

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Ron Hasley,
Appellant,

v.

Nuckolls County Board of Equalization,
Appellee.

Case No: 11E-020, 11C-001, 11C-002

Order Affirming the Denial of Exemption in
Case No. 11E-020

And

Order Affirming the Determinations of the
Nuckolls County Board of Equalization in
11C-001 and 11C-002

For the Appellant:

Ron Hasley, Pro Se,
Chairman, Prayer Center.

For the Appellee:

Timothy Schmidt,
Nuckolls County Attorney.

These appeals were heard by Commissioners Robert W. Hotz and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The Subject Property consists of two commercial parcels located in Nuckolls County, Nebraska. One parcel is improved with a 19,212 square foot structure that was previously used as a nursing home; the second parcel is an adjacent unimproved lot. The legal description and property record card for the Subject Property are found at Exhibits 88-89.

II. PROCEDURAL HISTORY

There are two different types of cases being considered in the above captioned appeals. The first concerns the exempt status of the two parcels of real property that make up the Subject Property. The Nuckolls County Assessor denied an exemption application and determined that the Subject Property was subject to taxation for tax year 2011.¹ Ron Hasley (Taxpayer) protested this determination to the Nuckolls County Board of Equalization (County Board) and

¹ Exhibit 3:1.

requested that the Subject Property be exempted from taxation for tax year 2011.² The County Board determined that the Subject Property was not exempt for tax year 2011.³

The Nuckolls County Assessor determined that the assessed value of the Subject Property for tax year 2011 was \$164,400⁴ (11C-001) and \$1,550⁵ (11C-002). Ron Hasley (Taxpayer) separately protested these assessments to the County Board. The County Board determined that the assessed values for tax year 2011 were \$164,400 (11C-001)⁶ and \$1,550 (11C-002)⁷.

The Taxpayer appealed the decisions of the County Board regarding both the exempt status of the Subject Property and the assessed value of the Subject Property to the Tax Equalization and Review Commission (Commission). The Commission consolidated these appeals for a single hearing to take evidence and argument in both the exemption appeal and the valuation appeals. The parties held a Pre-Hearing Conference, as ordered by the Commission, and exchanged 119 Exhibits prior to the hearing. The Commission held consolidated evidentiary hearings on December 16, 2011, and April 12, 2012.

The Commission will first consider the Taxpayer's appeal of the determination of the County Board that the Subject Property was not tax exempt for tax year 2011. If the Commission were to find that the Subject Property should be exempt from taxation, then the County Board's determination of assessed value for tax year 2011 would be moot. If the Commission were to affirm the determination of the County Board that the Subject Property is not exempt from taxation, the Commission would then consider the Taxpayer's separate appeals of the County Board's determination of assessed value of the Subject Property for 2011.⁸

² Exhibit 3:1.

³ Exhibit 3:1.

⁴ Exhibit 1.

⁵ Exhibit 2.

⁶ Exhibit 1.

⁷ Exhibit 2.

⁸ When determining the exempt status of real property, the Commission shall not determine the taxable value of the real property unless stipulated by the parties according to Nebraska Statute. Neb. Rev. Stat. §77-5016(10) (Cum. Supp. 2012). The Commission applies this principle in Case No. 11E-020. However, even in the absence of a stipulation from the parties in 11E-020, the Commission will determine the taxable value of the parcels since 11C-001 and 11C-002 were also filed.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.⁹ 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.”¹⁰

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.¹¹

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.¹² Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹³

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.”¹⁴ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, 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.”¹⁵

⁹ See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

¹⁰ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

¹¹ *Id.*

¹² Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

¹³ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁴ Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

¹⁵ Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

IV. EXEMPTION

A. Law

The Nebraska Constitution permits the Legislature to classify exempt property that is “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.”¹⁶

Therefore, under State Statutes §77-202(1)(d), the following property is exempt 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.¹⁷

(emphasis added). “Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.”¹⁸

In reference to subsection (1)(d) of Nebraska Statutes section 77-202, exclusive use means the primary or dominant use of property, as opposed to incidental use.¹⁹ It is the exclusive use of the property that determines the exempt status.²⁰ The Nebraska Supreme Court has held that, “intention to use property in the future for an exempt purpose is not a use of the property for [exempt] purposes.”²¹ Further, the court has held that the purchase of property for an intended exempt use does not show that the owner had more than intent to use the property for the exempt purpose.²² Additionally, “[t]he ownership of property is not evidence of use under [Nebraska Statutes §77-202(1)].”²³ Under subsection (1)(d) of section 77-202 of Nebraska Statutes, a property owner's exemption from federal income taxation does not determine whether the owner's property is tax exempt under state law.²⁴

¹⁶ Neb. Const., Art. VIII, § 2.

