

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

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|---------------------------|---|-------------------------------|
| ROBERT A. HACKBARTH, |) | |
| |) | |
| Appellant, |) | Case No 07SV-008 |
| |) | |
| v. |) | DECISION AND ORDER AFFIRMING |
| |) | THE DECISION OF THE LANCASTER |
| LANCASTER 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 Robert A. Hackbarth ("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 February 21, 2008, pursuant to an Order for Hearing and Notice of Hearing issued December 17, 2007. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Warnes was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code ch.4 §11 (10/07). Commissioner Wickersham was the presiding hearing officer.

Robert A. Hackbarth was present at the hearing without legal counsel.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster 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**

Was the County Board's decision upholding 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 appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lot 7 SW, Section 4, Township 11, Range 6, 6th PM, Lancaster, Nebraska, ("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.
5. The County Board affirmed the determination of the County Assessor.
6. An appeal of the County Board's decision was filed with the Commission.
7. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
8. An Order for Hearing and Notice of Hearing issued on December 17, 2007, set a hearing of the appeal for February 21, 2008, at 9:00 a.m. CST.

9. 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 necessary to determine taxable value. 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. The eligibility of land for the special valuation provisions is to be determined each year as of January 1, but if the land so qualified becomes disqualified on or before December 31 of that year, it shall be valued at its recapture value. Neb. Rev. Stat. 77-1344 (3).
7. Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel. Neb. Rev. Stat. 77-132 (Cum. Supp. 2006).
8. At any time, the county assessor may determine that land no longer qualifies for special valuation pursuant to sections 77-1344 and 77-1347. Neb. Rev. Stat. 77-1347.01 (Supp. 2007).
9. 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. Neb. Rev. Stat. 77-1347.01 (Supp. 2007).

10. 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. Neb. Rev. Stat. 77-1347.01 (Supp. 2007).
11. The county board of equalization shall decide the protest within thirty days after the filing of the protest. The county clerk shall, within seven days after the county board of equalization's final decision, mail to the protester written notification of the board's decision. Neb. Rev. Stat. 77-1347.01 (Supp. 2007).
12. The 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. Neb. Rev. Stat. 77-1347.01 (Supp. 2007).
13. 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).
14. 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).
15. The presumption disappears if there is competent evidence to the contrary. *Id.*
16. 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).

17. The Taxpayer has a burden to adduce evidence that the decision, action, order, or determination appealed from was unreasonable or arbitrary as prescribed by statute. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003)
18. 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),
19. 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).
20. "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).
21. 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).
22. 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 is a 21 acre parcel in rural Lancaster County. (E6:1). The parcel is improved with a residence, a detached garage and a farm utility building and storage sheds.

(E6:3). The County Assessor reviewed eligibility of the subject property for use of special

valuation in tax year 2007. The County Assessor determined that the parcel should be disqualified. The Taxpayer protested that determination to the County Board. The County Board affirmed the County Assessor's determination. The Taxpayer appealed to the Commission.

Only agricultural land and horticultural land as defined by the legislature is eligible for special valuation. Neb. Rev. Stat. 77-1344 (1) (Supp. 2007). The statutory definition of agricultural land and horticultural land contains various terms which are critical to an understanding of the statute. The term "parcel" has been defined by Nebraska's Legislature. "Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel." Neb. Rev. Stat. 77-132 (Cum. Supp. 2006).

Other significant terms within the statutory definition of agricultural land and horticultural land have not been defined by the Legislature. The term "commercial production" has not been defined but only land 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, with exceptions noted above, may be agricultural land and horticultural land. The Commission has not found in statute or in Nebraska case law a definition of the term "commercial production." Commercial can mean "of, in or relating to commerce." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 456. An alternate definition is "from the point of view of profit: having profit as the primary aim." *Id.* Prior to adoption of amendments to the statute defining agricultural land and horticultural land in

2006 the definition of agricultural and horticultural land contained a requirement that the land be used for the “production” of agricultural products. Neb. Rev. Stat. §77-1359 (Reissue 2003).

