

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

Fountain II, LLC,
Appellant,

v.

Douglas County Board of
Equalization,
Appellee.

Case Nos: 18SV 0001

Decision and Order Affirming
the Determination of the
Douglas County Board of
Equalization

For the Appellant:

Dwyer Arce,
Kutak Rock LLP

For the Appellee:

Jennifer D. Chrystal-Clark,
Deputy Douglas County
Attorney

This appeal was heard before Commissioners Steven Keetle and James Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a 19.9-acre parcel located in Douglas County, Nebraska. The legal description of the Subject Property is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 2.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the Subject Property should be disqualified from special valuation status for tax year 2018. Fountain II, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation to reinstate the special valuation status for the 2018 assessment year. The Douglas County Board

denied the Taxpayer's application for special valuation status for tax year 2018.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on February 19, 2020, this hearing was recessed and reconvened on March 3, 2021. Prior to the hearing, the parties exchanged exhibits. The parties stipulated to the receipt of exchanged exhibits 1 through 19, 30, 33 and 35. Exhibits 20 through 25, 27, 29, 34, and 36 through 41 were offered and received at the hearing. The Parties agreed to submit written closing arguments with the parties allowed to submit closing statements by April 2, 2021, with an opportunity for each party to respond to those arguments by April 9, 2021. This matter was submitted to the Commission for determination after the receipt of the written closing arguments.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.² 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.³

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

¹ Ex 1.

² See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County 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 County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

³ *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

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.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

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.⁷ The Commission may also take notice of judicially cognizable facts, take notice of general, technical, or scientific facts within its specialized knowledge, and utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.⁸ The Commission's Decision and Order shall include findings of fact and conclusions of law.⁹

IV. SPECIAL VALUATION

A. Law

Special valuation means the value that the land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses such as commercial, residential, or recreational.¹⁰ Agricultural or horticultural

⁴ *Id.*

⁵ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁶ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

⁸ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

⁹ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

¹⁰ See, Neb. Rev. Stat. §77-1343 (Reissue 2009).

land which has an actual value reflecting uses other than agricultural or horticultural purposes shall be assessed using special valuation if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved.¹¹ In order for special valuation to be applicable to a parcel it must be (a) located outside the corporate boundaries of any sanitary and improvement district, city, or village unless subject to a conservation or preservation easement and (b) the land must be agricultural or horticultural land.¹² The eligibility of land for the special valuation provisions of this section shall be determined each year as of January 1. If the land so qualified becomes disqualified on or before December 31 of that year, it shall continue to receive the special valuation until January 1 of the year following.¹³

Upon approval of an application for special valuation the property continues to be given special valuation status until the land becomes disqualified for such valuation by no longer qualifying as agricultural or horticultural land.¹⁴

At any time, the county assessor may determine that land no longer qualifies for special valuation.¹⁵ If land is deemed disqualified, the county assessor shall send a written notice of the determination to the applicant or owner within fifteen days after his or her determination, including the reason for the disqualification.¹⁶ A protest of the county assessor's determination may be filed with the county board of equalization within thirty days after the mailing of the notice.¹⁷

An applicant seeking special valuation shall make application to the county assessor on or before June 30 of the first year in which such valuation is requested.¹⁸ On or before July 15 in the year of application, the county assessor shall approve or deny the application for special valuation.¹⁹ On or before July 22, the county assessor shall

¹¹ See, Neb. Rev. Stat 77-1344 (Reissue 2009).

¹² Neb. Rev. Stat. 77-1344(1) (Reissue 2009).

¹³ Neb. Rev. Stat. 77-1344(3) (Reissue 2009).

¹⁴ Neb. Rev. Stat §77-1347 (Reissue 2009).

¹⁵ Neb. Rev. Stat §77-1347.01 (Reissue 2009).

¹⁶ Neb. Rev. Stat §77-1347.01 (Reissue 2009).

¹⁷ Neb. Rev. Stat §77-1347.01 (Reissue 2009).

