

Legislative Resolution 186 (LR186) Report
First Session – 107 Legislature
December, 2021

Introduction

Legislative Resolution 186 (LR186) was introduced by Senator Tom Brandt. The stated purpose of LR186 is:

The economic survival of many towns in Nebraska is dependent on features that encourage residents to continue living there. For some towns, a nonprofit movie theatre is one such feature. However, nonprofit movie theaters in certain jurisdictions in this state have been granted an exemption from state taxes, while others have not. This interim study seeks to improve consistency in granting a tax-exempt status to nonprofit movie theaters based on criteria that uses a clear definition of what constitutes a charitable or educational organization for such purposes and considers whether the nonprofit movie theatre holds a certification of exemption under section 501(c)(3) of the Internal Revenue Code. (Legislative Resolution 186, 2021)

LR186 identified four issues to be addressed:

1. Identifying the location of operating nonprofit movie theaters in Nebraska.
2. Ascertaining the tax exempt status of identified nonprofit movie theaters.
3. Evaluating the criteria used to assign and reject a tax exemption for such nonprofit movie theaters.
4. Examining the use of terms charitable and educational in designating a tax exempt status.

Findings

Researching the first two issues has been challenging. A nonprofit movie theater is a movie theater that has a 501(c)(3) designation for taxing purposes. The Nebraska Department of Revenue cannot provide a list of 501(c)(3) nonprofit movie theaters in Nebraska since it does not differentiate the income tax information filed by a movie theater as a for-profit concern or a non-profit concern.

The Department of Revenue uses the NAICS codes for identifying movie theaters in its income tax database. There are two codes in NAICS for identifying a movie theater:

- 512132 for Drive-in Movie Theaters
- 512131 for Movie Theaters other than Drive-In Movie Theaters

The NAICS codes do not breakdown the theaters as non-profit or for-profit entities. Code 512131 includes movie theaters and performing arts centers. Because the NAICS information is only available on an income tax return and a 501(c)(3) taxing designation is only available on an income tax return and the information is confidential, a list of nonprofit movie theaters cannot be shared by the Department of Revenue.

The best information available on the number of movie theaters in Nebraska is found by doing a Google search using the phrase “nonprofit movie theaters in Nebraska” and comparing those results to information found on the Cinema Treasures (cinematreasures.org/theaters/united-states/Nebraska).

However, as stated earlier, these two searches will only provide the names and locations of **all** movie theaters. The two searches do not provide a breakdown of a theater as a non-profit entity or as a for-profit entity.

In November of 2021, there were 91 open movie theaters in Nebraska with 82 of the theaters showing movies. In June of 2021 there were 90 open movie theaters in Nebraska with 81 theaters showing movies (Movie Theaters in Nebraska, 2021).

Since the information on how a movie theater is organized for taxing purposes is confidential, it is not possible to address the second issue of LR186 which is to determine the property tax exempt status of the nonprofit movie theaters.

Because the first two issues of LR186 are so intertwined and cannot be accurately identified, the remainder of this report will focus on the process for receiving tax exempt status.

Process for Tax Exempt Status

The tax identification of a 501(c)(3) organization does not automatically qualify the organization as property tax exempt. Property tax exempt status is determined on a case-by-case basis from the information file with the county assessor on Form 451.

A property owner or organization must file an *Exemption Application for Tax Exemption on Real and Personal Property by the Qualifying Organizations* (Form 451) with the county assessor to receive property tax exemption status. These original forms are kept on file with the county assessor. Form 451 is not filed with the Property Assessment Division unless there is an appeal to the county board of equalization by the property owner on the request for tax exemption status.

The information requested on Form 451 includes:

- The name and address of the property owner or organization;
- The name of the county where the property is located;
- The state where the business is incorporated;
- The tax year;
- The value of the property, real and/or personal;
- The Parcel ID number;
- The contact name, telephone number, and email address of the individual or organization filing the request;
- The type of ownership of the property;
- The names, title and address of the officers, directors or partners;
- A legal description of real property and a general description of all depreciable tangible personal property;
- How the property is used in one of the exempt categories – agricultural and horticultural society, educational, religious, charitable, or cemetery;
- A detailed description of the primary use of the property and any other uses of the property; and
- Four additional questions for all organizations other than agricultural and horticultural societies.

