BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, Appellant, v. LANCASTER COUNTY BOARD OF EQUALIZATION and DANIEL J. & LILLIAN R. JERRED, Appellees.	)	Case No 08SV 159 DECISION AND ORDER REVERSING THE DECISION OF THE LANCASTER COUNTY BOARD OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Norman H. Agena, Lancaster County Assessor, ("the County Assessor") 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 August 4, 2009, pursuant to an Order for Hearing and Notice of Hearing issued June 3, 2009. Commissioners Wickersham and Salmon were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Hotz was absent. The appeal was heard by a quorum of a panel of the Commission.

The presence of Norman H. Agena at the hearing was waived. Michael E. Thew, a Deputy County Attorney for Lancaster County, appeared as legal counsel for the County Assessor.

No one appeared on behalf of the Lancaster County Board of Equalization.

Daniel J. Jerred, ("Taxpayer"), was present at the hearing. No one appeared as legal counsel for the Taxpayer.

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 reversing a determination by the County Assessor that the land described in this appeal was disqualified for special valuation unreasonable or arbitrary?

II.
FINDINGS OF FACT

The Commission finds and determines that:

1. The parcel of real property to which this appeal pertains is described as Lot 5 NW Section 9, Township 12, Range 5, Lancaster, Nebraska, ("the subject property").
2. Prior to March 19, 2008, the County Assessor made a determination that the subject property should be disqualified for use of special valuation.
3. The Taxpayers protested that determination.
4. The County Board reversed the determination of the County Assessor.
5. The County Assessor timely filed an appeal of the County Board's decision with the Commission.

6. The County Board and the Taxpayers were served with Notices in Lieu of Summons and answered those Notices

7. An Order for Hearing and Notice of Hearing issued on June 3, 2009, set a hearing of the appeal for August 4, 2009, at 1:00 p.m. CDST.

8. 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. The Commission may determine any question raised in the proceedings upon which an order, decision, determination or action appealed from is based. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).

2. 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).

3. The County Assessor has standing to appeal decisions of the County Board. *Phelps County Board of Equalization v. Graf,* 258 Neb. 810, 606 N.W.2d 736 (2000).

4. 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).

5. 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).

6. 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).

7. 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).

8. 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) (Supp. 2007).

9. 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 (Supp. 2007).

10. 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).

11. 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).

12. 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).

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 an improved parcel. Improvements on the parcel include a 1,799 square foot residence with a 1,799 square foot basemen 1,600 square feet of which are finished, a 676 square foot garage attached to the residence, and a 2,368 square foot farm utility building.

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. The Commission finds that "commercial production" means production with the intent to make a profit .

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.

10.73 acres of the subject property are used for the production of crops through a crop share agreement. 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. All uses of a parcel are to be considered when determining its primary use. *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 758 N.W.2d 363 (2008). 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.

There are 30 acres in the subject property. (E9:1). The acres devoted to differing uses on the parcel are; more than 11 acres for commercial production, land the Taxpayer considers to be waste, a three acre pond used for recreation, and a portion used as a home site. The Taxpayer argues that wasteland should be considered agricultural land and horticultural land. The statutory definition of agricultural land and horticultural land does include wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2006). Wasteland for purposes of section 77-1359 is defined as "Wasteland includes those land types that cannot be used economically and are not

suitable for recreational or agricultural use or production. Such land types include but are not limited to, blowouts, riverwash (recent unstabilized alluvial deposits), marshes, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. To qualify for wasteland the land must be lying in or adjacent to and in common ownership or management with land used for the production of agricultural products. Some of these areas could be developed or reclaimed for some beneficial use by land shaping, revegetation, drainage or possibly other special practices. Until they are reclaimed, developed, or restored to agricultural production or recreational use, they should be classified as wasteland. Other land types which may be classified as wasteland are the permanent easement acres associated with Bureau of Reclamation or irrigation districts. These areas are defined as open canals or ditches, laterals, drains, and service roads for the canal system. Assessors need to verify or be aware of the type of deed or easement that may be filed for these areas before making any determination of classification." 350 Neb. Admin. Code ch 14 §002.05 (01/03/07). Recreational lands are those predominately used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. 350 Neb. Admin Code ch 10 §001.05E (01/03/07). Some of the uses wold include hunting, fishing, camping, boating, hiking, picnicking, and the access or views that simply allows relaxation, diversion and entertainment. Id.

