

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

EVANGELICAL LUTHERAN GOOD	)	
SAMARITAN SOCIETY,	)	
	)	CASE NO. 02E-231
Appellant,	)	
	)	FINDINGS AND ORDER DISMISSING
vs.	)	APPEAL FOR WANT OF
	)	JURISDICTION
NEMAHA COUNTY BOARD OF	)	
EQUALIZATION,	)	
	)	
Appellee.	)	

The above-captioned case was called for a hearing pursuant to an Order to Show Cause entered by 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 October 2, 2003, pursuant to a Notice issued August 13, 2003. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Darrold Nies, an Administrator of Evangelical Lutheran Good Samaritan Society, appeared, by teleconference, at the hearing on behalf of Evangelical Lutheran Good Samaritan Society ("the Taxpayer"). Ms. Stefanie S. Flodman appeared, by teleconference, as legal counsel for the Taxpayer. The Nemaha County Board of Equalization ("the County Board") appeared, by teleconference, through legal counsel, Ms. Marie Martin, Esq., a Deputy County Attorney for Nemaha County Nebraska. The Commission took statutory notice, received an exhibit, heard testimony and heard argument.

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

**I.  
FINDINGS**

The Commission finds and determines that:

**A.  
PROCEDURAL FINDINGS**

1. The Taxpayer is the owner of record of certain commercial real property described in the appeal as Evangelical Lutheran Good Samaritan Addition Lot 1 Nemaha County, Nebraska ("the subject property").
2. The Taxpayer applied for an exemption from taxation for the subject property on June 24, 2002. (E1).
3. The County Assessor recommended denial of the application on July 10, 2002 without stating a basis for the recommendation. (E1).
4. The County Board "based on information provided" denied the application on July 10, 2003. (E1) and Exhibit 4 to the Appeal Form.
5. The taxpayer timely filed an appeal of that decision to the Commission.
6. The County Board was served with a Notice in Lieu of Summons and has not answered that Notice.

7. An Order to show Cause was issued by the Commission on July 3, 2003, directing the Taxpayer to show why its appeal should not be dismissed for want of jurisdiction.
8. The Taxpayer timely responded to the order of July 3, 2003.
9. The Commission on August 13, 2003 issued another Show Cause Order directing that a hearing be held to determine whether the Commission has jurisdiction to hear the Taxpayer's appeal.
10. A Notice of Telephonic Hearing was issued giving notice of a telephonic hearing to be held October 2, 2003 at 10:00 a.m..
11. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Show Cause Order were served on all parties.

**B.**

**SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS**

1. The Taxpayer was required to comply with the provision of Neb. Rev. Stat. §77-202.02 (Cum. Supp. 2002) in order to obtain an exemption from taxation for the subject property during the tax year 2002.
2. Neb. Rev. Stat. §77-202.01(1) (Cum Supp. 2002) allows a taxpayer to apply for exemption of real or personal property from taxation on or before December 31 of the year preceding to the year for which an exemption is sought.
3. Neb. Rev. Stat. §77-202.01(2) (Cum Supp. 2002) allows a taxpayer to apply for exemption of real or personal property

from taxation on or before June 30 if an application was not filed on or before December 31 as provided in Neb. Rev. Stat. §77-202.01(1) (Cum.Supp. 2002).

4. Neb. Rev. Stat. §77-202.01(2) (Cum.Supp. 2002) requires the applicant to file a written request with the county board of equalization for a waiver so that the county assessor can consider the application.
5. If an application for exemption is accepted after approval of a waiver pursuant to section 77-202.01 the county board will hear and certify its decision on or before August 15. Neb. Rev. Stat. §77-202.02 (Cum.Supp. 2002)
6. Taxpayer's application for exemption was filed on June 24, 2002.
7. A written request for waiver was not filed with the county board of equalization.
8. On July 10, 2002 the County Assessor recommended disapproval of the Taxpayer's application. (E1).
9. The County Board disapproved the Taxpayer's application on July 10, 2002 "based on information provided". (E1) and Exhibit 4 to Taxpayer's appeal.
10. The Taxpayer did not attend the hearing or offer any evidence in support of its application.
11. The Taxpayer's appeal should be dismissed by the Commission for want of jurisdiction.

**II.  
CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties.
2. 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).
3. Parties cannot confer subject matter jurisdiction on a tribunal by acquiescence or consent nor may it be created by waiver, estoppel, consent, or conduct of the parties. *Creighton St. Joseph Regional Hospital, v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 905 (2000).
4. The County Board, without submission of a written request for waiver of the application deadline of December 31 lacked jurisdiction to consider the Taxpayer's application for exemption. Neb. Rev. Stats. §§77-202.01 and 77-202.02 (Cum. Supp. 2002).
5. Because the County Board lacked subject matter jurisdiction the Commission is without jurisdiction for further consideration of the Taxpayer's appeal. See, e.g. *Lane v. Burt County Rural Public Power Dist.*, 163 Neb 1, 77 N.W.2d 773 (1956).