All the information requested on Form 451 follows the guidelines provided in *Title 350, Chapter 40 – Property Tax Exemption Regulations* (Nebraska Department of Revenue, 2021). The guidelines include information on general rules applicable to property tax exemptions, educational, religious, charitable, and cemetery property tax exemptions, and the application, county review and appeal for property tax exemptions.

All real property in the State is subject to property tax unless an exemption is specifically mandated or permitted by the Nebraska Constitution. Property tax exemptions are to be strictly construed and may be allowed based on the inherent nature of the property, the ownership and use of the property or a combination of these factors.

LR186 only focused on the following property listed below that is exempt from property taxes. Additional properties that are exempt from property taxes may be found in Reg-40-002.03D through 40-002.3L, pages 3 & 4.

- Property owned by the state and governmental subdivision that is used or being developed for public purpose; and
- Property owned by educational, religious, charitable, or cemetery organizations or any organization created for the exclusive benefit of any qualified organization, and used exclusively for educational, religious, charitable, or cemetery purposes. (Nebraska Department of Revenue, 2021, p. 3)

Additional qualifiers for educational, religious, charitable, or cemetery property tax exemption is the property cannot be owned or used for financial gain or profit; used for the sale of alcoholic beverages for more than 20 hours per week; or owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.

An organization or society seeking a property tax exemption for real or personal property must file Form 451, on or before December 31 of the year preceding the year for which the exemption is sought with the county assessor where the property is located. The county assessor will then make a recommendation of approval or denial to the county board of equalization using the guidelines provided in Chapter 40. The property tax exemptions requested on Form 451 do not include motor vehicles.

Exemptions approved by the county board of equalization will continue for a period of four years, beginning with years evenly divisible by four. The first year in each period is known as an application year. If application for exemption is made and approved in an intervening year, the exemption will continue for the remainder of the applicable four-year period.

To continue the exemption for a succeeding four-year period, an organization or society which has previously been granted an exemption must file the Form 451 with the county assessor on or before December 31 prior to an application year.

Approved exemptions for a cemetery organization or any organization for the exclusive benefit of a cemetery organization will remain in effect and not require reapplication, until there is disqualification through a change in ownership or use. The county assessor will annually review ownership and use of all cemetery real property and report to the county board of equalization by August 1.

A Statement of Reaffirmation of Tax Exemption for Use When Applying for Continued Exemption for Qualifying Organizations, Form 451A, must be filed with the county assessor on or before December 31 prior to each intervening year. The reaffirmation statement must certify that the ownership and use of the exempted property has not changed from the ownership and use of the property at the time of the application for the application year.

The county assessor will examine the applications and will recommend either taxable or exempt status for the property to the county board of equalization by February 1 of the year for which the exemption is sought. In making the recommendation, the county assessor may specify that only a certain portion of the property should be exempt if all of the property described in the application is not eligible for exemption. The county assessor maintains a list of the applications for property tax exemption status and the original copy of Form 451.

After the county assessor has made his/her recommendation on the taxable or property tax exempt status of the property, the county board of equalization must hold a public hearing on the application. The public hearing notice must be published in a newspaper of general circulation in the county at least 10 days prior to the public hearing on the applications. The public hearing notice must state that a list of the applications from organizations seeking tax exemptions, descriptions of the property, and the county assessor's recommendations are available in the office of the county assessor.

The county board of equalization must hold a public hearing on all applications for exemption to determine whether to allow or deny an exemption. Exemptions will not be granted or denied by the county board of equalization until after the required hearing is held.

The county clerk must mail or deliver notice of the decision to approve, deny or modify the application for the property tax exemption within seven days of the decision by the county board of equalization.

A person, corporation or organization denied exemption from property taxation for real or tangible personal property by a county board of equalization may file an appeal with the Tax Equalization and Review Commission (TERC) within 30 days after the decision of the county board of equalization. The Tax Commissioner may, in his or her discretion, intervene in this appeal.

Only the county assessor, the Tax Commissioner, or the Property Tax Administrator may appeal the action of the county board of equalization granting or denying an exemption from taxation to the TERC. The appeal of the actions of the county board of equalization to the TERC must be made within 30 days after the decision of the county board of equalization.

A property owner or organization that disagrees with a modification or denial of an application for property tax exemption has several levels where it can appeal the decision of the county assessor. The first level is to file an appeal with the county board of equalization. If the property owner or organization does not agree with the decision of the county board of equalization, they may file an appeal with the Tax Equalization and Review Commission (TERC). All decisions rendered by the TERC may be appealed to a District Court.

