

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

BARRY D. CLARK,)	
)	
Appellant,)	Case No 06SV-008
)	
v.)	DECISION AND ORDER REVERSING
)	THE DECISION OF THE SARPY
SARPY COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Barry D. Clark ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on January 31, 2007, pursuant to an Order for Hearing and Notice of Hearing issued November 30, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Barry D. Clark, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Nicole O'Keefe, a Deputy County Attorney for Sarpy County, Nebraska, appeared as legal counsel for the Sarpy County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. 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 assessed based on its special valuation:

Was the decision of the County Board denying assessment of the subject property based on its special valuation unreasonable or arbitrary?

What was actual value of the subject property on January 1, 2006?

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has an interest, sufficient to maintain this appeal, in Lot 1, Van Buren Acres, Section 23, Township 14, Range 10, Sarpy County, Nebraska ("subject property").
2. The Taxpayer applied for assessment based on the special valuation of the subject property and that application was denied.
3. An appeal of the County Board's decision was filed with the Commission.
4. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
5. An Order for Hearing and Notice of Hearing issued on November 30, 2006, set a hearing of the appeal for January 31, 2007, at 9:00 a.m. CST.

6. 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.
7. The subject property is eligible for assessment based on its special valuation for the tax year 2006.

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. Qualified agricultural land and horticultural land means land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. Land retained or protected for future agricultural or horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or horticultural land. Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stat. §77-1359 (1) (Reissue 2003).

3. Agricultural or horticultural products include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops. Neb. Rev. Stat. §77-1359 (2) (Reissue 2003).
4. Agricultural or horticultural land may be assessed based on its special valuation value if an application for special valuation is made, the land is located outside the corporate boundaries of any existing sanitary and improvement district, city, or village, the land is used for agricultural or horticultural purposes and the land is zoned predominately for agricultural or horticultural use. Neb. Rev. Stat. §77-1344 (1) (Supp. 2005).
5. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
6. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action 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. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
7. 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) (citations omitted)

8. The Commission can grant relief only if the Taxpayer establishes by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005).
9. "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).
10. 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).
11. 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).
12. To inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000).
13. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any

- related statutes. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).
14. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975).
 15. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. *Equal Opportunity Commission v. Weyerhaeuser Co.*, 198 Neb. 104, 251 N.W.2d 730 (1977).
 16. “Components of a series or collection of provisions pertaining to the same subject matter which are in pari materia may be conjunctively considered so that different provisions are consistent, harmonious, and sensible. Where possible, effect should be given to all provisions of a statute or regulation.” (Citations omitted). *Elsome v. Elsome*, 257 Neb. 889, 900, 601 N.W.2d 537, 545 (1999).
 17. “In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result... Statutory language is to be given its plain and ordinary meaning . . .” *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996).

IV. DISCUSSION

The subject property is a 10.1 acre improved parcel in Sarpy County. The Taxpayer applied for special valuation for the tax year 2006. (E1:2). The Assessor recommended disapproval. (E1:2). The Taxpayer protested and the County Board denied the protest. (E1:1). The parties agreed that the subject property is located outside the corporate boundaries of any sanitary and improvement district, city, or village, and that the subject property is used for agricultural or horticultural purposes. The sole remaining question is whether the land is zoned predominately for agricultural or horticultural use.

The subject property is zoned AGD. (E10) Some of the restrictions on land zoned AGD are shown in Exhibit 12 even though it is incomplete. The County Assessor testified that in 2003 he determined that land zoned AGD should not be eligible for special valuation solely because of its zoning. Exceptions, which the Commission need not consider, were made by the County Assessor to that determination. In this appeal the Commission will consider whether the County Board's decision affirming the County Assessor's determination that land zoned AGD in Sarpy County is not eligible for special valuation was unreasonable or arbitrary.

To be eligible for special valuation agricultural land and horticultural land must be zoned predominately for agricultural or horticultural use. Neb. Rev. Stat. 77-1344 (Supp. 2005). The phrase "zoned predominantly for agricultural or horticultural use" is not defined and can be interpreted several ways. First, "zoned predominately for agricultural or horticultural use" may mean for example that of all the uses permitted by a zoning regulation that most of the permitted uses are agricultural or horticultural in nature. A second possible reading is that

the zoning restrictions would result in agricultural and horticultural use being in fact predominate on lands within the classification. In other words, no use except an agricultural or horticultural use could be predominate on those lands. A third alternative is that “zoned predominately for agricultural or horticultural use” means that an agricultural or horticultural use could be predominate on a parcel. In other words if an owner wished to apply an agricultural or horticultural use to a parcel, that use has to be permitted by the zoning and can be a “predominate” use ordinance. A statute that is ambiguous may be construed. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000).

The first possible reading of the statute would apply a mechanical and meaningless test unrelated to actual uses made of parcels subject to the zoning restriction. A statute should not be construed to produce a result that is absurd or does not comport with common sense. *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996).

The second possible construction would make the provisions of the statute regarding actual use of a parcel within a zoned area unnecessary except to determine if it was contrary to the zoning regulation. If construed a statute will be read to give meaning to the whole. *Elsome v. Elsome*, 257 Neb. 889, 900, 601 N.W.2d 537, 545 (1999).

The third possible reading allows the Commission to give effect to all provisions of the statute and is not offensive to the goals evident from the entire statutory scheme for use of special valuation. It is with the understanding that the zoning ordinances are to be examined to determine if they permit agricultural or horticultural use to be the predominate use of a parcel that the Commission turns to the evidence.

The County Assessor testified that the Taxpayer's application for special valuation of the subject property was denied solely because it was zoned AGD. The restrictions on parcels zoned AGD are described in part in Exhibit 12. Under the category of principal permitted uses the first use allowed for parcels classified AGD is agricultural farms, truck gardens, greenhouses, plant nurseries, orchards, apiaries, mushroom barns, grain storage facilities, and the usual farm buildings and structures. A principal permitted use of a parcel designated AGD clearly allows uses that are consistent with the uses permitted by the definition of agricultural lands and horticultural lands found in Neb. Rev. Stat. § 77-1359. Those uses can be predominate uses of the parcel. The determination of the County Board was unreasonable and should be reversed.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board that the subject property was ineligible for special use valuation as of the assessment date, January 1, 2006, is vacated and reversed.

2. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2006.
6. This order is effective for purposes of appeal February 7, 2007.

Signed and Sealed. February 7, 2007.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

William C. Warnes, Commissioner

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.