

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

PANHANDLE COMMUNITY SERVICES,)	
)	
Appellant,)	Case Nos 06E-001, 06E-002, and 06E-003
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISIONS OF THE MORRILL
MORRILL COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by Panhandle Community Services to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn and Conference Center, Sidney, Nebraska, on October 31, 2006, pursuant to an Order for Hearing and Notice of Hearing issued August 7, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

William E. Laux, a Director was present at the hearing on behalf of Panhandle Community Services ("the Taxpayer"), with Paul E. Hofmeister as legal counsel.

The Morrill County Board of Equalization ("the County Board") appeared through legal counsel, Jean Rhodes, County Attorney for Morrill County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that the subject property should be exempt from taxation.

The issues on appeal related to that assertion are:

Was the decision of the County Board denying an application for exemption of the subject property from taxation unreasonable or arbitrary?

Is the subject property exempt from taxation?

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has an interest, sufficient to maintain the above captioned appeals, in parcels of real property described as Lot 9 Block 2, East Addition, South Bayard; Lot 10, Block 2, Second East Addition, South Bayard; and Lots 2, 3, and 4 Block 4, Second East Addition, South Bayard; all City of Bayard, Morrill County, Nebraska. Those parcels are the ("subject property").
2. Applications for exemption of the subject property from taxation were filed by the Taxpayer.
3. The Assessor recommended disapproval.
4. The Assessor's recommendations were affirmed by the County Board.
5. The appeals were consolidated for hearing by order of the Commission.
6. An Order for Hearing and Notice of Hearing issued on August 7, 2006, set a hearing of the appeals for October 31, 2006, at 12:00 p.m. MST.

7. 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. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over issues raised during the county board of equalization proceedings on the appealed decision. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998).
2. “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

3. This section, 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).

4. “(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 (Supp 2005).

5. In reference to subsection (1)(c) of Nebraska Statutes section 77-202, exclusive use means the primary or dominant use of property, as opposed to incidental use. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993)
6. Subsection (1)(c) of Nebraska Statutes section 77-202 contains a two-tier approach to property tax exemption: the first tier involves the nature, character, or status of a property owner, and the second tier concerns the use of the property. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
7. To be tax exempt, property must (1) be owned by an organization designated in subsection (1)(c) of Nebraska Statutes section 77-202; (2) be used exclusively for at least one of the purposes specified in subsection (1) (c) of Nebraska Statutes section 77-202; and (3) not be (a) owned or used for financial gain to the property owner or user, (b) used more than 20 hours per week for sale of alcoholic liquors, or (c) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991)
8. Statutes exempting property from taxation are to be strictly construed, property must come clearly within the statutory provisions granting such exemption, and the burden of proving the right to the exemption is upon the claimant. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).

9. A liberal and not a harsh or strained construction is to be given to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order that the true intent of the constitutional and statutory provisions may be realized. The judicial interpretation of such statute should always be reasonable. *Young Men's Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921).
10. The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominant use is for one of the purposes set out in this section. *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971)
Berean Fundamental Church Council, Inc. v. Board of Equalization, 186 Neb. 431, 183 N.W.2d 750 (1971).
11. Regarding "mental" benefit of the public in subsection (1)(c) of section 77-202 Nebraska Statutes, as one of the requisite purposes of a charitable organization, "mental" means "intellectual," which means, among other things, engaged in creative literary, artistic, or scientific labor. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
12. Relative to a charitable organization, "an indefinite number of persons" in subsection (1)(c) of this section means a group of persons with a common characteristic, that is, a class, uncertain in number and composed from the public at large or a community. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
13. “The word “charitable” has been held to mean something more than mere alms-giving or the relief of poverty and distress and it has been given a significance broad enough to

- include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits.” *Lincoln Woman's Club*, 178 Neb. 357, 363-64, 133 N.W.2d 455, 460, (1965).
14. 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.” *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 3, 337 N.W.2d 103, 105 (1983).
 15. Under subsection (1)(c) of section 77-202 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. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).
 16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
 17. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action 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. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
 18. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove

that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted)

19. The Commission can grant relief only if the Taxpayer establishes by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005).
20. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
21. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
22. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).

IV. DISCUSSION

The subject property consists of three parcels. Two of the parcels are improved with three duplexes. Construction of the duplexes began in 1997 with occupancy in 1998. The third parcel is used in conjunction with the two improved parcels for a drive and green space. The

duplexes are three bedroom homes with 1050 square feet each. The Taxpayer applied for a charitable use exemption of the subject property from taxation. The application was denied. The Taxpayer is a nonprofit corporation existing under the laws of the State of Nebraska. The subject property is held without gain or profit to the owner or user. The subject property is not used for the sale of alcoholic liquors. The Taxpayer does not discriminate in membership or employment based on race, color, or national origin. The subject property is used exclusively for the provision of housing to migrant farm workers and others on a subsidized basis. Rental charged to any tenant is based on 30% of a tenant's income. The lower a tenant's income the lower the rent. Operation of the subject property is subsidized by the Federal government. Market rents are established for the subject property by the Federal government and the Taxpayer is reimbursed for the difference between rents collected and the market rent. (E14). Market rent is determined by USDA. Exhibit 38 is an example of those determinations. The most recent USDA determined market rent was \$600 per unit including utilities. Losses in the subject property's operation can occur and are made up by the Taxpayer. There is no evidence that funding for losses is made up with funds raised as charitable contributions to the Taxpayer. Two years ago losses required a financial workout with increased rents.

