

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

THE GROWING PLACE, INC.)	
)	
Appellant,)	CASE NO. 02E-184
)	
vs.)	FINDINGS AND ORDER
)	REVERSING THE DECISION OF THE
SEWARD COUNTY BOARD OF)	SEWARD COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by The Growing Place, Inc., to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on March 27, 2003, pursuant to a Notice and Order for Hearing issued December 20, 2002. Commissioners Wickersham, Reynolds, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Kevin L. Ruser, President of The Growing Place, Inc., appeared at the hearing on behalf of The Growing Place, Inc., ("the Taxpayer"). The Seward County Board of Equalization ("the County Board") appeared through counsel, Wendy L. Elston, Esq., the County Attorney for Seward County, Nebraska. The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002) to state its final decision concerning an appeal, with findings of fact and conclusions of law, on the record or in

writing. The final decision and order of the Commission in this case is as follows.

**I.
STANDARD OF REVIEW**

The appellant, in order to prevail, is required to demonstrate by clear and convincing evidence that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. § 77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws L.B. 291, §9). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

**II.
FINDINGS**

The Commission finds and determines that:

**A.
PROCEDURAL FINDINGS**

1. The Taxpayer is the owner of record of certain real property described in the appeal as S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 33, Township 11 North, Range 4 East, 6th P.M. also described as a tract of real estate located in the Southeast Quarter of Section Thirty-three (33), Township Eleven (11) North, Range Four (4), East of the 6th P.M., Seward County, Nebraska, more particularly described as follows: Beginning at the Southeast corner of said Southeast Quarter; thence Northerly along the East line of said Southeast Quarter a distance of 1988.1 feet; thence Westerly on a deflection angle of 89 degrees 45 minutes, 20 seconds left a distance of 1312.0 feet; thence Southerly on a deflection angle of 90 degrees 02 minutes left a distance of 1979.1 feet to the Southwest corner of the East Half of said Southeast Quarter; thence Easterly along the South line of said East Half, a distance of 1319.5 feet to the Point of Beginning, said tract containing 59.91 acres, more or less, including road right of way on the East and 20 foot consent road on the South, Seward County, Nebraska ("the subject property").

2. The Taxpayer timely filed an Affidavit for Continued Tax Exemption with the Seward County Assessor seeking continuation of a previously granted exemption of the subject property from taxation for tax year 2002. (E1:1)
3. A hearing before the County Board, on Taxpayer's application was held May 21, 2002. (E8)
4. The Assessor on May 28, 2002, recommended disapproval. (E1:1)
5. The County Board on May 28, 2002, determined that the subject property should be subject to taxation and did not continue the exemption from taxation previously granted. (E1:1)
6. The Taxpayer timely filed an appeal of that decision to the Commission. (Appeal Form)
7. The County Board was served with a Notice in Lieu of Summons, and duly answered that Summons.
8. A Notice and Order for Hearing issued on December 20, 2002, set a hearing of the Taxpayer's appeal for March 27, 2003, at 8:30 a.m..
9. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property, S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 33, Township 11, North, Range 4 East, 6th P.M. also described as a tract of real estate located in the Southeast Quarter of Section Thirty-three (33), Township Eleven (11) North, Range Four (4), East of the 6th P.M., Seward County, Nebraska, more particularly described as follows: Beginning at the Southeast corner of said Southeast Quarter; thence Northerly along the East line of said Southeast Quarter a distance of 1988.1 feet; thence Westerly on a deflection angle of 89 degrees 45 minutes, 20 seconds left a distance of 1312.0 feet; thence Southerly on a deflection angle of 90 degrees 02 minutes left a distance of 1979.1 feet to the Southwest corner of the East Half of said Southeast Quarter; thence Easterly along the South line of said East Half, a distance of 1319.5 feet to the Point of Beginning, said tract containing 59.91 acres, more or less, including road right of way on the East and 20 foot consent road on the South, Seward County, Nebraska, is owned by the Taxpayer.
2. The Taxpayer's President testified that no alcoholic liquors are sold on the subject property.
3. The Taxpayer's President testified that the only income from the subject property has been donations and the proceeds

from the grant of an easement to Seward County for road purposes.

4. The Taxpayers's President testified that the Taxpayer has held the \$1,300.00 received from the County to pay liability insurance premiums and corporate report fees payable to the State of Nebraska.
5. The Taxpayer's Articles of Incorporation restrict use of any earnings. "No part of the net earnings of the corporation shall inure to the benefit of or be distributed to its members, directors, officers, or any other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof."
(E2:16).
6. The Taxpayer's President testified that the Taxpayer does not discriminate in membership or employment based on race color or national origin, that the Taxpayer has no members, and that it has no employees.
7. In the event of its dissolution, the Taxpayer's Articles of Incorporation require distribution of all assets "for one or more exempt purposes within the meaning of section 501 (c) (3) of the Internal Revenue Code (or corresponding section of any future federal tax code), or shall be distributed to

the federal government, or to a state or local government, for a public purpose". (E2:17).

