

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

ROGER F. MORRISSEY, Douglas)	
County Assessor,)	
)	CASE NO. 03E-65
Appellant,)	
)	
and)	FINDINGS AND FINAL ORDER
)	REVERSING ORDER
CATHERINE D. LANG, Property)	GRANTING EXEMPTION
Tax Administrator, Intervenor,)	
)	
vs.)	
)	
DOUGLAS COUNTY BOARD OF)	
EQUALIZATION,)	
)	
and)	
)	
ALEGENT HEALTH, a Nebraska)	
Non-profit Corporation,)	
)	
Appellees.)	

Filed September 9, 2004

Appearances:

For the Appellant: Roger Morrissey
Douglas County Assessor
Civic Center, 1819 Farnam Street
Omaha, NE 68183

For the Intervenor: Michael J. Goodwillie, Esq.
Dept. of Property Assessment & Taxation
1033 "O" Street, Suite 600
Lincoln, NE 68508-3686

For the Appellee Patrick M. Flood, Esq.
Douglas County Hotz, Weaver, Flood & Breitzkreutz
Board of 444 Regency Parkway Drive, Suite 310
Equalization: Omaha, NE 68114

For the Appellee Samuel E. Clark, Esq.
Alegent Health Erickson & Sederstrom
Lakeside Health 10330 Regency Parkway Drive, Suite 10330
Park: Omaha, NE 68114

Before: Commissioners Hans, Lore, Reynolds, and Wickersham.

I.
STATEMENT OF THE CASE

Alegent Health, a Nebraska Nonprofit Corporation ("the Applicant"), owns a 12.21 acre tract of land legally described as Lot 1, Lakeside Hills Addition, Douglas County, Nebraska. (E4:33). The tract of land is improved with two buildings: a medical office building and a health club facility. (E4:33). The tax status of the medical office building is not at issue in this appeal. The health club facility ("the health club") is a two-story building which is 51,691-square feet in size. (E4:33; E4:35). The health club offers the use of a "Kids Center;" a conference room; locker rooms; an assisted changing area; a lap pool; a warm water pool; and a "gymnasium", all located on the first floor. An aerobics room, an exercise room, a Pilates exercise room, and a "cardio" area are located on the second floor. Access to the second floor is provided by a stairway and an elevator. (E7:2).

The Applicant has entered into a three-year "Management Agreement" with Power Wellness Management, L.L.C., an Illinois for-profit Limited Liability Company. (E4:70). The Management Agreement is automatically renewed for a three-year increment, with a base management fee of \$102,000 per year plus specified expenses. (E4:73; E4:80; E4:81). Bonus management fees are paid if financial goals are met. The management fees are in addition to necessary expenses incurred by the management company. These

expenses include all reasonable costs and expenses, including wages, salaries, benefits, and other costs. (E4:81; E4:75).

The Applicant filed its 2003 application for partial exemption on April 24, 2003. (E4:96). Roger F. Morrissey, the Douglas County Assessor ("the Assessor"), and the Douglas County Attorneys' Office recommended that the exemption application be denied. (E4:143; E158; E159).

The Douglas County Board of Equalization ("the Board") granted the exemption application in part for the health club on July 29, 2003. (E1; Stipulation of the Parties). The Assessor appealed that decision to the Commission. The Commission issued a Notice in Lieu of Summons to the Board and to the Applicant on September 5, 2003, which the Board and the Applicant filed Answers on October 3, and October 9, 2003, respectively. The Commission also served a Notice in Lieu of Summons on the Property Tax Administrator on September 24, 2003. The Property Tax Administrator exercised her right to intervene in the appeal as provided by law. Neb. Rev. Stat. §77-202.04 (Reissue 2003, as amended by 2004 Neb. Laws, L.B. 973, §8). The Commission thereafter issued an Amended Order for Hearing and an Amended Notice of Hearing to the Parties. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties. This Amended Order and Amended Notice of Hearing provided each of the Parties at least

ten-days notice of the hearing as required by Neb. Rev. Stat. §77-202.06 (Reissue 2003).