Definition of Charitable and Educational Organizations

The last issue to be addressed by LR186 is to examine the use of the terms charitable and educational in designating a property tax exempt status. REG-40-005, pages 5-8 of Chapter 40 provides the definitions

and examples of educational, religious, charitable and cemetery property tax exemptions. Because the focus of LR186 is only on the definitions of charitable and educational organization, this section of the report will focus only on those definitions.

A five part statutory test is used to determine eligibility for educational, religious, charitable, and cemetery property tax exemptions. There are five mandated criteria for this property tax exemption:

1. **Ownership** – the property must be owned by an educational, religious, charitable, cemetery organization, or any organization for the exclusive benefit of the educational, religious, charitable, or cemetery organization. Ownership means the right to sell, lease, use, give away, or enter the property and the right to refuse to do any of these. All rights may or may not be vested in one owner or interest holder.
2. **Exclusive use** - the property must be used exclusively for religious, educational, charitable, or cemetery purposes. The property does not need to be used solely for one of the four categories of exempt use. It may be used for a combination of exempt uses. Exclusive use means the predominant or primary use of the property as opposed to incidental use. The exemption will not be lost if the property is used in an incidental manner as long as the predominant or primary use of the property is for one or more of the exempt uses.
3. **No financial gain or profit** - the property cannot be used for financial gain or profit to either the owner or the user. There is no financial gain or profit if no part of the income from the property is distributed to the owners, users, members, directors, officers, or private individuals. Reasonable salaries paid to employees do not constitute a distribution of financial gain or profit.
4. **Restricted [prohibited] alcoholic liquor sales** - the property cannot be used for the sale of alcoholic liquors for more than 20 hours per week. For purposes of determining whether alcoholic liquor is sold in excess of 20 hours per week, a reasonable average for the tax year may be used. The sale of liquor is not considered to be an exempt use for educational, religious, charitable, or cemetery purposes.
5. **Prohibited discrimination** - The property must not be owned or used by an organization that discriminates in membership or employment based on race, color, or national origin. There must be some actual formal or informal policy of discrimination present, which denies or otherwise abridges membership or employment, to disallow an exemption.

The property must meet all five criteria for the exemption to be allowed. The organization does not need to be established solely for educational, religious, charitable, or cemetery purposes. It may be established for a combination of two or more of the exempt uses.

An educational organization is defined as an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects. It may also be an organization that assists students relating to the origination, processing, or guaranteeing of federally-insured student loans for higher education; or a museum or historical society operated exclusively for the benefit and education of the public

Charitable organizations are 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.

When a county assessor reviews an application based on educational or charitable use, he/she must look at the applications using the five mandated criteria noted above. If the property does not meet all five mandated criteria, the application for property tax exempt status will be denied.

Conclusion

The tax identification as a 501(c)(3) organization does not automatically qualify an organization for property tax exempt status. Property tax exempt status is determined on a case-by-case basis from the information file with the county assessor on Form 451. The Property Tax Assessment Office provides detailed guidelines in Rule 40 for a county assessor to follow when making a determination of the exemption for paying property taxes.

Property tax exemptions are strictly interpreted and are allowed based on the inherent nature of the property, the ownership of the property, the use of the property or a combination of these factors. The person or organization requesting a property tax exemption bears the burden of proof.

If the property is owned by the state or a political subdivision and it is used or being developed for a public purpose, it is exempt from paying property taxes. This exemption from paying property taxes is clear and concise.

If the property owned by an educational, religious, charitable, or cemetery organization or any organization created for the exclusive benefit of any qualified organization and it is used exclusively for educational, religious, charitable, or cemetery purposes, it is exempt from paying property taxes. This property tax exemption has caveats to the exemption which require interpretation on the part of the county assessor.

Rule 40 was last revised in July of 2013. It may be time for the Property Assessment Division to look at updating the information contained in Rule 40. The definition for educational organizations seems clear and easy to follow. The definition for charitable organizations is a little thin and it could be updated to provide a more detailed definition. Specifically, a clarification of the phrase “operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons” used in the charitable organization definition would be helpful.

Rules and regulations are written to provide latitude in interpreting their provisions. However, tightening up the definitions, especially for charitable organizations, may reduce the number of denials for applications for property tax exempt status.

Sources

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