8. The Taxpayer's Articles of Incorporation specify that it has the following as its specific purpose "To create a wilderness retreat where people can experience spiritual growth.". (E2:16).
9. The Taxpayer's President testified that the subject property is held exclusively to provide wilderness religious experiences. Those experiences include meditation and prayer.
10. The Taxpayer's President testified that no use of the subject property other than to provide a wilderness religious experience is permitted although trespassers may have made other uses of the subject property.
11. The Taxpayer's President testified that if groups use the property, they are asked to abide by guidelines contained in a brochure introduced as Exhibit 2 at page 140.
12. The Taxpayer's President testified concerning his personal use of the subject property, its use for sweat lodge ceremonies, seasonal spiritual gatherings and a blessing which occurred in 1986.
13. The Taxpayer's President testified that the number of persons using the subject property for religious purposes is unknown and the dates or times of usage are unknown.

14. The County Board granted an exemption from taxation in 2000 for a four year period subject to review. (E2:139)
15. No evidence was presented showing that use of the subject property or any other applicable condition changed between the County Board's granting of an exemption from taxation in 2000 and the date Taxpayer's application for a continuation of the granted exemption or the hearing on Taxpayer's application.
16. The Chair of the County Board of Equalization testified that use of the subject property for religious purposes would violate Seward County's zoning rules.
17. The Chair of the County Board of Equalization further testified that he knew of no actions to enforce the zoning rules against the Taxpayer.
18. The zoning rules and regulations of Seward County were not offered into evidence.
19. The County Assessor testified that the basis for her recommendation was advice from the Seward County Attorney and a concern that no one actually used the subject property for religious purposes.
20. The subject property is not owned or used for financial gain of either the owner or users.
21. The subject property is not used for the sale of alcoholic liquors for more than 20 hours per week.

22. The subject property is not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.
23. The subject property is owned by a religious organization for the exclusive benefit of the organization.
24. The subject property is used exclusively for religious purposes.
25. The Taxpayer has adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
26. The decision of the County Board was incorrect, arbitrary and unreasonable.
27. The decision of the County Board should be vacated and reversed.

**III.
CONCLUSIONS OF LAW**

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Board of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not

a part of the hearing record except those identified in the Commissions rules and regulations or Section 77-5016 (3).

Neb. Rev. Stat. § 77-5016(3) (Cum. Supp. 2002, as amended by 2003 Neb. Laws L.B. 291, §9).

4. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws 291, §9). The Nebraska Supreme Court, in considering similar language, has held that "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary." *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
5. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
6. The term "unreasonable" can be applied to a decision of an administrative agency only if the evidence presented leaves

no room for differences of opinion among reasonable minds.

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

7. "The Legislature by general law may classify and exempt from taxation property 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." *Art. VIII, Nebraska Constitution, §2 (2)*
8. "The following property shall be exempt from property taxes:
... (d) 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." *Neb. Rev. Stat. §77-202 (1) (d) (Cum. Supp. 2002)*

9. "Exemptions from taxation are to be strictly construed, and their operation is never to be extended by construction, the power and the right of the state to tax are always presumed, and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the law-makers and the legislature, but rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption." *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs* 122 Neb. 586, 598, 241 N.W. 93, 97, (1932).
(Citations Omitted).
10. "Religious organization means an organization whose purpose is the dedication to or profession of a sectarian creed and belief in a Devine or superhuman power or powers to be obeyed or worshiped, or the furtherance and enrichment of spiritual faith involving a code of ethics and a spiritual philosophy." 350 Neb. Admin. Code, Ch. 40, §005.01B (07/02).
11. Properly adopted rules and regulations have the force and effect of law. *Alexander v. J. D. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).
12. "Prayer is always worship. Reading the Bible and singing may be worship. *** If these exercises of reading the Bible,

joining in prayer, and in the singing of hymns were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance." *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs* 122 Neb. 586, 594-595, 241 N.W. 93, 96, (1932). (Citations Omitted)

13. The Nebraska Supreme Court has held that "exclusive use" means the primary or dominant use of property, as opposed to incidental use. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543, (1993).
14. An exemption will not be lost if the property claimed to be exempt is used in an incidental manner that is not religious as long as the predominant or primary use of the property is one or more of the exempt uses. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543, (1993).
15. The tax exemption for religious purposes is not restricted to property used exclusively for public worship; rather, the exemption embraces all property primarily used for religious purposes. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543, (1993).
16. Property may be deemed to be held for a particular exempt use during the period of non-use. *Brown Cty. Ag. Socy. v.*

Brown Cty Bd. of Equal. 11 Neb.App. 642, __N.W.2d __, (2003).

17. The abandonment of property formerly used exclusively for religious and educational purposes, with the intention of never again using the property for such purposes, together with the fact that since such abandonment the property has not been used for the purpose stated, or for any other purpose that would exempt it from taxation, renders such property liable to taxation from the time of such abandonment. *Holthaus v. Adams County et. al.* 74 Neb. 861, 105 N.W. 632, (1905).