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on August 12, 2004. Roger F. Morrissey, the Douglas County Assessor ("the Assessor") appeared personally at the hearing. The Property Tax Administrator ("the Intervenor") appeared through Michael J. Goodwillie, Esq.. The Board appeared through Patrick M. Flood, Esq., Special Appointed Counsel. The Applicant appeared through Samuel E. Clark, Esq.. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The completed copy of the Exemption Application (Form 451) is not a part of the record. The Parties stipulated and agreed that the Assessor had recommended denial of the Application. The Parties further stipulated that the "white portion" of the facility as shown on Exhibit 7, page 2, is subject to real property taxation for tax year 2003, and was subject to taxation for tax year 2002. The Parties therefore stipulated that Exhibit 1 represents the Board's final action concerning the Exemption Application for the subject property for tax year 2003. The Parties also stipulated that the Applicant is a charitable organization; that there were no sales of alcoholic beverages on

the property; and that the Applicant does not discriminate in membership or employment.

The Board and the Applicant moved to dismiss the appeal at the close of the Assessor's and Intervenor's case-in-chief. The Commission overruled the Motion. The Board rested without adducing any testimonial evidence. The Applicant adduced the testimony of two witnesses as well as certain documentary evidence. The Parties then made closing statements, after which the Commission took the matter under advisement. The matter now comes on for decision.

II. ISSUE

The issue before the Commission is whether the Board's decision to grant a partial exemption from real property taxation for tax year 2003 was incorrect and either unreasonable or arbitrary. The Assessor and Intervenor, in order to prevail, must demonstrate by clear and convincing evidence that either (1) the exempted portion of the subject property is not used exclusively for educational, religious, charitable, or cemetery purposes; or (2) that the subject property is owned or used for financial gain or profit to either the owner or user.

**III.
APPLICABLE LAW**

**A.
EXEMPTION PROVISIONS GENERALLY**

The Nebraska Constitution and state statutes establish the fundamental requirements for a charitable exemption. The Constitution authorizes an exemption only for educational, religious, charitable or cemetery purposes, and only when the property is neither owned nor used for financial gain or profit to either the owner or user. *Art. VIII, Nebraska Constitution, §2(2)*. State law provides a five-part test for determining exemption eligibility. Real property is exempt only when (1) the property is owned by an educational, religious, charitable or cemetery organization; (2) the property is used exclusively for educational, religious, charitable or cemetery purposes; (3) the property is not owned or used for financial gain or profit to either the owner or user; (4) the property is not used for the sale of alcoholic liquors for more than twenty hours per week; and (5) the property is not 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) (Reissue 2003)*. Finally, the law defines a "charitable organization" as one operated exclusively for the mental, social, or physical benefit of the public or an indefinite number of persons. *Neb. Rev. Stat. §77-202(1)(d) (Reissue 2003)*.

The Supreme Court has held that a charitable exemption is only authorized when the activities undertaken on the property benefit the public generally and only when those activities performed relieve the state *pro tanto* from performing some of its obligations. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 3, 337 N.W.2d 103, 105 (1983).

B.
THE BURDEN OF PROOF

The Commission hears exemption appeals and determines *de novo* all questions raised in the proceedings upon which the order, decision, determination or action appealed from is based. Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B. 973, §51). The Assessor in this appeal is required to demonstrate by clear and convincing evidence (1) that the decision of the Board was incorrect and (2) that the decision of the Board was either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (2003 Supp.). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Assessor, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's decision to grant the requested exemption was

unreasonable. *Pittman v. Sarpy County Bd. of Equal.*, 258 Neb. 390, 398 - 399, 603 N.W.2d 447, 453 - 454 (1999).

**IV.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The health club was designed and built as part of the private health club market. (E8:20).
2. The health club was designed, built for and targets advertising to "Key Consumer Households," i.e., households with "particular lifestyle and behavior characteristics, including age 35 - 70, annual income > \$35,000, upper education levels, professional employment, and home ownership." (E8:11; E8:21).
3. The health club has more than 5,000 dues-paying members. The dues paid for these memberships are the highest in the City of Omaha.
4. The health club has between 80 and 90 individuals for whom membership fees are reduced or waived. These "scholarships" are not well-publicized, and only offered on a limited basis during or after the health assessment. (E14:2).
5. Power Wellness Management, an Illinois, for-profit, Limited Liability Company, is a "user" of the property. The "user" is in business to make a profit.