¹⁷ Neb. Rev. Stat. § 77-202(1)(d) (2011 Supp.).

¹⁸ *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).

¹⁹ *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).

²⁰ See, *Nebraska Conf. Assn. of Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965).

²¹ *St. Monica's v. Lancaster County Bd. of Equalization*, 275 Neb. 999, 1002-1003, 751 N.W.2d 604, 607 (2008) (quoting *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 6-7, 337 N.W.2d 103, 107 (1983)).

²² *Id.* at 1003.

²³ *Id.* (citing *YMCA of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900)).

²⁴ *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

The Courts have spoken of two overriding factors to be considered when a request for an exemption is before them. Those factors are: the property tax burden is necessarily shifted from the beneficiary of an exemption to others who own taxable property, and that the power and right of the state to tax is always presumed.²⁵

In addition, Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;²⁶ (2) the alleged exempt property must clearly come within the provision granting the exemption;²⁷ (3), the laws governing property tax exemptions must be strictly construed;²⁸ (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”;²⁹ and (5) this interpretation should always be reasonable.³⁰

B. Summary of the Evidence

The Taxpayer asserted the Subject Property qualified for tax exempt status because the Taxpayer qualified as a religious organization under Nebraska Statutes. The County asserted that the Taxpayer did not qualify as a religious organization under Nebraska Statutes, and that the property was not used for religious purposes. The Taxpayer presented no evidence of the actual use of the property on the date of assessment. The Taxpayer testified that the property was purchased with the intent to be used for religious purposes.

As stated above, Nebraska Statutes not only require that an organization owning an alleged exempt property be a certain type of organization, but also that the property must be used exclusively for an exempt purpose.³¹ Under Nebraska law, the mere ownership of property is not evidence of use.³² As previously stated, neither the intent to use property for an exempt purpose, nor the purchase of property to use for an exempt purpose establishes that the property *is* used for an exempt purpose on the date of the assessment.³³

²⁵ 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).

²⁶ *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

²⁷ *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

²⁸ *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).

²⁹ *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

³⁰ *Id.* (citing, *Young Men's Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

³¹ See, Neb. Rev. Stat. § 77-202(1)(d) (2011 Supp.).

³² *St. Monica's v. Lancaster County Bd. of Equalization*, 275 Neb. 999, 1002-1003, 751 N.W.2d 604, 607 (2008).

³³ *Id.*

After a review of the record, the Commission finds that there is no evidence that the Subject Property was actually used exclusively for purposes which would qualify the Subject Property as exempt under Nebraska law. The Commission does not express an opinion regarding the status of the Taxpayer as a religious organization, because we find that the Subject Property does not qualify for such an exemption regardless of whether the Taxpayer is a religious organization or not. The Commission finds that the County Board's determination in Case No. 11E-020 should be affirmed, and that therefore the Commission must address the assessed valuation of the Subject Property for tax year 2011.

V. VALUATION

A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.³⁴

"Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach."³⁵ "Actual value, market value, and fair market value mean exactly the same thing."³⁶ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.³⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.³⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.³⁹

³⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

³⁵ Neb. Rev. Stat. §77-112 (Reissue 2009).

³⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

³⁷ Neb. Rev. Stat. §77-131 (Reissue 2009).

³⁸ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

³⁹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

The Taxpayer asserted that the assessed value of the Subject Property should be based solely on the sale of the Subject Property for \$4,500 on September 30, 2010. Bradley Elting, the real estate broker for the previous owner, testified that the sale of the Subject Property on September 30, 2010, was part of an absolute auction. Elting testified that he advertised the sale prior to the date of the auction using Loop Net, a commercial listing service, in order to reach the greatest potential number of prospective buyers. Elting also testified that he received multiple offers for the Subject Property, but that the Taxpayer's offer was the highest. He also testified that the sale included both parcels which are the subject of the current appeal. The Taxpayer asserted that this sale was an appropriate arm's length transaction for use in the determination of the value of the Subject Property.