**III.  
DISCUSSION**

The issue presented in this proceeding is whether or not the Commission has jurisdiction to hear the appeal of Evangelical Lutheran Good Samaritan Society from the Nemaha County Board of Equalization's disapproval of its application for exemption from taxation for the tax year 2002.

The pertinent provisions of statute are as follows: "Any organization or society seeking a tax exemption provided in subdivisions (1)(c) and (d) of section 77-202 for any real or tangible personal property, except real property used for cemetery purposes, shall apply for exemption to the county assessor on or before December 31 of the year preceding the year for which the exemption is sought on forms prescribed by the Property Tax Administrator." Neb. Rev. Stat. §77-202.01(1) (Cum. Supp. 2002); "Any organization or society which fails to file an exemption application on or before December 31 may apply on or before June 30 to the county assessor. The organization or society shall also file in writing a request with the county board of equalization for a waiver so that the county assessor may consider the application for exemption. The county board of equalization shall grant the waiver upon a finding that good cause exists for the failure to make application on or before December 31." Neb. Rev. Stat. §77-202.01(2) (Cum. Supp. 2002); and "for applications accepted after approval of a waiver

pursuant to section 77-202.01, the county board of equalization shall hear and certify its decision on or before August 15."

Neb. Rev. Stat. §77-202.02 (Cum. Supp. 2002).

The facts are not in dispute. The Taxpayer filed a form 451 making application for exemption from taxation of property on June 24, 2002. The Taxpayer did not file a written request for waiver of the December 31 filing deadline imposed by Neb. Rev. Stat. §77-202.01(2) (Cum. Supp. 2002). The County Board on July 10, 2002, disapproved the application. (E1). The motion for disapproval was "based on information provided". Exhibit 4 to Appeal Form. The Nemaha County Assessor recommended disapproval of the application on July 10, 2002. The Taxpayer acknowledges that a request for waiver of the December 31 filing deadline is required but argues that the County Board waived that requirement and waived the filing deadline with its motion to disapprove.

The first question is could the County Board waive filing of a request for waiver? The statute providing for a waiver states that the applicant "shall also file in writing a request with the county board of equalization for a waiver". Neb. Rev. Stat. §77-202.01(2) (Cum. Supp. 2002). Use of the word shall in a statutory provision does not denote a discretionary provision, use of the word shall in statutory provisions denotes provisions which are mandatory. *Creighton St., Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905,

620 N.W.2d 90 (2000). Filing a request for waiver initiates a board hearing to determine whether there is good cause for a delayed filing of the exemption application. The Assessor may consider the application but not recommend taxable or nontaxable status until the county board of equalization has acted on a request for waiver. Neb. Rev. Stat. §77-202.01(2) (Cum. Supp. 2002). Neb. Rev. Stat §77-201.02 (Cum. Supp. 2002) contains two provisions for hearing one applicable to applications for exemption filed prior to December 31 and a second provision applicable to applications filed after December 31. The provision applicable to applications filed after December 31 requires approval of a waiver prior to hearing. Neb. Rev. Stat. §77-201.02 (Cum. Supp. 2002). Because no hearing could be held before mandatory compliance with Neb. Rev. Stat. §77-202.01 (Cum. Supp. 2002) it is jurisdictional. Parties may not confer subject matter jurisdiction by acquiesce or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent of conduct of the parties. *Creighton*, supra. The County Board "disapproved" the application. Disapproval by the County Board was equivalent to a denial of further consideration for want of jurisdiction. The County Board did not have jurisdiction to consider the Taxpayer's application for exemption and the Commission cannot obtain jurisdiction on appeal. See, e.g. *Lane*

*v. Burt County Rural Public Power Dist.*, 163 Neb 1, 77 N.W.2d 773 (1956).

**IV.  
ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:**

1. The Appeal of Evangelical Lutheran Good Samaritan Society is dismissed for want of jurisdiction.
2. That this decision, if no appeal is timely filed, shall be certified to the Nemaha County Treasurer, and the Nemaha County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Cum. Supp 2002).
3. That any request for relief by any party not specifically granted by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2002.

6. This order is effective for purposes of appeal October 8, 2003.

**IT IS SO ORDERED.**

Dated October 8, 2003.

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*Wm. R. Wickersham, Vice-Chair*

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*Susan S. Lore, Commissioner*

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*Robert L. Hans, Commissioner*

**SEAL**