V.
ANALYSIS

Permissive exemptions shift the real property tax burden. See, e.g., *Jaksha v. State*, 241 Neb. 106, 112, 486 N.W.2d 858, 864 (1992). The Nebraska Supreme Court, having the benefit of that knowledge, has established certain controlling principles. controlling tax exemptions. First, an exemption is never presumed. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999). Second, the property which is claimed as exempt must clearly come within the provision granting the exemption. *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991). Third, the laws governing property tax exemptions must be strictly construed. *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).

The Assessor and the Intervenor allege that the Board's decision was incorrect, unreasonable and arbitrary in that (1) the subject property is not used exclusively for educational, religious, charitable, or cemetery purposes; and/or (2) the subject property is used for financial gain or profit to either the owner or user. The Commission must concur with each of these contentions.

A.
QUALIFYING OWNERSHIP AND USE

Real property can qualify for exemption only if (1) the property is owned by a qualifying entity and (2) the property is used for a qualifying purpose. A qualifying entity is one organized for a educational, religious, charitable or cemetery purposes. Neb. Rev. Stat. §77-202(d) (Reissue 2003). A "charitable" organization is defined as one 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(1)(d) (Reissue 2003). The Assessor did not raise the question of whether the Applicant is a charitable organization before the Board. That issue is therefore not before the Commission. *Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 458, 640 N.W.2d 398, 403(2002).

The Constitution and statutes allow an exemption where the property is both owned and used exclusively for educational, religious, charitable or cemetery purposes. Art. VIII, Neb. Const, §2(2). A "charitable organization" is defined as "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(1)(d) (Reissue 2003). The statutes do not, however, explicitly define "charitable use." A sensible construction of the section as a whole, however, would result in the same definition of "charitable" being applied to

the term "use" as being applied to the "organization" provision. "Charitable use" would therefore be defined as an activity conducted for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons. The Supreme Court implicitly applies this definition of "charitable use," holding, for example: "The use of the property establishes whether it is exempt. . . A tax exemption for charitable use is allowed because those exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing." *Bethesda Foundation, supra*, at 458, 403. *See, also, United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 3, 337 N.W.2d 103, 105 (1983); *Immanuel, Inc. v. Board of Equalization of Douglas County*, 222 Neb. 405, 409, 384 N.W.2d 266, 268, (Neb. 1986). A "charitable" use must therefore be one made for the purpose of the mental, social or physical benefit of the public or an indefinite number of persons.

The Board here considered whether the health club is exclusively used for charitable purposes. The Assessor and the Intervenor both challenge the Board's determination that the health club is used exclusively for charitable purposes. The health club is used as a private commercial enterprise. The health club bills itself as "one of the most technologically advanced fitness facilities in the Omaha area [which] will feature state-of-the-art fitness equipment, professional

management and staff, as well as a full menu of services designed to invigorate and relax." (E4:124). The Business Plan establishes that the health club is part of the "private market." (E8:20). The private health club sells a variety of memberships. (E10:7). The memberships range in price for a regular single membership at \$64 per month to family memberships at \$119 per month. The health club had 5,064 "billable members" as of January 31, 2004. (E10:7; E14). The health club also had 191 "complimentary" memberships, although the record is silent as to who exactly qualifies for "complimentary" memberships. Finally, the health club offers "scholarships" to between 80 and 90 individuals. These "scholarships" are not publicized, and allow the recipients to pay reduced fees or no fees to use the health club. The evidence establishes that as of "2/04" there were 41 "reduced rate" scholarships and 17 "memberships that pay no fees." (E14:3). The health club also offers certain services for an additional fee. The services range from individual fitness training at \$55 per hour, to bikini waxing. (E4:52 - 53).

