

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

DON L. CLARKE,)	
)	
Appellant,)	Case Nos 08SV 214, 08SV 215, 08SV 216,
)	08SV 217 & 08SV 218
v.)	
)	DECISION AND ORDER AFFIRMING
DODGE COUNTY BOARD OF)	THE DECISIONS OF THE DODGE
EQUALIZATION,)	COUNTY BOARD OF EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by Don L. Clarke ("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 July 22, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 21, 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. A panel of three commissioners was created pursuant to 442 Neb. Admin. Code, ch. 4, §011 (10/07). Commissioner Hotz was absent. The appeal was heard by a quorum of a panel of the Commission.

Don L. Clarke was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Stacey Hultquist, a Deputy County Attorney for Dodge County, Nebraska, was present as legal counsel for the Dodge 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. 2008) 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 the consolidated cases is as follows.

I. ISSUES

Was the County Board's decision upholding the County Assessor's determinations that the lands described in the captioned appeals were not eligible for special valuation unreasonable or arbitrary?

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are described as Tax Lots 7 & 13, Section 32, Township 20, Range 7, Dodge, Nebraska, SE $\frac{1}{4}$ SW $\frac{1}{4}$ and Tax Lots 11 & 15, Section 32, Township 20, Range 7, Dodge, Nebraska, Tax Lots 27 & 30, Section 32, Township 20, Range 7, Dodge, Nebraska, Tax Lots 36, Section 32, Township 20, Range 7, Dodge, Nebraska, and Tax Lots 37 & 39, Section 32, Township 20, Range 7, Dodge, Nebraska which together comprise ("the subject property").
3. The Taxpayer filed applications for special valuation
4. The Taxpayer's applications were denied.

5. The Taxpayer protested that determination.
6. The County Board affirmed the determinations of the County Assessor.
7. Appeals of the County Board's decisions were filed with the Commission.
8. The County Board and the Taxpayer were served with Notices in Lieu of Summons and duly answered those Notices.
9. The appeals were consolidated for hearing by order of the Commission.
10. An Order for Hearing and Notice of Hearing issued on May 21, 2009, set a hearing of the appeals for July 22, 2009, at 11:00 a.m. CDST.
11. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals 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).
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. 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).

7. An application for application of special valuation on or before June 30 of the first year in which special valuation is requested. Neb. Rev. Stat. §77-1345(1) (Cum. Supp 2008).
8. County Assessor is required to act on an application for special valuation on or before July 15 of the year in which the application is filed and notice mailed on or before July 22. Neb. Rev. Stat. §77-1345.01(1) Cum. Supp 2008).
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 denial. Neb. Rev. Stat. §77-1347.01(3) (Supp. 2007).
11. The county board of equalization shall decide the protest within thirty days after the filing of the protest. (Neb. Rev. Stat. §77-1345.01(7) (Cum. Supp. 2008).
12. 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(8) (Cum. Supp. 2008).
13. 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(9) (Cum. Supp. 2008).
14. 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).

15. 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).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. 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).
18. 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)
19. 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),
20. 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).
21. "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).

22. 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).
23. 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

Only agricultural land and horticultural land as defined by the legislature is eligible for special valuation. Neb. Rev. Stat. §77-1344(1) (Cum. Supp. 2008). 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.

Sometime in 2008 the Taxpayer had a gate constructed and placed at the entrance to the subject property. (E6:1). The Taxpayer paid for construction of the gate and its installation with an in kind payment of lifetime firewood gathering rights on subject property. (E6:1). The Taxpayer and the gate builder agreed that the transaction had a value of \$1,500. (E6:1). The Taxpayer has consulted with forester's and has maintained a record of the only transaction for the sale of firewood from the subject property. Assuming without deciding that firewood is a horticultural product the Commission concludes that a one time transaction late in 2008 is not sufficient evidence that commercial production had occurred prior to January 1, 2008, or was planned for the tax year 2008. There is no evidence that the subject property was eligible for special valuation as of January 1, 2008.

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 decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining that the subject property was not eligible for special valuation are affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Dodge County Treasurer, and the Dodge County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
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 2008.
6. This order is effective for purposes of appeal on July 27, 2009.

Signed and Sealed. July 27, 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. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.