Ron Hasley testified that Nuckolls County and the specific rural community where the Subject Property is located were experiencing a decrease in residents. He testified that due to this decrease, the value of commercial property had also been decreasing.

The Taxpayer referred the Commission to Reports and Opinions of the Property Tax Administrator for Nuckolls County (Reports). The Taxpayer indicated that the Reports included the sale of the Subject Property in its analysis of commercial sales for purposes of statewide equalization. Further, the Taxpayer indicated that the Reports stated that there were not enough sales of commercial properties in Nuckolls County to constitute a market for commercial properties in tax year 2011. The Taxpayer asserted that these indications were evidence that the sale on September 30, 2010, was an arm's length transaction and a reasonable indication of the Subject Property's taxable value. The Taxpayer offered no other evidence to quantify the market value of the Subject Property.

Darrel Stanard, a licensed appraiser who contracted with the County Assessor, testified that he valued the Subject Property using the cost approach. He testified that he was unable to inspect the interior of the Subject Property. He stated that since the Subject Property sold in 2010, an inspection was requested. The Taxpayer acknowledged at least one inspection request prior to this hearing.⁴⁰ The Taxpayer also explicitly denied a request for an inspection.⁴¹ Stanard testified that an interior inspection would have allowed him to take measurements and determine

⁴⁰ See Exhibit 7, page 1, a letter dated May 11, 2011, from the Taxpayer to the Nuckolls County Assessor.

⁴¹ In Exhibit 92, page 1, a letter from the Taxpayer to Stanard, dated December 28, 2010, the Taxpayer stated, in part, "[a]t this time, the church will be denying any access or photographs of the property."

the use of the Subject Property. He stated that he was aware when he appraised the property that it was no longer being used as a nursing home. Without the benefit of an interior inspection, Stanard decided to appraise the Subject Property using the cost approach, with its highest and best use as a warehouse, the lowest class (Occupancy Code) of commercial property in the Marshall Valuation Service cost manual.⁴² He further testified that without the benefit of an interior inspection it was much more difficult to determine the amount of physical depreciation to deduct when using the cost approach.

Stanard testified that in his opinion the sale on September 30, 2010, did not qualify as an arm's length transaction because the sale was the result of an absolute auction. However, he stated that the critical question was whether this one sale was reliable indicia of the market value of the Subject Property on January 1, 2011.

“It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value.”⁴³

“Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under the compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.”⁴⁴ In the present case, the sale was an absolute auction in which the property was sold to the highest bidder without minimum or reservation.⁴⁵ The seller was under compulsion to sell, regardless of the bid price.⁴⁶ The Commission finds that the absolute auction sale was not an arm's length transaction.⁴⁷

The Nebraska Supreme Court has acknowledged that “where there is no market or no sale of like property, actual or market value must be arrived at by theoretical methods commonly used

⁴² Stanard testified that when the improvement was being used as a nursing home, its highest and best use was determined to be for use as a nursing home. On that basis, the 2010 tax year assessed value of the improvement was \$411,600. See the property record card at Exhibit 39:1.

⁴³ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637, (1998).

⁴⁴ *Dowd v. Board of Equalization*, 240 Neb. 437, 447, 482 N.W.2d 583, 589 (1992) (quoting *Potts v. Board of Equalization*, 213 Neb. 37, 47-48, 328 N.W.2d 175, 181 (1982)).

⁴⁵ *The Dictionary of Real Estate Appraisal*, 4th Ed., Appraisal Institute, (2002), at pg. 22.

⁴⁶ *Id.*

⁴⁷ See, IAAO, *Standards on Ratio Studies* (2010), Section A.4.2, item 5, at 50.

by appraisers qualified in the particular field.”⁴⁸ The cost approach is a theoretical approach to property valuation.⁴⁹

In order to properly value property, the appraiser often must inspect the property. This conclusion is supported by the Nebraska Supreme Court which has determined that “(w)here the county assessor does not act upon his own information, or does not make a personal inspection of the property, any presumption as to the validity of the official assessment does not obtain.”⁵⁰ Given this mandate, where the Taxpayer refuses the County’s request to inspect the property, the provisions of the Adverse Inference Rule are triggered.⁵¹ The provisions of this rule may be summarized as follows: where the Taxpayer refuses to allow the County to inspect the Subject Property, after challenging the taxable value as determined by the County Board, there is a presumption that the results of the inspection would militate against the Taxpayer’s interest. The finder of fact is the sole judge of what probative value to give the fact that the Taxpayer refused the County’s request to inspect the property. Furthermore, that the relative convincing powers of the inferences to be drawn from that fact is for the determination of the finder of fact. Based upon the foregoing, the Commission finds that the sale price of \$4,500 is not clear and convincing evidence of the taxable value of the Subject Property.