The Applicant alleges that these uses qualify as a charitable use, that is, the property is used for the mental, social or physical benefit of the public or an indefinite number of persons. The Applicant specifically alleges that the health club's purpose is to promote a healthy lifestyle, and that the

health club's facilities, i.e., the warm water pool and the "cardio" area, are features which not only promote a healthy lifestyle, but also assist in recovery from illness in general and cardiovascular disease in particular.

The Applicant alleges the health club promotes a healthy lifestyle, and that this purpose qualifies for federal tax exemption. Activity qualifying for tax exempt status under the federal Internal Revenue Service Code is not determinative under Nebraska law. *Nebraska State Bar Foundation v. Lancaster County Bd. Of Equal.*, 237 Neb. 1, 10, 465 N.W.2d 111, 118 (1991). In Nebraska, the activity must benefit the public or an indefinite number of persons. *Bethesda, supra.*

The health club is not a licensed health care facility open to the public. Doctors and nurses are not on duty at the health club. The "cardio" area is an area open to members for all but 24-hours per week. On three days each week for a period of eight hours the "cardio" area is roped off, and a nurse is present in case a "cardio" patient using the equipment suffers a medical emergency. The health club is open approximately 105.75 hours per week. (E10:5). Limitations on use of the "cardio area," a small portion of facility on the second floor, where the limitations exist for a total of 24 hours per week out of 105.75 hours per week is an incidental use.

The testimony is in conflict regarding the purpose and use of the warm water pool. The former manager of the health club testified that the pool is similar to a hot tub and was often frequented by children. The current manager testified that the pool was too hot for most people, was a source of considerable expense, and was primarily used for persons suffering from fibromyalgia and arthritis. The Applicant, in light of this evidence, has failed to adduce clear and convincing evidence that the warm water pool provides a mental, social or physical benefit to the public or an indefinite number of persons.

The health club is a high-end facility designed and used in an upscale market for the benefit of dues paying members at a "first class level." (E4:74). The low number of scholarships, which are not widely advertised and therefore do not provide any benefit to the public or an indefinite number of persons. Any "charitable use" is incidental to the health club's primary purpose, that is, serving as a first class health club in a wealthy area of Omaha. This health club is not predominantly used for a "charitable" purpose as required by statute.

**B.
OWNED OR USED FOR FINANCIAL GAIN FOR PROFIT**

Power Wellness Management is a for-profit Illinois corporation. (E4:70). The management company earns a management fee of at least \$108,000 per year. (E4:80). This fee may be

increased if certain financial goals are achieved. (E4:80). The Applicant contends that the Management Agreement is not a lease, and is within the parameters fixed by the federal Internal Revenue Service Code for a charitable organization concerned with issuing tax exempt bonds.

The management company is obliged to provide all amenities in connection with the operation of the health club at a "first class level." (E4:74). The management company has the "exclusive right to hire, discharge, supervise, promote, train, [and] determine salaries" and benefits for all of the health club's employees within limits listed in the Business Plan and contract. (E4:75). The management company is also authorized to "negotiate rental conference center and concession agreements." (E4:75). These contractual rights establish that the management company uses the property. This use is by a for-profit corporation, with an incentive to achieve certain profit goals in return for \$1,500 monthly "bonus." (E4:80). The Applicant points to the fact that the management company has yet to receive a bonus as proof of the charitable nature of the health club. The fact that a business fails to achieve a financial goal does not make that business a charitable organization.

Power Wellness Management, LLC, is a user of the property with a profit-making motive, contrary to the requirements for a charitable exemption.

C.
CONCLUSION

The Applicant's health club was designed and built to attract clients from the affluent neighborhoods within a five-mile radius of the facility. The health club is a first-class facility used by more than 5,000 dues-paying members pursuant to a Business Plan. The 80 to 90 scholarships offered are not well publicized and are incidental to the primary use. *See, e.g., Sioux Valley Hosp. Assn. v. South Dakota State Bd. of Equal.*, 513 N.W.2d 562 (1994). *See also, In re: Mercy Health System of Kansas, Inc.*, 29 Kan.App.2d 375, 26 P.3d 78 (2001). The health club is not operated for the physical benefit of the public. The health club is no operated for the benefit of an indefinite number of persons. The health club is operated for the benefit of a definite number of persons: the health club's dues-paying clientele. And, the health club is used by a for-profit management company.