IV. DISCUSSION

A statutory test in five parts is prescribed for determining eligibility for property tax exemption. Neb. Rev. Stat. §77-202 (d) (Cum. Supp. 2002). The five parts are: (1) exclusive ownership and use by a qualified organization; (2) an exclusive qualified use; (3) no financial gain from use to the owner or users; (4) limited sales of alcoholic liquor, if any; and (5) no discrimination in employment or membership based on race, color, or national origin. *Id.* Each part of the test must be proven by the Taxpayer. *Nebraska State Bar Association v. Lancaster County Board of Equalization et al.*, 237 Neb. 1, 465 N.W.2d 111, (1991).

The County Board did not contest the Taxpayer's proof that alcoholic liquors are not sold on the subject property or that

the Taxpayer does not discriminate in membership or employment based on race, color, or national origin.

The Taxpayer has received donations and recently received proceeds from sale of an easement to the County for road purposes. The sale occurred after Taxpayer's application for tax exemption had been denied by the County Board. The Taxpayer's Articles of Incorporation restrict the use of its assets held in any form to its religious purposes and that upon a dissolution that assets be transferred to qualified organizations.

The County Board suggests that financial gain or profit could accrue to the Taxpayer by virtue of continued ownership of the subject property and increases in its value over time. The test is not whether financial gain could occur but whether the subject property is "used" for financial gain. "There is no financial gain or profit if no part of the income from the property is distributed to the owners or users, members, directors, or officers or to private individuals." 350 Neb. Admin. Code, Ch. 40, §005.05 (07/02). See also *Bethesda Foundation v. County of Saunders*, 200 Neb. 574, 264 N.W.2d 664, (1978).

The Taxpayer's Articles of Incorporation specify that Taxpayer's specific purpose is to create a wilderness retreat where people can experience spiritual growth. It is not necessary that the Taxpayer advocate or promote a creed or

specific belief. *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs*, 122 Neb. 586, 594-595, 241 N.W. 93, 96, (1932). The Taxpayer has offered sufficient proof that it is a religious organization. The County Board has offered no proof that the Taxpayer is not a religious organization.

The sole test remaining is whether the subject property is used exclusively for a religious purpose. The Taxpayer produced evidence of religious use of the subject property and that all other uses were prohibited. The unimproved property (about 60 acres) is held and used for prayer, meditation, and nondenominational services. Use of the property for the religious purposes is not continuous or scheduled. The County Board produced evidence that the subject property was used infrequently. Exempt property may become abandoned and lose its exemption. *Holthaus v. Adams County et. al.* 74 Neb. 861, 105 N.W. 632, (1905). There is no proof in this case that the subject property has been abandoned.

The County Board asserts that because the subject property is seldom used that its exclusive use is no longer for religious purposes. Property held ready for a primary use is considered to be used for that primary use. *Brown Cty. Ag. Socy. V. Brown Cty Bd. Of Equal.* 11 Neb. App. 642, __N.W.2d __, (2003). There is no

evidence that the exclusive use of the subject property is other than the religious use proved by the Taxpayer.

The Taxpayer has met its burden of proof with regard to each component of the five part test specified by the Legislature for the exemption of its property from taxation.

**V.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the Seward County Board of Equalization determining the subject property was subject to taxation as of the assessment date, January 1, 2002, is vacated and reversed.
2. That the real property described in the appeal as S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 33, Township 11 North, Range 4 East, 6th P.M. also described as a tract of real estate located in the Southeast Quarter of Section Thirty-three (33), Township Eleven (11) North, Range Four (4), East of the 6th P.M., Seward County, Nebraska, more particularly described as follows: Beginning at the Southeast corner of said Southeast Quarter; thence Northerly along the East line of said Southeast Quarter a distance of 1988.1 feet; thence Westerly on a deflection angle of 89 degrees 45 minutes, 20 seconds left a distance of 1312.0 feet; thence Southerly on a deflection angle of 90 degrees 02 minutes left a distance of

1979.1 feet to the Southwest corner of the East Half of said Southeast Quarter; thence Easterly along the South line of said East Half, a distance of 1319.5 feet to the Point of Beginning, said tract containing 59.91 acres, more or less, including road right of way on the East and 20 foot consent road on the South, Seward County, Nebraska, as of the assessment date January 1, 2002, for the tax year 2002 is exempt from taxation.

3. That this decision, if no appeal is timely filed, shall be certified to the Seward County Treasurer, and the Seward County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002).
4. That any request for relief by any party which is not specifically provided for by this order is denied.
5. That each party is to bear its own costs in this matter.
6. That this decision shall only be applicable to tax year 2002.

7. This order is effective for purposes of appeal May 16, 2003.

IT IS SO ORDERED.

Dated May 16, 2003.

Wm R. Wickersham, Vice-Chair

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

Mark P. Reynolds, Chair