VI. CONCLUSION

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is not clear and convincing evidence that the County Board’s determinations were arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board should be affirmed.

⁴⁸ *Lincoln Tel. and Tel. Co. v. York County Bd. of Equal.*, 209 Neb. 465, 476, 308 N.W.2d 515, 522 (1981).

⁴⁹ See, *The Appraisal of Real Estate*, 13th Ed., The Appraisal Institute (2008) at p. 377.

⁵⁰ *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966).

⁵¹ See *Yarpe v. Lawless Distrib. Co.*, 7 Neb.App. 957, 962 - 963, 587 N.W.2d 417, 421 (1998).

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Nuckolls County Board of Equalization to deny the exemption application in Case No. 11E-020 for tax year 2011 is affirmed.
2. The decisions of the Nuckolls County Board of Equalization determining the taxable value of the Subject Property for tax year 2011 in Case No. 11C-001 and 11C-002 for tax year 2011 are affirmed.
3. The assessed value of the Subject Property for tax year 2011 is:

Case No. 11C-001

Land	\$2,000.00
<u>Improvements</u>	<u>\$162,400.00</u>
Total	\$164,400.00

Case No. 11C-002

<u>Land</u>	<u>\$1,550.00</u>
Total	\$1,550.00

4. The Subject Property is not exempt from taxation for tax year 2011.
5. This Decision and Order, if no appeal is timely filed, shall be certified to the Nuckolls County Treasurer and the Nuckolls County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
6. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This Decision and Order shall only be applicable to tax year 2011.

9. This Decision and Order is effective for purposes of appeal on June 19, 2013.

Signed and Sealed: June 19, 2013.

Robert W. Hotz, Commissioner

SEAL

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), and other provisions of Nebraska Statutes and Court Rules.

Commissioner Freimuth, Concurring:

I concur that the Taxpayer did not provide sufficient evidence in terms of use of the Subject Property to support exemption from property tax. While it is my concern that the inactive commercial market in Nuckolls County was not given adequate consideration by the County, I also concur regarding valuation because I do not believe the \$4,500 absolute auction sale price is sufficient clear and convincing evidence of actual value to demonstrate that the assessment of the Subject Property was arbitrary or unreasonable for tax year 2011.

The Dictionary of Real Estate Appraisal defines the word “auction” as follows:

A sale, public or private, where property is sold to the highest bidder. Some states require an auctioneer selling real estate to have both an auctioneer's license and a real estate license. Historically auctions were seen as a way of disposing of distressed properties, but auctions have become an alternative when a quick sale is necessary. In an absolute auction, the property is sold to the highest bidder "without minimum or reservation." In a reserve auction, the seller and the auction company mutually agree on a sale price that must be obtained before the property can be sold.⁵²

Bradley Elting, the real estate broker involved in the sale of the Subject Property to the Taxpayer, testified that the transaction was an absolute auction without minimum or reserve conditions in favor of the seller. Additionally, Mr. Elting's affidavit found at Exhibit 82

⁵² *The Dictionary of Real Estate Appraisal*, 4th Edition, The Appraisal Institute, 2002, at p. 22.

indicates that the sale to the Taxpayer involved an absolute auction. Therefore, because the evidence demonstrates that the transaction was an absolute auction rather than a reserve auction under the definition above, I find that the \$4,500 sale to the Taxpayer in October of 2010 is not clear and convincing evidence of actual value for tax year 2011.

Notwithstanding this finding, it is my concern that the County's assessments did not sufficiently consider the declining economy in the town of Nelson, where the Subject Property is located. In this regard, page 27 of the 2011 Reports and Opinions of the Property Tax Administrator for Nuckolls County states that "[m]ost of the county is experiencing decreasing population and economic decline," and that "there is just not an active commercial market in Nuckolls County." Additionally, the County's Appraiser testified that the Subject Property was sold to the Taxpayer in an inactive commercial market.

Thomas D. Freimuth, Commissioner