

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

SUTHERLAND UNITED METHODIST)
CHURCH,)
)
Appellant,)
)
v.)
)
LINCOLN COUNTY BOARD OF)
EQUALIZATION,)
)
Appellee.)
)
and)
)
DOUG EWALD, TAX COMMISSIONER,)
)
Intervener.)

Case No. 08E 033

**DECISION AND ORDER
DISMISSING APPEAL FOR WANT OF
JURISDICTION
(Untimely Filing)**

The above-captioned case was called for a hearing on Order to Show Cause (Filing Defect) to determine whether the appeal by Sutherland United Methodist Church ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission") should be dismissed. 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 December 15, 2008, pursuant to an Order to Show Cause (Filing Defect) issued November 4, 2008. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07).

Patricia A. Brunz, Treasurer of Sutherland United Methodist Church, was present at the hearing by telephone. No one appeared as legal counsel for the Taxpayer.

Joe W. Wright, a Deputy County Attorney for Lincoln County, Nebraska, was present as legal counsel for the Lincoln County Board of Equalization (“the County Board”) by telephone.

Doug Ewald, Nebraska State Tax Commissioner was not present nor did anyone appear on his behalf.

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

I. ISSUES

Whether the County Board had jurisdiction.

Whether the appeal should be dismissed for failure to timely file the appeal.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The appeal, with the required filing fee and documentation, was received on October 6, 2008. (Case File).
3. The envelope in which the appeal, filing fee, and documentation was delivered is postmarked October 2, 2008. (Case File)

4. The appeal in this case was filed based on an action of the County Board pursuant to section 77-202.04 of Nebraska Statutes.

III. APPLICABLE LAW

1. The Commission obtains jurisdiction over an appeal when it is timely filed, the filing fee is timely received and thereafter paid and a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from is timely filed. Neb. Rev Stat. §77-5013 (Cum. Supp. 2006).
2. An appeal is deemed timely received if placed in the United States mail, postage prepaid, with a legible postmark for delivery to the commission, or received by the commission, on or before the date specified by law for filing the appeal.
3. An appeal from an action of a county board of equalization pursuant to section 77-202.04 (1) of Nebraska Statutes must be filed within thirty days after the decision of the county board of equalization.
4. An organization or society seeking a tax exemption under subdivisions (1)(c) and (d) of section 77-202 for real property, except real property used for cemetery purposes, is required to file for exemption to the county assessor on or before December 31. Neb. Rev. Stat. §77-202.01(1) (Supp. 2007).
5. An organization or society which has failed to file an application on or before December 31, may file an application for exemption with the county assessor on or before June 30

- of each year. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007).
6. The applicant for exemption after December 31 shall also file a request with the county board of equalization seeking a waiver of the December 31 deadline. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007).
 7. A waiver of the December 31 filing date can only be granted if good cause exists for failure to make the application by December 31. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007).
 8. The county assessor cannot consider an application for exemption made after December 31 unless a waiver of the December 31 deadline is granted by the county board. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007).
 9. 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 90 (2000).

IV. ANALYSIS

On or about May 28, 2008, the Taxpayer applied for a religious exemption for certain parcels of real property. (E1:1). The approval of the application was recommended by the County Assessor. (E1:1). Penalties and interest were computed by the County Assessor. (E1:1). The County Board considered the County Assessor's recommendation and granted the requested exemptions. (E1). The parcels for which exemptions were sought had been owned and used by

the Taxpayer for exempt purposes in prior years.

An organization or society seeking a tax exemption under subdivisions (1)(c) and (d) of section 77-202 for real property, except real property used for cemetery purposes, is required to file for exemption to the county assessor on or before December 31. Neb. Rev. Stat. §77-202.01(1) (Supp. 2007). If, however, an organization or society fails to file an application on or before December 31, an application for exemption may be filed with the county assessor on or before June 30 of each year. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007). The applicant shall also file a request with the county board of equalization for a waiver of the December 31 deadline so that the county assessor can consider the application. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007). A waiver can only be granted if good cause exists for failure to make the application by December 31. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007). If the county board grants the requested waiver then the county assessor can consider the application. Neb. Rev. Stat. §77-202.01(2) (Supp. 2007). There is no evidence that a request for waiver was filed with the County Board. As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). There is no basis for concluding that use of the word shall in section 77-202.01(2) of Nebraska Statutes is not mandatory. Without filing of a request for waiver and grant of the waiver the county assessor could not consider the application.

Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15

(1996). Consideration of the Taxpayer's application for exemption by the county assessor and the County Board review of the county assessor's determination was contrary to the provisions of section 77-202.01(2) of Nebraska Statutes and cannot confer jurisdiction on the Commission.

Section 77-202.03 of Nebraska Statutes allows the owner to seek a tax exemption on or before August 1 of each year if property is acquired after January 1 or is converted to an exempt use after January 1. Neb Rev. Stat. §77-202.03(3)(a) (Supp. 2007). The evidence in this case is that on acquisition the Taxpayer began using the property in the manner it believes entitled it to an exemption from taxation. The provisions of section 77-202.03(3)(a) of Nebraska Statutes are not applicable.

The County Board acted on the Taxpayer's application for exemption on July 14, 2008. An appeal was filed with the Commission on October 6, 2008. An appeal of the County Board's decision can only be filed with the Commission within thirty days after the date of the decision. Neb. Rev. Stat. §77-202.04 (Supp. 2007).

The Commission does not have jurisdiction and the appeal must be dismissed.

**V.
CONCLUSIONS OF LAW**

1. The Commission does not have subject matter jurisdiction in this appeal.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The appeal in Case No. 08E 033 is dismissed.

2. Each party is to bear its own costs in this proceeding.

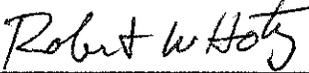
Signed and Sealed December 16, 2008.



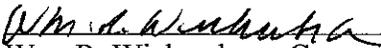
SEAL



Nancy J. Salmon, Commissioner



Robert W. Hotz, Commissioner



Wm. R. Wickersham, Commissioner

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.