

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

D & N EVENT CENTER,)	
)	
Appellant,)	CASE NO. 98E-2
)	
vs.)	
)	DOCKET ENTRY
LINCOLN COUNTY BOARD OF)	REVERSING COUNTY'S DECISION
EQUALIZATION,)	TO DENY AN EXEMPTION
)	
Appellee,)	
)	
and)	
)	
CATHERINE D. LANG,)	
Property Tax Administrator,)	
)	
Intervenor,)	

The Nebraska Tax Equalization and Review Commission ("Commission") called the above-captioned case for hearing on the merits in the City of North Platte, Lincoln County, Nebraska, on the 30th day of June, 1999, pursuant to a Notice of Hearing issued the 26th day of March, 1999.

D & N Event Center ("Applicant") appeared through its President. The Lincoln County Board of Equalization ("County") appeared through the Deputy Lincoln County Attorney. The Property Tax Administrator appeared through counsel. During the hearing, the Commission took judicial notice of certain information, and each of the parties was afforded the opportunity to present evidence and argument. Each party was also afforded the opportunity to cross-examine witnesses of the opposing party as required by law.

Neb. Rev. Stat. §77-5018 (1997 Supp.), requires that every final decision and order entered by the Commission which is adverse to a party be stated in writing or on the record and be accompanied by findings of fact and conclusions of law. The Commission, after receiving the

exhibits and hearing evidence and argument, entered its Findings of Fact, Conclusions of Law, and a Final Order on the merits of the appeal in this case, which were in substance as follows:

FINDINGS OF FACT

From the record, the Commission found and determined as follows:

A. PROCEDURAL FINDINGS

1. That Applicant timely filed an application for exemption from real property taxes ("Application") for tax year 1998. (E27).
2. That the Lincoln County Assessor ("Assessor") recommended that the Application be denied. (E1).
3. That the County denied the Application. (E27).
4. That the Applicant timely filed an appeal of that decision to the Commission. (Appeal Form).
5. That the Property Tax Administrator intervened in the appeal on behalf of the County as provided by Neb. Rev. Stat. §77-202.04 (1998 Cum. Supp.).
6. That the County made a "Motion in Limine" on the record alleging that the Commission's jurisdiction in this appeal was limited to a consideration of whether the Applicant qualified for exemption under the applicable exemption provisions for educational and agricultural/horticultural societies. The "Motion in Limine" was based on the language of Neb. Rev. Stat. §77-1511, which is identical to the language of 1999 Neb. Laws, L. B. 140, Section 7 (effective date May 26, 1999). The pertinent language

of the statute is as follows:

“The commission shall hear appeals and cross appeals . . . as in equity and without a jury and determine de novo all questions raised before the county board of equalization . . . ”

That the issue of whether or not the subject property qualifies for a “charitable” exemption was not, from the record before the Commission, presented to the County, as the appropriate “box” was not checked, and no record of the proceedings before the County was made a part of the record.

The Commission determined that disposition of the Motion in Limine must be resolved by consideration of two issues: (1) the role of the Commission; and (2) the test adopted by the Nebraska Court of Appeals in *Arcadian Fertilizer v. Sarpy Cty. Bd. Of Equal.*, 2 Neb. App. 499, 505 (1998).

As to the first issue, the Commission hears appeals “as in equity.” Equity looks through form to substance. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147 (Neb. 1999). The substance of the question is whether the subject property should be exempt from real property taxation.

To hold that the failure to “check the appropriate box” is fatal to Applicant’s appeal would be to elevate form over substance, and would constitute a violation of the Commission’s statutory duty. The second issue requires the Commission to “determine whether the question as presented to the Board of Equalization and the question as presented to the Commission were sufficiently related in content and context to be deemed the same question at both levels.” *Arcadian, supra*. The question presented to

both bodies is whether the property should be exempt from taxation. The property may be exempt as an agricultural/horticultural society, or as an educational, religious, charitable, or cemetery organization. The Commission is charged with considering "all questions anew." Given the mandate of hearing cases "as in equity," and the charge that the question must be considered "anew," the Commission determined that it had jurisdiction of the question as to whether the subject property should be exempt on charitable grounds, and overruled the Motion.