The new term “commercial production” did not appear in the definition. *Id.* A statute should be construed to give effect to purposeful change in its provisions. A construction of “commercial production” to mean production from the point of view of making a profit gives effect to the change in terminology as adopted by the legislature and is adopted by the Commission.

It is appropriate to consider a number of factors to determine whether or not an activity is undertaken with a view to making a profit. See, *Wood*, 548 T.M., *Hobby Losses*. Among the factors to be considered are: whether the activity is conducted in a business like manner with adequate records and adaption of operating methods to changing circumstances; expertise of the Taxpayer, if any, necessary for conduct of the operation; consultation with experts, if necessary, and reliance on appraisals or other data for decision making as necessary; time and effort expended by the Taxpayer in furtherance of the operation; any expectation of appreciation in the assets employed in the operation; success the Taxpayer has had in carrying on similar or dissimilar operations; the Taxpayer’s history of profits or losses with respect to the operation discounting startup losses and losses or gains due to unusual circumstances; any profits earned and the possibility of profits if none have been earned to date; the Taxpayer’s financial status i.e. the ability to sustain losses or incur costs without regard to returns; and elements of personal pleasure or recreation, or other motives other than profit or gain. The same factors are relevant to a determination of whether commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or

horticulture (“commercial production”) has occurred on the parcel. In addition the Commission will consider other factors as presented for consideration on a case by case basis.

At the end of the year 2006 the taxpayer was keeping two horses on a fee basis and two horses owned by the Taxpayer and his wife on the subject property. The horses use a lean-to on the south side of the barn for shelter. About 14 acres of the parcel are used for pasturing horses. The horse pasture was developed after purchase of the subject property with a mixture of warm and cool season grasses blended to maximize grazing use. The Taxpayer devotes a significant amount of time to the care and feeding of the horses. The 14 acres of horse pasture are also used for the production of some hay. The Taxpayer testified that 6 acres of the subject property were used for the production of alfalfa hay prior to January 1, 2007. The Taxpayer testified that 3 or 4 cuttings are harvested in small square bales. The small square bales are produced for marketing to the owners of horses. Production of small square bales requires more labor than larger bales but also adds value. Hay is stored in the farm utility building or barn until sale or use for horse feed on the subject property. Production of hay and the growing of grass for grazing are the production plant products in a raw or unprocessed state derived from the science or art of agriculture or horticulture. The Taxpayer maintains records pertaining to production of hay and grass on the subject property and devotes significant time to that production. The Taxpayer has consulted with others for the purpose of improving production of hay and grass for grazing on the subject property. The Taxpayer has acquired specialized equipment to be used for the production of hay and grass for grazing. The Taxpayer has proven that he has a reasonable expectation of realizing profits from the production of hay and grass for grazing on the subject property.

Based on the Taxpayer's record keeping, time devoted to agricultural production, adaption of the products produced for market and other conditions, investment in specialized equipment, consultations to determine best practices and efforts to improve those practices, and efforts to maximize profits the Commission concludes that the requirement for commercial production on the parcel has been met. But that is not the only requirement.

Section 77-1359 of Nebraska statutes requires a determination that the primary use of a parcel be for commercial production before it can be deemed agricultural land and horticultural land. 17.57 acres of the subject property are used for commercial production; the balance of the parcel is used for residential purposes. Given the definition of parcel found in section 77-132 of Nebraska Statutes and the use of that term in section 77-1359 of Nebraska statutes it is clear that the parcel as a whole is to be considered when determining whether or not a parcel is agricultural land and horticultural land. The remaining question is then whether the subject property (parcel) is primarily used for the commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Primarily can be defined as first of all or in the first place. *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 1800. Primary can be defined as the "first in rank or importance." Id.

