

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

BETHEL BAPTIST CHURCH,)	
)	
Appellant,)	Case No. 11E 004
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
SCOTTS BLUFF COUNTY BOARD OF)	THE SCOTTS BLUFF COUNTY BOARD
EQUALIZATION,)	OF EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Bethel Baptist Church ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn & Suites Scottsbluff, 301 W. Hwy. 26, Scottsbluff, Nebraska, on June 7, 2011, pursuant to an Order for Hearing and Notice of Hearing issued April 12, 2011. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

William D. Powell, Pastor of Bethel Baptist Church, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Tiffany Wasserburger, a Deputy County Attorney for Scotts Bluff County, Nebraska, was present as legal counsel for the Scotts Bluff County Board of Equalization ("the County Board").

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 (Reissue 2009). The final decision and order of the Commission in this case 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:

Whether the decision of the County Board denying an application for exemption of the subject property from taxation is unreasonable or arbitrary; and

Whether the subject property is exempt from taxation.

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 parcel of real property to which this appeal pertains ("the Subject Property") is Lot 17 Block 2 Westmoor 4th Add, Scottsbluff, Scotts Bluff County, Nebraska.
3. The Taxpayer sought reaffirmation of an existing exemption from property tax. (E2:15).
4. Reaffirmation was allowed by the County Assessor. (E2:15).
5. Subsequent to reaffirmation a determination was made that the exemption of the subject property from taxation should be reviewed. (E2:18).

6. The Taxpayer's pastor acknowledged that it received notice of a hearing before the County Board to be held on March 7, 2011.
7. Notice of the County Board of Equalization meeting was published. (E2:21).
8. The County Board determined that the exemption from taxation granted for the subject property should be revoked. (E2:22).
9. Notice of the County Board's decision was given to the Taxpayer. (E1).
10. The Taxpayer timely appealed to the Commission.
11. The Tax Commissioner was served with a Notice in Lieu of Summons and did not exercise the statutory right to intervene.
12. An appeal of the County Board's decision was filed with the Commission.
13. An Order for Hearing and Notice of Hearing issued on April 12, 2011, set a hearing of the appeal for June 7, 2011, at 10: 00 a.m. MDT.
14. 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 this appeal is over issues raised during the county board of equalization proceedings. *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. 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).
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. (Reissue 2009).

5. 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. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).
6. Subsection (1)(d) 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)(d) of Nebraska Statutes section 77-202; (2) be used exclusively for at least one of the purposes specified in subsection (1) (d) 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 interpretation 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. “(1) A properly granted exemption of real or tangible personal property, except real property used for cemetery purposes, provided for in subdivisions (1)(c) and (d) of section 77-202 shall continue for a period of four years if the statement of reaffirmation of exemption required by subsection (2) of this section is filed when due. The four-year

- period shall begin with years evenly divisible by four.” Neb. Rev. Stat. §77-202.03(1) (Reissue 2009).
12. “(2) In each intervening year occurring between application years, the organization or society which filed the granted exemption application for the real or tangible personal property, except real property used for cemetery purposes, shall file a statement of reaffirmation of exemption with 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, certifying that the ownership and use of the exempted property has not changed during the year.” Neb. Rev. Stat. §77-202.03(2) (Reissue 2009).
 13. In any year, the county assessor or the county board of equalization may cause a review of any exemption to determine whether the exemption is proper. Such a review may be taken even if the ownership or use of the property has not changed from the date of the allowance of the exemption. If it is determined that a change in an exemption is warranted, the procedure for hearing set out in section 77-202.02 shall be followed, except that the published notice shall state that the list provided in the county assessor's office only includes those properties being reviewed. Neb. Rev. Stat. §77-202.03(4) (Reissue 2009).
 14. The county board of equalization, between February 1 and June 1 after a hearing on ten days' notice to the applicant and the publication of notice as provided in section 77-202.01, and after considering the recommendation of the county assessor and any other information it may obtain from public testimony, shall grant or withhold tax exemption

for the real property or tangible personal property on the basis of law and of regulations promulgated by the Tax Commissioner. Neb. Rev. Stat. §77-202.02 (Reissue 2009).

15. Notice that a list of the applications from organizations seeking tax exemption, descriptions of the property, and recommendations of the county assessor are available in the county assessor's office shall be published in a newspaper of general circulation in the county at least ten days prior to consideration of any application by the county board of equalization. Neb. Rev. Stat. §77-202.01(1) (Reissue 2009).
16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
17. 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).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. 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. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).

20. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. *See, e.g., Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
21. "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).
22. 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).
23. 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).
24. Subject matter jurisdiction may be raised any time. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

IV. ANALYSIS

The County Board is required by law to give 10 days notice of a hearing to consider revocation of an exemption. Neb. Rev. Stats. §§77-202.03(4) and 77-202.02 (Reissue 2009). The Taxpayer's Pastor acknowledged that it received notice of a hearing. The Notice of hearing in evidence is at page 20 of Exhibit 2. The notice is not dated nor is there any evidence of the date it was mailed. The notice is addressed To Whom It May Concern. County Assessor records

for the parcel being reviewed show that the owner of the parcel was known. The notice does not describe the parcel for which exempt status is being reviewed. In addition, the notice was sent by a Deputy Assessor when the review would be conducted by the County Board. Sending a notice addressed To Who It may Concern when the owner of a parcel under review is known to the sender renders the notice defective. The parcel being reviewed is not identified in the notice. It is worth noting that another statutory provision requires the county assessor to keep a list of parcels subject to review and that the County Board publish notice that the list exists. Even if not required by law, identification of parcels being reviewed is important so that the owner can prepare for the County Board's review. Failure to identify the parcel being reviewed makes the notice deficient. As a contrast to the notice given by the County Assessor, the notice given by the County Clerk that the County Board had acted to revoke the exemption is dated, properly addressed, and describes the property for which the exemption was revoked. (E1:1).

The County Board is required to publish notice that a list of organizations whose properties are being reviewed, descriptions of the property, and the recommendations of the county assessor are available in the county assessor's office. Neb. Rev. Stats. §§77-202.02 and 77-202.01(2) (Reissue 2009). There is no evidence that the County published notice as required. Provision of notice to the Taxpayer and publication of the notice as prescribed by statute is mandatory. Absent compliance with the noted statutory provisions the County Board did not have jurisdiction to consider revocation of the property tax exemption previously granted for the subject property. The County Board's decision is void.

**V.
CONCLUSIONS OF LAW**

1. The Commission has limited subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property is taxable as of the assessment date January 1, 2011, is void.
2. This decision, if no appeal is timely filed, shall be certified to the Scotts Bluff County Treasurer, and the Scotts Bluff County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2011.
6. This order is effective for purposes of appeal on June 22, 2011.

Signed and Sealed. June 22, 2011.

Nancy J. Salmon, Commissioner

Wm. R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.