For the tax year 2007 special valuation eligibility guidelines were developed by the County Assessor's office. (E7:2). The guidelines advised that a parcel with a residence must have at lease 20 acres of qualified agricultural/horticultural use to qualify for agricultural/horticultural valuation. (E7:2). The Taxpayer asserts that the subject property has more than 20 acres of qualified agricultural/horticultural use if wasteland is added to the acres in

actual production. An appraiser employed by the County Assessor testified however that the guidelines were general guidelines and that factors other than the number of acres deemed to be agricultural/horticultural land were considered.

The Commission need not however, determine whether the subject property contains agricultural land and horticultural land classified as wasteland. The primary use of a parcel is not, commercial production merely because the number of acres in the parcel used for commercial production exceeds the number of acres used for any other purpose. *Agena*, supra. Simply counting acres does not give effect to the change in statute enacted by the legislature requiring that the primary use of the entire parcel be considered: (A 21 acre parcel with a residence and 16 to 18 acres rented to an adjoining farmer is not agricultural land or horticultural land; A 20 acre parcel of land with a residence and storage building on 2.3 acres with the balance rented to a farmer is not agricultural land or horticultural land; A 26 acre parcel, 6 acres of which are used for religious purposes with the balance leased to a farmer in a profit sharing arrangement, is not agricultural land or horticultural land.) *Id*.

The Property Tax Administrator, in Directive 07-01, advised that criteria other than area could be applied. (E3:3). The Property Tax Administrator, in Directive 07-01, indicated that other criteria uniformly applied could be used. An appraiser employed by the County Assessor testified that the value of the residence was considered as a factor in all primary use determinations for special valuation qualification.

"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. Actual value of the subject property as determined by the County Assessor was $320,809. (E9:1). The contribution to actual value of the residence, and its site as determined by the County Assessor was $239,899 ($211,899 + $28,000 = $239,899). (E9:1). The contribution to actual value of the unimproved acres was

$80,910. (E9:1). These relative values indicate that the parcel's primary or most important use is for residential use.

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.

The Taxpayer contends that two parcels deemed to have 20 acres of agricultural/horticultural land by the County Assessor was granted special valuation for tax year 2008 and that the subject property should be evaluated on the same basis i.e. with 20 or more acres deemed to be agricultural/horticultural land. The records submitted do not show whether the 2 parcels submitted by the Taxpayer were qualified for special valuation in the tax year 2008. An appraiser employed by the County Assessor testified that the information obtained from Taxpayer's for the year tax year 2007 was used to evaluate parcels eligibility for special valuation for the tax year 2008. In the factors used to make an evaluation were unchanged. As noted above however factors other than the number of acres were considered in the evaluation of each parcels eligibility for special valuation. In addition the qualification of another parcel is not before the Commission. Qualification of the subject property for special valuation is the only issue before the Commission. See, Neb. Rev. Stat. §77-1345 (2006 Cum. Supp.).

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 County Assessor 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 ORDERED THAT:

1. The decision of the County Board determining that the subject property was eligible for special valuation is vacated and reversed.

2. The subject property was not eligible for special valuation as of the assessment date, January 1, 2008.

3. 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. 2008).

4. Any request for relief, by any party, which is not specifically provided for by this order is denied.

5. Each party is to bear its own costs in this proceeding.

6. This decision shall only be applicable to tax year 2008.

7. This order is effective for purposes of appeal on August 12, 2009.

Signed and Sealed. August 12, 2009.

_____
Wm. R. Wickersham, Commissioner

_____
Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.