The Assessor and the Intervenor have demonstrated by clear and convincing evidence that the Board's decision was incorrect and both unreasonable and arbitrary. The Assessor and the Intervenor have also established by clear and convincing evidence that the property is not used for a charitable purpose, and that it is used by a for-profit business. The Board's decision to grant a requested exemption for the health club for tax year 2003 must be vacated and reversed.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal pursuant to Neb. Rev. Stat. §77-202.04(2003 Supp., as amended by 2004 Neb. Laws, L.B. 973, §8) and Neb. Rev. Stat. §77-5007(2) (2003 Supp.).
2. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. The burden of showing the Board's decision is unreasonable rests on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001). See also *Pittman v. Sarpy County Bd. of Equal.*, 258 Neb. 390, 398 - 399, 603 N.W.2d 447, 453 - 454 (1999).
3. Tax exemption provisions are to be strictly construed. *Metropolitan Utilities Dist. of Omaha v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997).
4. Tax exempt status under the federal Internal Revenue Service Code is not determinative for tax exemption under Nebraska law. *Nebraska State Bar Foundation v. Lancaster County Bd. Of Equal.*, 237 Neb. 1, 10, 465 N.W.2d 111, 118 (1991).

5. The Assessor and the Intervenor have adduced clear and convincing evidence that the Board's decision was incorrect and both unreasonable and arbitrary.
6. The Applicant has the burden of establishing the exemption. *Nebraska State Bar Foundation v. Lancaster County Bd. Of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
7. The property must be used exclusively for religious, educational, charitable, or cemetery purposes. The property need not be used solely for one of the four categories of exempt use, but may be used for a combination of the exempt uses. The term "exclusive use" means the "predominant or primary use." Title 350, Nebr. Admin. Code, Chapter 40, reg. 005.03 (04/2003).
8. No exemption is permitted for a portion of the property where exempt and non-exempt uses are commingled and the property is not used exclusively for exempt purposes. Title 350, Nebr. Admin. Code, Chapter 40, Reg. 005.03. (04/2003).
9. The Applicant has failed to establish by clear and convincing evidence that the subject property is used exclusively or predominantly for charitable purposes.
10. The Applicant failed to establish by clear and convincing evidence that the subject property is not used for financial gain or profit.

11. The Douglas County Board of Equalization's decision to grant the requested exemption for tax year 2003 must be vacated and reversed.
12. If the Commission determines exempted property to be taxable, the Commission must remand this matter to the county board of equalization to determine taxable value of the property unless the parties stipulate to such taxable value during the hearing before the commission. Neb. Rev. Stat. §77-5017(2) (2003 Supp., as amended by 2003 Neb. Laws, L.B. 973, §61).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Douglas County Board of Equalization's Order granting the requested exemption for tax year 2003 for the Applicant's real property legally described as Lot 1, Lakeside Hills Addition, Douglas County, Nebraska, and more commonly known as the Alegent Lakeside Wellness Center, is vacated and reversed.
2. This matter, as required by Neb. Rev. Stat. §77-5017(2) (Reissue 2003, as amended by 2004 Neb. Laws, L.B. 973, §61) is remanded to the Douglas County Board of Equalization for a determination of the taxable value of the subject property for tax year 2003.

3. The Douglas County Board of Equalization shall (a) assess such property using procedures for assessing omitted property; (b) determine the taxable value of the subject property within ninety days of the date of this Order; and (c) apply interest, but not penalty, to the taxable value as of the date of this Order, or the date the taxes were delinquent, whichever is later.
4. Any request for relief by any Party not specifically granted by this Order is denied.
5. This decision, if no appeal is filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B. 973, §51).
6. This decision shall only be applicable to tax year 2003.
7. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 9th day of September, 2004.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

Wm. R. Wickersham, Chair

SEAL