**B.
SUBSTANTIVE FINDINGS**

1. That the Applicant is the owner of record of certain real property legally described as Lot 1, Simon 2nd Replat of Simon Replat of PT of SE 1/4, more commonly known as 501 East Walker Road, North Platte, Nebraska ("subject property").
2. That the subject property consists of an "event center" which consists of 40,000 square foot building, which contains a 35,000 square foot event or exhibit area, and a 3,000 square foot meeting room. The center has a seating capacity of 3,000, a concession area, and parking for 1,000 cars. (E5).
3. That the subject property is not owned and used by an Agricultural or Horticultural Society, as defined in Title 316, Neb. Admin. Code, Chapter 42, Reg. 42-005. That the property therefore does not qualify for exemption under the applicable provisions of Neb. Rev. Stat. §77-202(1)(b) (1998 Cum. Supp.).
4. That from the record before the Commission, the subject property is not used to provide ". . . regular courses with systematic instruction in academic, vocational, or technical

subjects, or a museum or historical society” That the subject property therefore IS NOT owned by an educational organization, that is, an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects, or a museum or historical society operated exclusively for the benefit and education of the public.

5. That from the record before the Commission, the subject property IS NOT owned by a religious organization, that is, an organization whose purpose is the dedication to or profession of a sectarian creed and belief in divine or superhuman power or powers to be obeyed and worshiped, or the furtherance and enrichment of spiritual faith involving a code of ethics and a spiritual philosophy.
6. That from the record before the Commission, the subject property generated approximately \$45,000 in income from all sources in 1997, and a similar amount in 1998. That the bulk of the income is from grants, donations, and fees received. That approximately one-fourth of the income generated from the property is received from rent.
7. That the property was used for a “non-exempt” purpose on approximately 27 days during calendar year 1997, and for approximately 16 days during the first five months of calendar year 1998. (E3:2).
8. That although the subject property does generate income from “for profit” users, the leasing of the subject property to some users who are for profit organizations is not fatal to an exemption application, so long as that use is incidental, and not the predominant use.

9. That the subject property has not generated a profit for the D & N Event Center. That the subject property IS NOT used for financial gain or profit.
10. That although not dispositive of the issue of qualified ownership for exemption purposes, the owner of the subject property is a "Not for Profit" corporation organized under the laws of the State of Nebraska. (E30).
11. That although not dispositive of the issue of qualified ownership for exemption purposes, the owner of the subject property is recognized as a tax exempt entity for federal tax purposes under the provisions of the Internal Revenue Service Code, Section 501(c)(3). (E32).
12. That from the record before the Commission, the area served by the subject property covers a 6 county area, which have a combined population of approximately 60,000 persons. That approximately 2,000 children are served by the subject property.
13. That the uncontroverted evidence before the Commission is that the subject property's indoor facilities consisting of a tennis court, basketball court, volleyball court, and dirt arena is used for the following purposes:
 - Youth Basketball: 35 hours per week between December and April.
 - Youth Volleyball: 20 hours per week between September and December.
 - Youth wrestling: 6 hours per week between January and May.
 - Girls softball: 27 hours per week between October and May.
 - Youth soccer: 14 hours per week between October and December.
 - Baseball: 4 hours per week between October and May. (E3:1).There was also testimony that other activities sponsored by a college were held over

summer months, as well as anti-drug and anti-violence programs by Mad Dads.

14. That the subject property is predominantly or primarily used for youth basketball, youth volleyball, youth wrestling, girls softball, youth soccer, and youth baseball, primarily between September and May (the "winter months"). That the only "fees" charged are for the youth basketball league (\$25, which also entitles the youth to a "t-shirt") and an available family membership fee of \$100, which allows all family members the opportunity to participate in all activities. (E3:1). Further that the fees are waived for any child who is unable to afford them.
15. That from the record before the Commission, the primary or predominant use of the subject property is for charitable purposes, specifically recreational use, i.e., physical benefit of area youth, and other charitable purposes.
16. That from the record before the Commission, the subject property IS owned by a charitable organization, that is, an organization operated primarily or predominantly for the purpose of the mental, social or physical benefit of the public or an indefinite number of persons.
17. That the subject property IS NOT owned by a cemetery organization, that is, an organization whose purpose is to maintain areas formally set apart for the interment of the human dead.
18. That the religious, educational, or cemetery use IS NOT the predominant or exclusive use of the subject property. That any religious, educational, or cemetery use of the subject property is an incidental and commingled use.

19. That alcoholic liquor was sold on the premises of the subject property pursuant to approximately 13 Special Designated Licenses under the Nebraska Liquor Control Act, over a period of approximately 19 days out of approximately a 14-month period. (E2). That the subject property IS NOT used to sell alcoholic liquor more than twenty hours per week.
20. That the subject property IS NOT owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.
21. That the Applicant has established that the subject property satisfies the five-part test set forth in the applicable provisions of the state statutes and rules and regulations of the Department of Revenue.
22. That the subject property therefore does qualify for exemption from real property taxation under the applicable laws and rules and regulations governing the exemption of real property from taxation.
23. That from the record before the Commission the Taxpayer has established that the decision of the County to deny the exemption application was unreasonable and arbitrary.
24. That therefore the decision of the County to deny the application for exemption for tax year 1998 is not supported by the evidence, and that decision was unreasonable and arbitrary.

