

Joe Koziol, President of Clearwater Corp. was present without legal counsel on September 18, 2008. After a recess Jodi Knight a shareholder of Clearwater Corp., was present without legal counsel for the November 20, 2008 portion of the hearing.

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

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

I. ISSUES

Was the County Board's decision reversing the County Assessor's disqualification of the land described in this appeal for special valuation unreasonable or arbitrary?

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are described as Tax lot 2A Section 4 Township 12, Range 10; Tax Lot 2B, Section 5 Township 12, Range 10; and Tax Lots 1A, B, and B1 Section 32, Township 13, Range 10, all Sarpy County, Nebraska, and together comprise ("the subject property").

3. Prior to March 19, 2007, the County Assessor made a determination that the subject property should be disqualified for use of special valuation.
4. The Taxpayer protested that determination on June 5, 2007.
5. The County Board reversed the determination of the County Assessor on July 12, 2007.
6. Appeals of the County Board's decisions were filed with the Commission by the County Assessor.
7. The County Board was served with Notices in Lieu of Summons and did not file answers.
8. Clearwater Corp., was served with Notices in Lieu of Summons and filed answers.
9. The appeals were consolidated for hearing by order of the Commission.
10. An Order for Hearing and Notice of Hearing issued on June 26, 2008, set a hearing of the appeals for September 18, 2008, at 2:00 p.m. CDST.
11. 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.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions raised in the proceeding upon which an order, decision, determination, or action appealed from is based. Neb. Rev. Stat. §77-5016 (7) (Supp 2007).
2. The Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and

horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land. Neb. Const. art. VIII, §1 (4).

3. For purposes of sections 77-1359 to 77-1363:

(1) Agricultural land and horticultural land means a parcel of land 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. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure;

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

(a) 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

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production;

(3) Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and

such improvements include utility connections, water and sewer systems, and improved access to a public road; and

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site. Neb. Rev. Stat. §77-1359 (Cum. Supp. 2006).

4. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).
5. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved pursuant to section 77-1345. In order for the land to qualify for special valuation all of the following criteria shall be met: (a) The land is located outside the corporate boundaries of any sanitary and improvement district, city, or village except as provided in subsection (2) of this section; and (b) the land is agricultural or horticultural land. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007).
6. An application seeking special valuation may be filed on or before June 30 of the first year in which such valuation is requested Neb. Rev. Stat. §77-1344 (3) (Cum, supp. 2006).

7. The county assessor shall on or before July 15 in the year of application approve or deny the application and send notice of approval or denial prior to July 22. Neb. Rev. Stat. §77-1345.01(1) (Cum. Supp. 2006).
8. If an application for special valuation is denied by the county assessor a written protest of the denial may be filed within thirty days after the mailing of the denial. Neb. Rev. Stat. §77-1345.01(3)(a) (Cum. Supp. 2006).
9. The county board of equalization shall decide any protest of a denial of special valuation within thirty days after filing of the protest. Neb. Rev. Stat. §77-1345.01(7) (Cum. Supp. 2007).
10. The Statutes governing the Commission create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York Cty. Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003).
11. 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).
12. The presumption remains until there is competent evidence to the contrary presented. *Id.*
13. Competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

14. Competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).
15. The Taxpayer has a burden to adduce evidence that the decision, action, order, or determination appealed from was unreasonable or arbitrary. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003)
16. The Commission may not grant relief unless it is shown that the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006),
17. Proof that the action of the County Board was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
18. "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).
19. 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).
20. 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).

IV. ANALYSIS

The subject property received special valuation in the tax year 2006. The County Assessor determined that special valuation should not be applied for the tax year 2007. Notice of disqualification was sent to a shareholder of the Taxpayer. Disqualification was not protested. The Taxpayer filed applications for special valuation for the tax year 2007. (E6:1, 2, &3). The applications were denied. (E6:1, 2, & 3). A protest of the County Assessor's denials was filed on June 5, 2007 (E10:1). The County Board acted on the Taxpayer's protest of the County Assessor's denials of special valuation on July 10, 2007. (E1:1). The County Board was required by law to act on the Taxpayers protest within 30 days of filing. Neb. Rev. Stat. §77-1345.01(7) (Cum. Supp. 2007). The thirty day period for acting on the Taxpayer's protest expired on July 5, 2007. The County Board had no power on July 12, 2007, to grant the relief requested by the Taxpayer. See, *Sumner v. County of Colfax*, 14 Neb. 524, 16 N.W. 756 (1883). An action taken without authority is arbitrary. Even though it may appear that the County Board's decision is not appealable because it was without effect, the Commission can enter orders supported by the evidence and appropriate for resolving the matters in dispute. Neb. Rev. Stat. §77-5018(1) (Cum. Supp. 2006). In this case the County Board unlawfully determined that the subject property was eligible for special valuation. The County Board's determination was in effect pending appeal to the Commission. Neb. Rev. Stat. §77-1613.02 (Supp. 2007). The assessment rolls may be changed by order of the Commission. Neb. Rev. Stat. §77-5018 (Supp. 2007). The Commission determines that it is necessary to enter an order directing that the subject property be

disqualified for special valuation in the tax year 2007 so that erroneous application of the County Board's determination may be removed from the assessment records.

**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 Assessor has adduced sufficient, clear and convincing evidence that the decisions of the County Board were unreasonable or arbitrary.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The parcels described in Case Nos. 07SV-199, 07SV-200 and 07SV-201 are not eligible for special valuation during the tax year 2007, as determined by the Assessor, and are subject to tax at 100% of their actual value.
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 2007.

6. This order is effective for purposes of appeal on December 16, 2008.

Signed and Sealed. December 16, 2008.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

Wm R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.