"Value can have many meanings in real estate appraisal: the applicable definition depends on the context and usage. In the market place value is commonly perceived as the anticipated benefits to be received in the future." *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p 20. "The economic concept of value is not inherent in the commodity, good, or service to which it is ascribed; it is created in the minds of the individuals who make up the

market.” Id p 29. Typically four independent factors create value; utility, scarcity, desire, and effective purchasing power. Id p. 29. “Utility is the ability of a product to satisfy a human want, need or desire.” Id. p 29. “Scarcity is the present or anticipated supply of an item relative to the demand for it.” Id. p 30. “Desire is a purchaser’s wish for an item to satisfy human needs (e.g., shelter, clothing, food, companionship) or individual wants beyond the essential required to support life.” Id. p 30. “Effective purchasing power is the ability of an individual or group to participate in a market ---- that is, to acquire goods with cash or its equivalent.” Id. p 30. The value of a parcel of real estate is the sum of its component parts. *See, The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001). “The value of owner-occupied residential property is based primarily on the expected future advantages, amenities, and pleasures of ownership and occupancy.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p. 35. “The value of income-producing real estate is based on the income it will generate in the future.” Id. In the context of this appeal if greater utility is assigned to a use it will have a greater value. Greater value is then an indicator of the primary use of the parcel. Actual values of components of the subject property as determined by the County Assessor as of January 1, 2007, were not disputed. The total actual value of the residence its site as determined by the County Assessor was \$135,944.00 (\$130,800.00 - \$22,856.00 + \$28,000.00). (E6:1). Actual value of the 20 unimproved acres was \$60,000.00. (E6:1) The relative values do not indicate that the parcel’s primary or most important use of the parcel is for commercial production or that the parcel is primarily used for that purpose.

The acres devoted to differing uses on the parcel are 20 acres for commercial production (E6:1). There are 21 acres in the subject property. (E6:1). The fact that the number of acres

used for commercial production exceeds the number of acres used for all other purposes indicates that commercial production on the 19 acres is the primary use of the subject property.

The Property Tax Administrator, in Directive 07-01, advised that criteria other than area could be applied. (E8:3). The Property Tax Administrator also advised that “primarily used” meant “for the most part” and that case law usually referred to “primarily” as more than 51%. (E8:3). A comparison of the size of areas of use within a parcel is suited to use of the “for the most part” and “51%” criteria . The Property Tax Administrator, in Directive 07-01, indicated that other criteria uniformly applied could be used. In this appeal factors such as the relative values of the components of the subject property strongly indicate that the most important or primary use of the subject property is for residential purposes.

In addition to the residential use of the subject property the Taxpayer testified that part of the grass produced for grazing is used for the pasturage of horses for personal use. The Taxpayer testified that the subject property is also used in the conduct of a business not related to the commercial production of plants or animals in a raw or unprocessed state derived from the science and art of agriculture, aquaculture or horticulture. Recreational use of the subject property and use for a business unrelated to commercial production do not support a claim that the primary use of the parcel is for commercial production. The subject property was acquired in 2000 with the expectation that commercial production might offset some costs associated with the ownership and use of the subject property. That testimony indicates that factors other than commercial production motivated purchase of the property. There is no evidence that circumstances had changed as of January 1, 2007.

The Commission concludes based on its consideration of the evidence that the subject property is not used primarily for the production of plant or animal products in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture or horticulture.

The Taxpayer has not produced clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

The factors considered in this appeal to determine the primary use of the parcel are based on the facts presented. Factors in addition to those discussed in this appeal may be presented in other appeals and will be considered as presented. An exhaustive list of factors is not possible based on the facts of this appeal or perhaps never possible. It is however the consideration of all factors as applicable for each parcel rather than reliance on a single factor that is necessary to make a reasonable determination of primary use for a parcel.

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 not 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 affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property was not eligible for special valuation is affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster 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 February 28, 2008.

Signed and Sealed. February 28, 2008.

Wm. R. Wickersham, Commissioner

Nancy J. Salmon, Commissioner

SEAL

Robert W. Hotz, Commissioner

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.