

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

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| NORMAN H. AGENA, LANCASTER) | | |
| COUNTY ASSESSOR,) | | |
| |) | Case No 08SV-143 |
| Appellant,) | | |
| |) | DECISION AND ORDER REVERSING |
| v.) | | THE DECISION OF THE LANCASTER |
| |) | COUNTY BOARD OF EQUALIZATION |
| LANCASTER COUNTY BOARD OF) | | |
| EQUALIZATION) | | |
| |) | |
| and) | | |
| |) | |
| BONITA J. BREITENFELDT, ET AL,) | | |
| |) | |
| Appellees.) | | |

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 April 1, 2009, pursuant to an Order for Hearing and Notice of Hearing issued February 2, 2009. Commissioners Warnes and Salmon were present. Commissioner Warnes was the presiding hearing officer. Commissioner Wickersham 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.

Bonita J. Breitenfeldt, et al ("the Taxpayers") were present at the hearing. Jason Scott, attorney at law, 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 S2, T12, R7, 6TH PRINCIPAL MERIDIAN, LOT 9SE, 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 February 2, 2009, set a hearing of the appeal for April 1, 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 20.79 acre parcel of land. (E6:1) The parcel consists of a 1.92 acre home site, and an additional 18.05 acres of land, all 18.05 acres are designated dryland. (E8:4). The subject property is owned by the Taxpayer and a partner. The Taxpayer testified that she is retired and she devoted approximately 6 to 7 hours per day to the agricultural and or horticultural pursuits on the subject property throughout 2005 and 2006. The partner does not actively participate in the agricultural and or horticultural pursuits on the subject property and all income is attributable to the Taxpayer.

The Taxpayer testified that she purchased the subject property on May 2, 2002, for a purchase price of \$359,000. At the time of purchase there was a “lean to like shed”. Additional improvements were added to the subject property after its purchase by the Taxpayer in 2002 including a farm utility building, 60 x 30 foot added in 2006, referred to as the “barn”, plus a farm utility shed, 60 x 6 foot which the Taxpayer testified t was a smaller storage shed which was destroyed by a tornado.

The Taxpayer testified that the agricultural and or horticultural uses made of the 18.05 acres of land on the subject property were the raising of prairie hay and secondly, the raising of horses. This description of the land use is found on the protest form completed by the Taxpayer. (E2:5). A detailed written explanation by the Taxpayer of the land use may also be found in Exhibit 2 pages 6 to 9.

The Taxpayer testified and wrote that she was transitioning the subject property from “pure crop production to a horse breeding facility.” (E2:5). The Taxpayer testified that in the

Fall of 2005 she built a barn, fenced off approximately one half of the 18.05 acres and rented out the other one half to a tenant farmer for the raising of cash grain crops (corn/soybeans). The Taxpayer testified that she learned that it was not practical to rent out the land on the subject property for farming and that is why she started to raise horses.

Evidence was provided by the Taxpayer as to expenses and income derived from the subject property for the raising of prairie hay and cash rent for the years 2006 and 2007. (E2:11 to E2:42). A summary of this evidence is that the Taxpayer received as net income from the rental of the subject property to a tenant farmer in 2006, \$832 and in 2007 the sum of \$774. (E10:16 and E10:29). The Taxpayer provided receipts for payment of expenses for the years 2005 and 2006. The gross income received in 2005 and 2006 by the owners of the subject property for agricultural and or horticultural use of the subject property represents only a “minimal” amount of the Taxpayers yearly total income.

The Taxpayer testified that her initial attempts to grow prairie hay beginning in 2005 were unsuccessful due to poor growing conditions and lack of moisture. No income was derived from the subject property from either the production of prairie hay nor the raising of horses prior to January 1, 2008. The Taxpayer testified that it was her intent to raise horses for sale in the future, but the young horses would need to be developed with training and not sold until sufficient age. As of January 1, 2008, the Taxpayer had one Egyptian Arabian mare horse which had been bred on June 22, 2006; however, a foal was not born to the mare until June, 2008. The Commission cannot speculate as to whether or when the Taxpayer will ever sell a horse. As of January 1, 2008, no income had been received by the Taxpayer from the sale of horses.

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. 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.

Based on the Taxpayer's testimony and the evidence received on behalf of the Taxpayer, the Commission finds that the subject property is not used by the Taxpayer in a manner intended to produce a profit from the production of agricultural or horticultural products. The Commission finds that the Taxpayer's use of the subject property does not meet the requirements of 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.” The subject property is therefore not agricultural or horticultural land qualified for special valuation.

The Commission finds that the Appellant/County Assessor has rebutted by competent evidence the presumption that the County Board of Equalization had faithfully performed its duties and (had competent evidence for its decision denying the County Assessor’s disqualification of the land described in this appeal for special valuation.) The Commission further finds that the County Assessor has provided by clear and convincing evidence that the decision of the county Board was arbitrary or unreasonable in its decision to grant greenbelt status to the subject property. The appeal of the County Assessor is granted and greenbelt status of the subject property 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 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 July 20, 2009.

Signed and Sealed. July 20, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, 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.