BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

KEITH A. WHITE, Appellant, v. SEWARD COUNTY BOARD OF EQUALIZATION, Appellee.	)	Case No 07SV-223 DECISION AND ORDER AFFIRMING THE DECISION OF THE SEWARD COUNTY BOARD OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Keith A. White ("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 September 11, 2008, pursuant to an Order for Hearing and Notice of Hearing issued July 11, 2008. Commissioners Warnes, Salmon, and Hotz were present. Commissioner Warnes was the presiding hearing officer. Commissioner Wickersham 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).

Keith A. White was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Jamie Hopp, Deputy County Attorney for Seward County, Nebraska, was present as legal counsel for the Seward 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 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 A TRACT OF LAND LOCATED IN THE NORTHWEST QUARTER OF SECTION 23, TOWNSHIP 12 NORTH, RANGE 4, Seward, Nebraska, ("the subject property").
2. For tax year 2007, the County Assessor made a determination that the subject property should be disqualified for use of special valuation.
3. The Taxpayer protested that determination.
4. The County Board upheld the greenbelt disqualification by the County Assessor.
5. The Taxpayer timely filed an appeal of the County Board's decision with the Commission.
6. The County Board and the Taxpayer were served with a Notice in Lieu of Summons and duly answered that Notice.
7. An Order for Hearing and Notice of Hearing issued on July 11, 2008, set a hearing of the appeal for September 11, 2008, at 9:00 a.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) (Supp. 2007).

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).

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 (Cum. Supp. 2006).

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 a 20 acre rural parcel on which has been built an 1,188 square foot house in 2004. (E8:2). The 20 acre parcel was divided out of a quarter section of land (160 acres) on September 6, 2004, (E10:1-2) and (E3:1). The quarter section had been previously

purchased jointly by the Taxpayer and his parents on January 9, 2004. (E2:1). A survey map of the 20 acres is shown on Exhibit 4, page 1. Aerial photographs of the subject property are shown on Exhibit 5, page one and Exhibit 6, page one.

The Taxpayer testified that his intention after purchasing the quarter section was to build a house on a portion of the newly-acquired land. A parcel of 20 acres was divided off from the jointly-owned quarter section and transferred solely to him without financial remuneration. This transfer of 20 acres satisfied both local zoning ordinances and his finance company. (E9:2).

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 "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 usually involving import and esprit 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 pp. 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 p. 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)(03/07).

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 . 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.

A summary of the use made of the land on the subject parcel was received by the testimony of the Taxpayer and is written in Exhibit 9, page two. His testimony was that the 20 acres is part of an agricultural or horticultural use made in conjunction with the farming enterprise of he and his parents, which is the raising of cattle. The 20 acres were not fenced off to separate it from the balance of the quarter section owned with his parents. The subject property has a barn and corral used to feed and water the cattle which graze on the 20 acres plus

an additional 100 acres of the quarter section. Further testimony by the Taxpayer was that 40 acres of the original quarter section was placed in the CRP program and is not grazed.

The Taxpayer testified that a permanent fence is around his house to keep the grazing cattle away from the house. He estimates that the area fenced off around his house is between 1/4 to 1/3 acre of land. In addition, his testimony was that a "permanent auto gate" (cattle guard) was located in his driveway. The only access to water for the grazing cattle for the 20 acre parcel and the additional 100 acres owned jointly with his parents is that provided on the 20 acre parcel, the subject property. Exhibit 7 has photos of the subject property.

Testimony by the Taxpayer was that he bartered and traded for farming services from a tenant who grazes cattle on the subject property and the additional 100 acres. The exchange included the Taxpayer receiving planting and harvesting services from a tenant in return for grazing rights to the tenant. Testimony of the tenant was that he kept approximately 63 cows and 61 calves on the subject property and the adjacent 100 acres. The tenant did not know the exact boundaries of the subject property since the subject property is contiguous with the remaining 140 acres of the total 160 acres purchased by the Taxpayer and his parents. The tenant was grazing cattle during 2006 to 2007 on the basis of an oral lease with the Taxpayer and the Taxpayer's parents.

The Tenant testified that the barter with the Taxpayer and the Taxpayer's parents exchanged his planting of corn and the harvesting of the corn on 40 acres for the right to graze his cattle on the balance of 120 acres, 20 acres of which is the subject property. Testimony by the Taxpayer was that the income from the corn through 2006 was in the amount of $4,000 per year. This amounts to $667 to the Taxpayer (20 acres/120 acres x $4,000). The tenant testified

that the value of leasing land for grazing as of January 1, 2007 was $30 to $50 per acre.

The Taxpayer testified that the money equivalent received from the subject parcel was not his primary income source and he was unable to identify specific income from the subject property since all monies went into a joint account with his parents. He testified that he assists in the tending of the cattle especially in the winter. The tenant lives some 9 miles away and visits the subject property approximately once per week. The Commission finds that any benefit from the use of the subject property transmits to both the Taxpayer and his parents.

Based on the Taxpayer's evidence, the Commission concludes that the requirement for commercial production of agricultural or horticultural products on the subject property has been met as evidenced from the grazing of cattle. But that is not the only requirement in the analysis of a greenbelt disqualification.

The insertion of the word "parcel" in Neb. Rev. Stat. Section 77-1359(1) by 2006 Neb. Laws LB808, Section 35 was critical. By inserting that word, the primary use aspect of green belt analysis shifted dramatically. The word "parcel" is defined as "a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section." Neb. Rev. Stat. Section 77-132. Thus, the insertion of the word "parcel" into the definition of "agricultural land and horticultural land" at Neb. Rev. Stat. Section 77-1359(1) gives the effect that there is to be no greenbelt designation unless the *entire* parcel – including any residential land or buildings – is primarily used for agricultural or horticultural purposes, as defined at Neb. Rev. Stat. Section 77-1359(2). In other words, since the residence and the land associated with the residence are part of the "parcel," as defined in Section 77-132, the analysis of the primary use of the parcel cannot ignore the relative use of the residence.

A summary of the County's valuation of the parcel's components of land and improvements is found on Exhibit 8, page 1. This exhibit shows that the County's assessed and appraised taxable value on the land was $25,611 and the improvement was $90,800. The Taxpayer did not dispute the taxable valuation the County used for the improvements of the subject property for 2007.

There was no evidence presented as to whether the subject property would sell as a farm or as a rural residential parcel. The Commission notes that a buyer would have to pay $5,840/acre to purchase the entire 20 acre parcel. The Commission takes statutory notice of the Reports and Opinions submitted by Seward County as part of 2007 Statewide Equalization, Exhibit 80, page 68, which shows that the average value of agricultural grassland in Seward County for 2007 was $465/acre.

The Commission, having found that commercial production existed on the subject property, must determine what was the primary use of the subject property. The choices include use of the subject property for rural residential or for agricultural or horticultural use. The Commission finds that the primary use of the parcel is not for agricultural or horticultural use, but rather for rural residential use.

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. The subject property was not eligible for special valuation as of the assessment date, January 1, 2007.
3. This decision, if no appeal is timely filed, shall be certified to the Seward County Treasurer, and the Seward County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2007.

7. This order is effective for purposes of appeal on March 5, 2009.

Signed and Sealed. March 5, 2009.

_____
William C. Warnes, Commissioner

_____
Nancy J. Salmon, Commissioner

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Robert W. Hotz, 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.