

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

Tony Fulton, Tax Commissioner & Ruth Sorenson, Property Tax Administrator, Nebraska Department of Revenue, Appellant,

v.

Keith County Board of Equalization, West Central Nebraska Development District, Allo Communications, LLC, & Mud Buckets, Inc., Appellees

Case No: 11E 018

Decision and Order Reversing the Determination by the Keith County Board of Equalization

**For the Appellant:**

Jon Cannon,  
Nebraska Department of Revenue

**For the Appellees:**

No appearances

Heard before Commissioners Robert W. Hotz and Steven A. Keetle.

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel located at 333 E. 2<sup>nd</sup> Street, in the city of Ogallala, Keith County, Nebraska. The parcel is improved with a 4,378 square foot office building. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 1.

**II. PROCEDURAL HISTORY**

The Assessment Manager for Keith County (the Assessment Manager)<sup>1</sup> determined that the Subject Property was not exempt from taxation and delivered a Notice of Taxable Status<sup>2</sup> to the West Central Nebraska Development District (the Taxpayer) for tax year 2011. The Taxpayer protested this determination to the Keith County Board of Equalization (the County Board) and requested that the Subject Property be exempt from taxation. The County Board determined that

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<sup>1</sup> At all times relevant to these proceedings, employees of the Property Assessment Division, Nebraska Department of Revenue, performed the assessment function, rather than a County Assessor.

<sup>2</sup> Exhibit 3.

portions of the Subject Property other than an apartment were approved for exemption from property taxation “as long as fair market rent is being paid.”<sup>3</sup>

The Tax Commissioner and Property Tax Administrator appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission).<sup>4</sup> Allo Communications, LLC and Mud Buckets, Inc., lessees, were made parties to the appeal and were issued a notice of the appeal.<sup>5</sup> Prior to the hearing, the parties exchanged exhibits, as ordered by the Commission. The Commission held a hearing on April 4, 2016

### III. STANDARD OF REVIEW

The Commission’s review of the determination of the County Board of Equalization is de novo.<sup>6</sup> 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.”<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>10</sup>

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<sup>3</sup> Exhibit 1.

<sup>4</sup> The Tax Commissioner or Property Tax Administrator may appeal a determination by the County Board of Equalization granting an exemption for real or tangible personal property. Neb. Rev. Stat. §77-202.04 (2014 Cum. Supp.).

<sup>5</sup> See, Neb. Rev. Stat. §77-202.04 (2014 Cum. Supp.).

<sup>6</sup> See, Neb. Rev. Stat. §77-5016(8) (2014 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).

<sup>7</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>10</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

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.”<sup>11</sup> 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.”<sup>12</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>13</sup>

#### IV. EXEMPTION

##### A. Applicable Law

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation.<sup>14</sup> When the state or a governmental subdivision leases property to a private party, the public purpose requirement is not met unless “the lease of the property is at fair market value for a public purpose.”<sup>15</sup>

“Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is on the claimant.”<sup>16</sup> 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.<sup>17</sup>

In addition, the Courts in Nebraska have developed several principles concerning requests for exemptions: (1) an exemption is never presumed;<sup>18</sup> (2) the alleged exempt property must clearly come within the provision granting the exemption;<sup>19</sup> (3) the laws governing property tax exemptions must be strictly construed;<sup>20</sup> (4) the courts must give a “liberal and not a harsh or strained construction ...to the terms ‘educational,’ ‘religious,’ and ‘charitable’ in order

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<sup>11</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>12</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

<sup>13</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

<sup>14</sup> Neb. Const., Art. VIII, § 2. Property of the state and its governmental subdivisions is defined at Neb. Rev. Stat. §77-202(1)(a)

<sup>15</sup> Neb. Rev. Stat. §77-202(1)(a)(ii).

<sup>16</sup> *Fort Calhoun Baptist Church v. Washington Cty. Bd. of Equal.*, 277 Neb. 25, 30, 759 N.W.2d 475, 480 (2009) (citations omitted).

<sup>17</sup> 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).

<sup>18</sup> *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999).

<sup>19</sup> *Nebraska State Bar Foundation v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 4, 465 N.W.2d 111, 114 (1991).

<sup>20</sup> *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).

that the true intent of the constitutional and statutory provisions may be realized[;]”<sup>21</sup> and (5) this interpretation should always be reasonable.<sup>22</sup>

### **B. Findings of Fact and Conclusions of Law**

The Nebraska Constitution specifies that property of the state and its governmental subdivisions used for authorized public purposes is exempt from taxation. In this proceeding, the Tax Commissioner and Property Tax Administrator have stipulated that West Central Nebraska Development District (West Central) is a governmental subdivision of the State. When a development district is formed under the Interlocal Cooperation Act,<sup>23</sup> creating a joint entity, such entity constitutes a separate public body corporate and politic of this state.<sup>24</sup>

At all times relevant to tax year 2011, West Central was the lessor for two separate portions of the Subject Property. The lessees were Allo Communications and Mud Buckets, Inc. Under the terms of each lease, it was agreed that rent was to be “calculated on a graduated scale below fair market value” as established by West Central’s “Administrative Board Rates and Fees Schedule.”<sup>25</sup> In order to maintain a property tax exemption as a governmental subdivision leasing its property to a private party West Central must prove that the property is “used for authorized public purposes,”<sup>26</sup> and that “the lease of the property is at fair market value for a public purpose.”<sup>27</sup> We cannot conclude that the public purpose requirement has been met when the leases by West Central were made for rental amounts below fair market value. Therefore, we find that West Central has failed to prove that the Subject Property may legally be exempt from taxation.

## **V. CONCLUSION**

The Taxpayer has not met the burden that the Subject Property should be granted a property tax exemption for tax year 2011. The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable.

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<sup>21</sup> *Lincoln Woman’s Club v. City of Lincoln*, 178 Neb. 357, 363, 133 N.W.2d 455, 459 (1965).

<sup>22</sup> *Id.* (citing, *Young Men’s Christian Assn. of City of Lincoln v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921)).

<sup>23</sup> Neb. Rev. Stat. §13-1902.

<sup>24</sup> Neb. Rev. Stat. §13-804(6).

<sup>25</sup> See, Exhibit 6:2 and Exhibit 7:2.

<sup>26</sup> Neb. Const., Art. VIII, § 2. Property of the state and its governmental subdivisions is defined at Neb. Rev. Stat. §77-202(1)(a)

<sup>27</sup> Neb. Rev. Stat. §77-202(1)(a)(ii).

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

## VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Keith County Board of Equalization determining that any portion of the Subject Property is exempt from property taxation for tax year 2011 is vacated and reversed.<sup>28</sup>
2. The Subject Property is not exempt from property taxation for tax year 2011.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Keith County Treasurer and the Keith County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order, is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2011.
7. This Decision and Order is effective for purposes of appeal on April 22, 2016.<sup>29</sup>

Signed and Sealed: April 22, 2016

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Robert W. Hotz, Commissioner

SEAL

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Steven A. Keetle, Commissioner

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<sup>28</sup> The determination by the County Board of Equalization was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

<sup>29</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.