The subject property is operated by the Taxpayer to meet the objectives of a Federal grant acting through the United States Department of Agriculture ("USDA"). (E14). The Taxpayer also obtained a USDA loan for construction of the duplexes. (E16). The loan is secured by a mortgage. (E17). The grant and loan were obtained after a study of housing needs for migrant farm workers was conducted in 1992. Migrant farm workers are necessary to assist in the seasonal production of sugar beets and dry edible beans. Any migrant farm laborer, as

determined by the USDA criteria, can rent a unit in a duplex. If a duplex unit is rented by a low income tenant who is not a migrant farm worker, the migrant farm worker can have the nonimmigrant farm worker's occupancy terminated and obtain use of the duplex unit.

Tenants are required to sign a lease. The lease provides for a month to month tenancy terminable on 30 days notice, a security deposit, occupancy restrictions, a wide variety of other restrictions and compliance with rules and regulations set out separately. (E23). The rules and regulations require payment of a \$10.00 return check fee, court costs on a collection action, replacement of light bulbs, and a \$5.00 key charge. (E27). The lease also has an addendum. (E24). The addendum provides for a \$25.00 furniture disposal charge, a \$25.00 grounds charge, parking restrictions and participation in case management. (E24). Tenants can be evicted for nonpayment of rent but no eviction has occurred since construction.

Over a period from July of 2002 to May 15, 2006, the duplexes had 33 different tenants. (E15:1). Eleven of the tenants were migrant and 22 were transitional or nonmigrant. (E15:1). The median term of occupancy was 6 months and the average tenancy was 6.5 months. The longest tenancy was 20 months.

The Taxpayer conducts other supportive programs in addition to operation of the subject property. Those other programs include a health program serving over 1,000 children, a head start program for child development, youth services, and family and community services. The Taxpayer's aim is to help people help themselves to become self-sufficient. Tenants of the subject property may be eligible for other services of the Taxpayer and are encouraged through the required case management to use those services. Availability of the additional services from the Taxpayer makes tenancies in the subject property unique in the area. The Taxpayer

offers all of its services, other than housing, to many persons who are not tenants in the subject property.

It is well established that low-income housing is not a charitable use of property. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971); *Christian Retirement Homes, Inc. v. Board of Equalization*, 186 Neb. 11, 180 N.W.2d 136 (1970); *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961). *Pittman v. Sarpy County Bd. Of Equalization*, 258 Neb. 390, 603 N.W.2d 447 (1999). The Supreme Court has however held that the provision of some housing is charitable. *Young Women's Christian Assn. v. City of Lincoln*, 177 Neb. 136, 128 N.W.2d 600 (1964) and *Young Men's Christian Assn. v. Lancaster County*, 106 Neb. 105, 182 N.W. 593, (1921). The lines drawn in the noted cases are not readily apparent and perhaps can't or shouldn't be readily apparent. See, *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971). The lines were last distinguished in *Pittman* supra. In *Pittman* the Court emphasized differences in funding streams, membership requirements, supervision, and a limitation on tenancy for a particular purpose.

The evidence in this appeal is that primary funding is from the Federal Government in the form of a grant and continuing rent subsidies that are used in part to repay a federal loan. Primary support of the Taxpayer's construction and operation of the subject property comes from the Federal government rather than the general charitable activities of the community in which the subject property is located. While no tenant has occupied a unit for more than 20

months, there is no limit placed by the Taxpayer on the duration of a tenancy. Roomers in the Young Women's Christian Assn. building *could not* reside there for more than 3 years. Roomers in the Young Women's Christian Assn. building were subject to a curfew. See. *Young Women's Christian Assn.* supra. Tenants of the Taxpayer are only advised and encouraged to use other services offered by the Taxpayer. There is no evidence that tenants of the Taxpayer are subject to special rules such as a curfew. Finally at least from the Taxpayer's perspective, the subject property could be operated without a loss. The Federal government will reimburse the Taxpayer for the difference between rent paid by a tenant and "market rent". With that assurance from the Federal Government, the Taxpayer is no different than any other landlord trying to break even. There is no evidence that the Taxpayer intentionally operates the subject property at a loss as evidence of a charitable objective.

The Commission cannot determine that the decision of the County Board was unreasonable or arbitrary.

V. CONCLUSIONS OF LAW

- 1 The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decisions of the County Board are unreasonable or arbitrary, and the decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decisions of the County Board determining that the subject property is taxable as of the assessment date January 1, 2006, are affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Morrill County Treasurer, and the Morrill County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
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 2006.

6. This order is effective for purposes of appeal December 14, 2006.

Signed and Sealed. December 14, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

William C. Warnes, Commissioner

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.