¹⁸ Neb. Rev. Stat. 77-1345(1) (Reissue 2009).

¹⁹ Neb. Rev. Stat §77-1345.01(1) (Reissue 2009)

issue notice of approval or denial.²⁰ If the application is denied by the assessor, a written protest of the denial of the application may be filed within thirty days after the mailing of the denial.²¹ The county board of equalization shall decide any protest filed pursuant to this section within thirty days after the filing of the protest.²² Any decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission, in accordance with section 77-5013, within thirty days after the date of the decision.²³

Agricultural land and horticultural land means a parcel of land, excluding land associated with a building or enclosed structure located on the parcel, which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land.²⁴

Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.²⁵ Under Neb. Rev. Stat. § 77-1359:

(2)(a) Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture.

(b) Agricultural or horticultural purposes includes the following uses of land:

- (i) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and
- (ii) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production; and

²⁰ Neb. Rev. Stat §77-1345.01(1) (Reissue 2009)

²¹ Neb. Rev. Stat 77-1345.01(3)(a) (Reissue 2009)

²² Neb. Rev. Stat 77-1345.01(7) (Reissue 2009)

²³ Neb. Rev. Stat 77-1345.01(9) (Reissue 2009)

²⁴ Neb. Rev. Stat. § 77-1359(1) (Reissue 2018).

²⁵ Neb. Rev. Stat. § 77-132 (Reissue 2018).

(c) Whether a parcel or land is primarily used for agricultural and horticultural purposes shall be determined without regard to whether some or all of the parcel is platted and subdivided into separate lots or developed with improvements consisting of streets, sidewalks, curbs, gutters, sewer lines, water lines, or utility lines.²⁶

B. Summary of the Evidence

The Taxpayer alleges that the Subject Property qualifies for special valuation status for the 2018 assessment year as it was put to no other use than an agricultural or horticultural use. The Taxpayer and County Board agree that the Subject Property received special valuation status in 2017 and 2019, and the Taxpayer argues that supports its 2018 special valuation status claim. The Taxpayer further contends that the determination made in this case would detrimentally impact agricultural and horticultural producers in the state who utilize the practice of letting their ground lie fallow during certain years. The County Board contends that the Subject Property was not used primarily for the planting of a crop for commercial income purposes as no viable crops were planted or harvested in 2018 and that therefore the denial of special valuation status should be affirmed. In order to grant special valuation status, the Commission must find that the Subject Property was primarily used for agricultural or horticultural purposes for the 2018 assessment year.

The Subject property is a 19.9-acre parcel of land located on 192nd Street just south of West Dodge Road in Western Douglas County. The Subject Property was purchased in 2016 by Fountain II LLC, which is a wholly owned subsidiary of R&R Realty Group (R&R or the Taxpayer). Fountain II LLC was created for the purpose of holding real property interests for tax and estate planning purposes.

Stan Mlotek, Real Estate Specialist for the Douglas County Assessor's Office, is responsible for determining the special valuation status for agricultural or horticultural land in Douglas County and has

²⁶ Neb. Rev. Stat. § 77-1359(2) (Reissue 2018).

been since 2012. Mlotek testified regarding the special valuation designation history of the Subject Property.

Sadie Lee, VP of Finance and Chief Accounting officer for R&R Realty, and Mlotek each testified that they spoke in December of 2016 regarding the Taxpayer's purchase of the Subject Property. Lee told Mlotek at that time that R&R Realty's intent was to develop the Subject Property but until that time they were going to contract with a farmer to keep it in an agricultural use.

The Subject Property was located in an area of the county where several former agricultural parcels were being developed for commercial or residential use. Based on the location of the Subject Property and his conversation with Mr. Lee regarding the sale Mr. Mlotek testified that the Subject Property was "on his radar" to be reviewed for continuing agricultural use. For the 2017 assessment year the Subject Property retained the special valuation status it had under the prior owner.