CONCLUSIONS OF LAW

1. That the Commission has jurisdiction over the parties and the subject matter of this appeal.

2. That under Nebraska State Statutes:

“The following property shall be exempt from property taxes . . . (c) Property owned by educational, religious, charitable, or cemetery organizations 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 shall mean an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or a museum or historical society operated exclusively for the benefit and education of the public. For purposes of this subdivision, charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons.” *See, Neb. Rev. Stat. §77-202(1)(c)* (1998 Cum. Supp.).

3. That tax exemption provisions are to be strictly construed. *See Metropolitan Utilities Dist. Of Omaha v. Balka*, 252 Neb. 172, 560 N. W. 2d 795 (1997).

4. That the Applicant has the burden of establishing the exemption. *See Nebraska State Bar Foundation v. Lancaster County Bd. Of Equal.*, 237 Neb. 1, 465 N. W. 2d 111 (1991).

5. That tax exempt status under the federal internal revenue code is not determinative of Applicant's exemption from taxation under Nebraska property tax laws. *See Nebraska State Bar Foundation, supra*, at 10, 118.

6. That "In reference to § 77-202(1)(c), this court has held that exclusive use means the primary or dominant use of property, as opposed to incidental use. An exemption will not be lost if the property claimed to be exempt is used in an incidental manner that is not educational, religious, charitable, or cemetery use, as long as the predominant or primary use of the property is one or more of the exempt uses." *Nebraska Annual Conference of United Methodist Church v. Scotts Bluff County Bd. of Equalization*, 243 Neb. 412, _____, 499 N.W.2d 543, 547 (Neb. 1993).
7. That the Rules and Regulations governing exemptions direct that:
"A five-part statutory test is prescribed for determining eligibility for educational, religious, charitable, and cemetery property tax exemptions. The five mandated criteria are ownership, exclusive use, no financial gain or profit, restricted alcoholic liquor sales and prohibited discrimination. The property must meet all five of the criteria for the exemption to be allowed. *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.*
8. That under this five-part test, the property must be owned by an educational, religious, charitable, or cemetery organization, as those terms are defined in the regulations. *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.01.*
9. That the property must be used exclusively for religious, educational, charitable, or cemetery purposes. That 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. That the term "exclusive use" means the "predominant or primary use." *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.02.*

10. That the property must not be used for financial gain or profit. *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.03.*
11. That the property must not be used for the sale of alcoholic liquors for more than twenty hours per week. *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.04.*
12. That the property must not be owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.05.*
13. That 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. *See Title 316, Nebr. Admin. Code, Chapter 42, Reg. 006.02.*
14. That based on the record before the Commission, the Commission must, and hereby does, conclude as a matter of law that the decision of the County to deny the Applicant's request for tax exempt status for tax year 1998 was both unreasonable and arbitrary.
15. That therefore the order of the County must be vacated and reversed.

ORDER

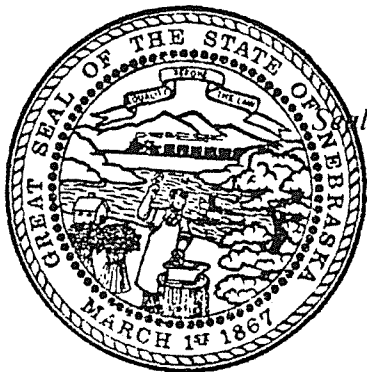
1. That the order of the Lincoln County Board of Equalization denying real property tax exempt status to the subject property for tax year 1998 is vacated and reversed.
2. That Applicant's real property legally described as Lot 1, Simon 2nd Replat of Simon Replat, in the City of North Platte, Lincoln County, Nebraska, more commonly known as 501 East Walker Road, shall be removed from the tax rolls of Lincoln County, Nebraska, for tax year 1998.

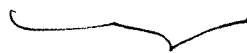
3. That this decision, if no appeal is filed, shall be certified to the Lincoln County Treasurer, and the Lincoln County Assessor, pursuant to Neb. Rev. Stat. §77-1511 (Reissue 1996).
4. That this decision shall only be applicable to tax year 1998.
5. That each party is to bear its own costs in this matter.

IT IS SO ORDERED.

The above and foregoing Findings of Fact, Conclusions of Law, and Order were approved by a quorum of the Commission, and entered of record on the 30th day of June, 1999, and are therefore deemed to be the Order of Commission in this case, pursuant to Neb. Rev. Stat. §77-5005 (Reissue 1996).

Signed and sealed this 2nd day of July, 1999.





Mark P. Reynolds, *Chairman*