial gain or profit, despite the fact it has entered into grazing leases for a portion of the Subject Properties.

B. SUMMARY OF THE ARGUMENT OF THE COUNTY BOARD

The County Board contends that despite its exempt status under Section 501(c)(3) of the Internal Revenue Code, the Crane Trust is not entitled to status as a charitable organization under Nebraska law. In support of this contention, the County Board argues that the activities and purposes of the Crane Trust are far outside the definition of a charitable organization under existing Nebraska law. Specifically, the County Board maintains that the Nebraska Legislature could have created an exemption for such conservation activities, but has not done so. Therefore,

absent a statutory definition to include such conservation activities, there is no statutory authority for such an exemption.

The County Board also contends that the Crane Trust's use of the Subject Properties do not satisfy the exclusive use requirement for charitable purposes within the meaning of Nebraska statutory law and regulations. Finally, the County Board argues that portions of the Subject Properties are used for financial gain or profit to the owner or user, due to the existence of grazing leases for some of the Subject Properties.

VII. FINDINGS OF FACT

As noted above, a "charitable organization" is an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons.²⁶ To simplify, the issue before the Commission is whether the language of the law in Nebraska is broad enough to recognize a trust devoted to protecting natural habitat as a charitable organization. The Commission has reviewed the evidence and briefs submitted by the parties and finds that only the Legislature can make such a determination. Neither party has pointed the Commission to any decisions of the Commission or the Nebraska Supreme Court recognizing that an organization devoted to protecting habitat may be found by this Commission to be a charitable organization under the Nebraska Constitution or statutes. Tax exemption provisions are strictly construed and their operation will not be extended by construction.²⁷ Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.²⁸

While the Crane Trust adduced considerable evidence of the Trust's efforts to provide educational, scientific, and recreational benefits to the general public, the Commission does not find such benefits conclusive in determining the status of the organization as "charitable." It appears from the evidence that the thrust of the Crane Trust argument involves its significant activities to maintain or re-establish native prairie grass on the Subject Properties and to use bison to attempt to demonstrate how the prairie may have looked sometime in the past.

²⁶ Neb. Rev. Stat. § 77-202(1)(d)(2014 Cum. Supp)

²⁷ *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).

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

As pointed out by the County Board, in cases involving charitable exemptions, the courts in Nebraska have limited the exemption to traditional charitable enterprises providing relief of the poor and distressed. That is not to say that efforts of conservation could not be defined as charitable, but the question presented is whether or not the present statutory scheme so allows.

The policy question of whether to expand the definition of a charitable organization to include conservation efforts such as that of the Crane Trust, with the potential to remove thousands of acres of land from the tax rolls which support governmental activities across the state, is a matter for the Legislature, not this Commission. This Commission must follow the Constitution and Statutes without reference or preference to policy considerations. To date the Legislature has not seen fit to legislatively grant such exemptions.

The Crane Trust correctly asserts that Nebraska law defines a charitable organization as one operated exclusively for the purpose of mental, social, or physical benefit of the public, or an indefinite number of persons. The evidence indicates that the Trust's conservation efforts do provide certain intellectual or mental benefits, as well as social and physical benefits. However, the Commission does not find that the Subject Properties are operated exclusively for such purposes.

As there do not appear to be any Nebraska cases on the subject before the Commission, the Commission has reviewed the precedent from other jurisdictions as cited by the Crane Trust. However, our review of those cases does not result in our acceptance of the holdings therein. In fact, the case of *Santa Catalina Island Conservatory v. City of L.A.*,²⁹ supports the theory that the granting of an exemption for conservation purposes is a legislative function. There, the court held that 42,000 acres of land was entitled to an exemption for conservation purposes. In that case, the court held a statute enacted by the California legislature to provide for exemptions to conservation organizations was constitutional. In other words, the **legislature** specifically found that preservation or conservation was a charitable purpose. The Crane Trust also referred the Commission to *Turner v. Tr. For Pub. Land*,³⁰ There, the court held that the Florida Constitution contained a provision indicating that the public policy of the State was to conserve and protect natural resources including 1,168 acres of wetlands and lowlands in their natural state.

²⁹ *Santa Catalina Island Conservatory v. City of L.A.*, 126 Cal App. 3d 221 (Ct. App. 1981).

³⁰ *Turner v. Tr. For Pub. Land*, 445 So.2d 1124 (Fla. Dist. Ct. App. 1984).

While some jurisdictions have concluded that conserving property for habitat and wildlife is a charitable use, the Commission is not persuaded that such lands should be exempt without legislative action. Accordingly, the Commission finds that, based upon the submitted evidence, the decision of the County Board should be affirmed.

Because of the Commission's finding that insufficient evidence exists to conclude that the Crane Trust qualifies as a charitable organization for tax exemption purposes, we need not decide the merit of the remaining arguments set forth by the Crane Trust.³¹

For all of the reasons cited above, the Commission finds that the Subject Property is not exempt from tax for tax year 2015.

VIII. CONCLUSIONS OF LAW

The Commission finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The Commission also finds that the applicant for the exemption has failed to prove its entitlement to the exemption.

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

IX. ORDER

IT IS ORDERED THAT:

1. The decisions of the Hall County Board of Equalization determining the Subject Properties are not exempt are affirmed.
2. The Subject Properties are not exempt for tax year 2015.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Hall County Treasurer and the Hall County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2016 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 2015.

³¹ An intermediate appellate body "is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it." *Medicine Creek v. Middle Repub. Nat. Res. Dist.*, 296 Neb. 1, NW2d (2017).

7. This Decision and Order is effective for purposes of appeal on March 15, 2017.³²

Signed and Sealed: March 15, 2017.

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

³² Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.