On December 6, 2017, Mr. Mlotek visited the Subject Property and observed orange and purple surveyors' flags present on the Subject Property. He did not observe any grading equipment or other heavy machinery on the Subject Property at that time but saw that grading work had been done on the Subject Property. Mr. Mlotek testified that he determined this use was not consistent with an agricultural use and therefore, the County Assessor's office disqualified the Subject Property from special valuation.²⁷

The Taxpayer did not protest the disqualification but rather filed a new Special Valuation Application for the Subject Property on May 23, 2018.²⁸ Attached to this application was a copy of a farm lease agreement for the Subject Property.²⁹ Based on inspections of the property the County Assessor's office denied the application for special valuation status.³⁰

²⁷ E4

²⁸ E6, see, Neb. Rev. Stat. 77-1345(1) (Reissue 2009).

²⁹ E6:4-12

³⁰ E7:1

The Taxpayer appealed the County Assessor's determination, and the County Board held a hearing on this appeal on September 11, 2018.³¹ At that hearing the County Board received information from the Taxpayer and the County Assessor's office regarding the use of the Subject Property. The County Board denied the appeal of the of special valuation status application for the Subject Property.³²

The Taxpayer does not contest that the ultimate use that they intend to make of the Subject Property is for the development of commercial buildings. Wendy Ogden, in house counsel for R&R Realty Group, testified that R&R is a full-service realty group, in the business of owning, developing, and managing real property. The sole business of R&R is the commercial development of real property, not farming, but that R&R's practice is to maintain farm leases on properties that are being held for future development to preserve the agricultural designation and the taxation benefits that go along with that designation. Typically, after purchasing a property, R&R would have the acquired property mass graded or leveled, removing trees and preparing the appropriate drainage for future commercial development prior to the land being put into (or back into) a farm lease until building construction began.

Ogden testified that in April of 2018 the Taxpayer entered into a written Farm Lease Agreement with a farmer who leased multiple properties from the Taxpayer and who had previously farmed the Subject Property. That farm lease agreement ran from January 1, 2018 and terminated on December 31, 2018.³³ Ogden testified that the Taxpayer received all rent due under the 2018 farm lease agreement from the Farmer and that the Taxpayer did not receive any income beyond the lease payments and is not aware of any income derived by the Farmer. The lease specified that the Farmer could not access the Subject Property until informed in writing that all grading work had been completed and then the Subject Property must be planted in

³¹ E8

³² E1

³³ E37

alfalfa.³⁴ Ogden testified that the requirement that alfalfa be planted was in place because the lease allowed R&R to destroy any crop planted if they chose to develop the property and alfalfa was cheaper than corn and that the farmers preferred alfalfa on graded land. The owner of R&R Realty preferred the “clean” look of alfalfa, particularly in urban areas.

Michael Homa, who joined R&R as President of Nebraska division on August 23, 2017, was responsible for management of Nebraska properties owned by R&R Realty, including the Subject Property. Homa testified that from October of 2017 to the end of that year work was done to tear down the abandoned house and outbuildings on the Subject Property. In April or May of 2018 work was done to remove a cell phone tower from the Subject Property which he testified was a very extensive project. In June and July of 2018 grading work took place on the Subject Property to level out the area where the buildings had been located as well as leveling out the topography for future development and spread topsoil on the surface to allow for the farming of the Subject Property while waiting to construct buildings on the property. Trees were also removed from the Subject Property sometime between October 2017 and July of 2018. Homa stated that no final plat for commercial development was approved in 2018, but infrastructure work may have started but only small amounts of easements that were impacted. In the spring of 2019 construction of water, power, and sewer improvements were begun on and around the Subject Property.

