

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 the consolidated cases is as follows.

**I.
ISSUES**

Does the Commission have jurisdiction to hear the above captioned appeals?

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels described in the above captioned appeals were acquired by the Taxpayer on March 5, 2007.
3. An application for exemption of the parcels described in the above captioned appeals was filed on or after January 7, 2008.
4. The County Assessor recommended disapproval.
5. The County Board adopted the recommendation of the County Assessor.
6. Appeals of the County Board's decisions were filed with the Commission.
7. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
8. The appeals were consolidated for hearing by order of the Commission.

9. An Order for Hearing and Notice of Hearing issued on July 17, 2008, as amended by an Order issued on August 20, 2008, set a hearing of the appeals for October 29, 2008, at 9:00 a.m. CDST.
10. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

**III.
APPLICABLE LAW**

1. “Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law; (2) 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....”

Neb. Const., Art. VIII, § 1

2. Section 1 of Art VIII of Nebraska's Constitution, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect. *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987).
3. “(1) 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. For 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 subjects or assisting students through services relating to the origination, processing, or guarantying of federally reinsured student loans for higher education or (B) a museum or historical society operated exclusively for the benefit and education of the public. 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....” Neb. Rev. Stat. §77-202 (Cum. Supp 2006).
4. 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 Tax Commissioner. Neb. Rev. Stat. §77-202.01 (Supp. 2007).

5. 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. When the waiver is granted, the county assessor shall examine the application and recommend either taxable or exempt for the real property or tangible personal property to the county board of equalization and shall assess a penalty against the property of ten percent of the tax that would have been assessed had the waiver been denied or one hundred dollars, whichever is less, for each calendar month or fraction thereof for which the filing of the exemption application missed the December 31 deadline. Neb. Rev. Stat. §77-202.01 (Supp. 2007).
6. If any organization or society seeks a tax exemption for any real or tangible personal property acquired on or after January 1 of any year or converted to exempt use on or after January 1 of any year, the organization or society shall make application for exemption on or before August 1 of that year as provided in subsection (1) of section 77-202.01. The procedure for reviewing the application shall be as in sections 77-202.01 to 77-202.05, except that the exempt use shall be determined as of the date of application and the

review by the county board of equalization shall be completed by August 15. Neb. Rev. Stat. §77-202.03 (3)(a) (Supp. 2007).

7. 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).
8. The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997). *Crabb v. Bishop Clarkson Memorial Hospital*, 256 Neb. 756, 591 N.W.2d 756, (1999).
9. The doctrine of presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not apply to courts or tribunals of inferior or limited jurisdiction who act in a judicial capacity, but as to such courts or tribunals the facts necessary to confer jurisdiction must affirmatively appear upon the face of the record. *Olsen v. Grosshans*, 160 Neb. 543, 71 N.W.2d 90 (1955), See, also, *Shambaugh v. Buffalo County*, 133 Neb. 46, 274 N.W. 207 (1937).

IV. ANALYSIS

The parcels subject to appeal are an abandoned railroad right of way. The Taxpayer acquired the property in March of 2007. (E18). After acquisition, the Taxpayer sought assistance in developing a recreational trail on the property. As of January 1, 2008, no assistance had been obtained. After acquisition, the Taxpayer allowed open access to the property for

hiking or other recreational uses. Some parcels were used for hiking during the year 2007.

Which parcels were used for hiking or other recreational uses and which were not is unclear.

The Taxpayer could have sought exemption of the property described in the appeals as of the date of purchase pursuant to the provisions of section 77-202.03 (3)(a) of the Nebraska Statutes. The application in the record before the Commission is an initial application filed for the year 2008. (E1:1). 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). 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 contrary to the provisions of section 77-202.01(2) of Nebraska Statutes 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 Commission does not have jurisdiction and the appeals must be dismissed.

**V.
CONCLUSIONS OF LAW**

1. The Commission does not have subject matter jurisdiction in the captioned appeals.
2. The Commission has jurisdiction over the parties to this appeal.

**VI.
ORDER**

IT IS ORDERED THAT:

1. Appeals in Case Nos 08E-001, 08E-002, 08E-003, 08E-004, 08E-005, 08E-006, 08E-007, 08E-008, 08E-009, 08E-010, 08E-011, 08E-012, 08E-013, and 08E-014 are dismissed.
2. This decision, if no appeal is timely filed, shall be certified to the Hamilton County Treasurer, and the Hamilton County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.

4. Each party is to bear its own costs in this proceeding.
5. This decision shall only be applicable to tax year 2008.
6. This order is effective for purposes of appeal on January 6, 2009.

Signed and Sealed. January 6, 2009.

Wm. R. Wickersham, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

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.