

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

EDWARD W. HOWARD & CYNTHIA )  
JOHNSON, )

Appellant, )

v. )

LANCASTER COUNTY BOARD OF )  
EQUALIZATION, )

Appellee. )

Case No 07SV-021

DECISION AND ORDER AFFIRMING  
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 Edward W. Howard & Cynthia Johnson ("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 June 16, 2008, pursuant to an Order for Hearing and Notice of Hearing issued December 18, 2007. Commissioners Warnes and Salmon were present. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07). Commissioner Wickersham and Hotz were excused from participation by the presiding hearing officer. Commissioner Warnes was the presiding hearing officer.

Edward W. Howard & Cynthia Johnson were present. No one appeared as legal counsel for the Taxpayer.

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 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 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 S1, T9, R5, 6th PRINCIPAL MERIDIAN, LOT 7 NE , Lancaster County, 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 18, 2007, as amended by an Order issued on March 19, 2008, set a hearing of the appeal for June 16, 2008, at 11:00 a.m. CDST.
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. 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).
14. The presumption remains until there is competent evidence to the contrary presented. *Id.*

15. 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).
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 20.52 acre parcel, Exhibit 2 page one, which has been improved with a single family residence, Exhibit 2 page two, and a farm utility storage shed, Exhibit 2 page three.

The Taxpayer testified that they purchased the subject property in 1988 with the intention to build a house and to keep horses. Further testimony of the Taxpayer was that subsequent improvements to the subject property included installing a well in 1989, building and moving into a house in 1991, and the construction of a farm utility storage shed in 2000, Exhibit 2 page three.

The testimony of the Taxpayer was that the land on the subject property which is potentially subject to greenbelt status is the 20.52 total acres less the one acre homesite, Exhibit 2 page one, less a one quarter to one half acre pond, less the farm site on which sits the farm utility storage shed. The remainder of the land was used for one of two purposes.

First, certain areas were used for the care, breeding and training of horses. Second, the balance of the land was used to grow brome grass for grazing and hay.

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. 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. That definition without examination appears circular simply using the word commerce to define commercial.

Commerce may, however be defined as “the exchange or buying or selling of commodities esp. on a large scale and involving transportation from place to place, compare trade, traffic. “ Id. Trade may mean “the business of buying and selling or bartering commodities: exchange of goods for convenience or profit: commerce.” *Supra* at p 2421. Traffic may mean “a commercial activity usu. involving import and export trade, or to engage in commercial activity: buy or sell regularly or the activity of exchanging commodities by bartering or buying and selling.” *Supra* at 2422-2423.

An alternate definition of the term commercial is “from the point of view of profit: having profit as the primary aim.” *Supra* at 456. A definition of the word commercial also appears in the rules and regulations of the Tax Commissioner. “Commercial shall mean all parcels of real property predominately used or intended to be used for commerce, trade, or business.” 350 Neb. Admin. Code, ch. 10, §001.05C (3/07). That definition is used for the classification of real property for assessment purposes. See, 350 Neb. Admin. Code, ch. 10, §004.02 B (3/07). The Property Tax Administrator has advised that commercial production

means agricultural or horticultural products produced for the primary purpose of obtaining a monetary profit. Directive 07-01, Property Tax Administrator, (3/07).

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 with the intent to make a profit gives effect to the change in terminology as adopted by the legislature and is adopted by the Commission. The Commission finds that the critical element to the term commercial production is the intent to make a profit and not whether a profit was in fact made.

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.

The first use made by the Taxpayer of the subject property for agricultural or horticultural purposes was for the growing of brome grass for grazing and hay production. The Taxpayer testified that the land not devoted to the care, training and breeding of horses was used to grow brome grass for grazing and hay. The area devoted to hay production is about 12 acres, Exhibit 6 page 1. Forty percent of the hay produced by the Taxpayers is retained for their use. (E5:1). The Taxpayer receives the 40% portion of hay production as their share of the total crop. The tenant receives the rest as his share for producing the hay each season. The Taxpayer testified that they were not in the business of producing hay. No hay has been sold and the Taxpayer did not provide evidence of value of that hay which was produced.

The second use made by the Taxpayer of the subject property for agricultural or horticultural use was for the care and breeding of horses. (E6:1) The Taxpayer testified that on January 1, 2007, she had four horses, one was a Dutch warm blood broodmare imported from Holland in 2001 and a second horse was the foal of the broodmare born in 2006. Further testimony by the Taxpayer was that they owned a third horse which was purchased in 1999 when it was four years old. The three horses are shown on the expense sheet provided by the Taxpayer, Exhibit 18 page 1. A fourth horse was owned by the Taxpayer but was not part of the business, it being considered a “companion” horse. The testimony of the Taxpayer was that it is her

intention to breed the broodmare and raise additional horses for sale. Her testimony was that it was her intention to sell off her horses in time, but it will take 1 to 3 additional years to do so. She testified that to date, the business has not generated any income and has resulted in a \$12,000 loss per year for the past 8 years. Exhibit 5 page 2 shows such loss for the year 2005.

Based on the evidence before it, the Commission finds that the requirement for commercial production of agricultural or horticultural products on the parcel has not been met as relates to the hay production or the breeding and care of horses. First, the Commission notes that the hay produced was not sold by the Taxpayer outright, but she did receive the benefit of its production by receiving shares. The Commission finds that the Taxpayer was not in the business of hay production to make a profit. Second, the Taxpayer's business of horse breeding requires that the Commission speculate into the future to affirm that the Taxpayer will ever sell a horse and therefore show income to verify an intent to make a profit. The Commission cannot so speculate.

There is an additional legal requirement for qualification of the subject property as green belt. If commercial production of agricultural and horticultural products are found to be present, that use must be weighed against the residential use of the property to determine the primary use of the subject property. The use made of the entire parcel must be examined in this analysis. Since the Commission has not found that there was commercial production of agricultural or horticultural products on the subject property, further analysis and comparison of the primary use of the entire parcel is not required since 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.

The Commission finds the Taxpayer has not rebutted by competent evidence the presumption that the County Board of Equalization has faithfully performed its duties and had sufficient competent evidence for its decision upholding the County Assessor's disqualification of the land described in this appeal for special valuation. The Commission further finds that the Taxpayer has not provided by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable in its decision to deny greenbelt status to the subject property. The appeal of the Taxpayer is denied.

**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 January 12, 2009

**Signed and Sealed.** January 12, 2009.

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Nancy J. Salmon, Commissioner

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William. C. Warnes, 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.**