The Commission received an affidavit of Scott Thomsen (the Farmer), who farmed the Subject Property under a farm lease agreement in 2018.³⁵ The Farmer averred that he farmed the Subject Property from 2016 until at least the end of 2019.³⁶ The Affidavit states that the Subject Property was previously planted in soybeans which were harvested in October of 2017. The affidavit further states that, due to heavy rains in July and August of 2018 he planted Alfalfa

³⁴ E37:1 paragraph 3

³⁵ E27

³⁶ The Affidavit was dated December 17, 2019.

and oats on the Subject Property in the first two weeks of September of 2018. This planting of alfalfa was unable to be harvested in the spring of 2019 due to previously unknown debris on the Subject Property.

The Taxpayer offered the testimony of Monte Stauffer, a recently retired agricultural extension educator in Douglas and Sarpy Counties. Mr. Stauffer currently manages his home operation in north central Nebraska that is cash leased as well as land twelve miles from the Subject Property that is used for livestock and custom haying. Stauffer testified that planting alfalfa with oats is a good idea as the annual nature of the oats, which grow more quickly can protect the soil from erosion and protect the newly planted alfalfa plants, which once established are an annual crop. Stauffer also offered testimony about the practice of letting ground lie fallow. Stauffer testified that letting ground lie fallow for as much as 15 months at a time can increase the amount of moisture in the soil for a subsequent year's planting. Stauffer further testified that this is done primarily in western Nebraska and the panhandle, where there is typically much less moisture than in eastern Nebraska.

In order to qualify for special valuation, the Subject Property must have been primarily used for agricultural or horticultural uses during the assessment year 2018. The Taxpayer alleged that the Subject Property was not put to any use other than agricultural use in 2018 but the evidence does not support this contention. The evidence before the Commission shows that the Farmer planted alfalfa, along with a companion crop of oats on the Subject Property sometime in the first two weeks of September 2018. As the County Board points out, this is after the assessment date of January 1, 2018, and after the date the County Assessor must make a determination on an application for special valuation status of July 15, 2018. The Taxpayer argues that prior to this fall planting the Subject Property was put to no other use. The evidence and testimony however show that the Subject Property did not just sit fallow but that there was activity on the Subject Property prior to the September 2018 planting. After the fall 2017 harvest the Taxpayer removed the existing farmhouse and

outbuildings, additionally a cell phone tower located on the Subject Property was removed. Trees were removed from the Subject Property and after this the Taxpayer graded the Subject Property to make it suitable for the construction of future commercial buildings, streets, parking lots and sidewalks. Heavy equipment was present on the Subject Property and grading work was being done through at least July 25, 2018.³⁷ The final step of the mass grading process was the spreading of topsoil onto the Subject Property to allow for the planting of alfalfa but all of the activity prior to that date was to site preparation to allow for future construction and not an agricultural or horticultural use. In support of this view, the farm lease agreement for the Subject Property states that the Farmer shall not access the land until notified by the Taxpayer in writing that all grading work has been completed.³⁸ While there is no evidence that this written notification was made, the evidence that the Farmer did access and plant on the Subject Property sometime during the first two weeks of September 2018 returning it to an agricultural use.

The Taxpayer alleges that the determination in this case would have wide ranging impact on farmers holding land fallow or idle. There is no evidence in the record before the Commission in this appeal to show that the Subject Property was left fallow or simply idle. The work that was done on the Subject Property for the majority of 2018 was to prepare it for the future construction of commercial buildings and while it was eventually returned to agricultural use, that was not its primary use for assessment year 2018.

The Commission finds that the primary use of the Subject Property was not for agricultural or horticultural use. The determination of the County Board denying the appeal of the denial of special valuation status for tax year 2018 is affirmed.

³⁷ E10

³⁸ E37:1 paragraph 3

V. CONCLUSION

The Commission finds that there is not 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 not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the Subject Property is not entitled to special valuation status for tax year 2018 is affirmed.³⁹
2. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018)
3. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This Decision and Order shall only be applicable to tax year 2018.

³⁹ The determination of the County Board 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.

6. This Decision and Order is effective for purposes of appeal on November 4, 2022.⁴⁰

Signed and Sealed: November 4, 2022.

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

⁴⁰ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.