BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, Appellant, v. LANCASTER COUNTY BOARD OF EQUALIZATION and JOHN H. SR. & CAROL J. WELLS, Appellees.	)	Case No 07SV-034 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 March 26, 2009, pursuant to an Order for Hearing and Notice of Hearing issued January 30, 2009. Commissioners Wickersham and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Salmon 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.

John H. Wells Sr. & Carol J. Wells ("the Taxpayers") were present at the hearing. No one appeared as legal counsel for the Taxpayers.

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 20 NE, Section 24, Township 10, Range 8, Lancaster, Nebraska ("the subject property").
2. Prior to March 19, 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 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 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 January 30, 2009, set a hearing of the appeal for March 26, 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 a 21.69 acre parcel with a residence and a farm utility building. (E9:3). The County assessor contends that no part of the subject property is eligible for special valuation contrary to the decision of the County Board.

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, 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.

The Taxpayers have shown that 17.1 acres of the subject property were in the Conservation Reserve program ("CRP") for several years after its purchase by them. After the CRP contract terminated, the Taxpayers acquired a tractor, side mower, rake, and bailer, and began harvesting hay for sale. A farm utility building constructed in 1997 is used to house the machinery. Sales of hay of native grasses generated $1,912 for the calendar year 2007. (E12:1). Additional income is generated by Agricultural program payments. (E12:1). Gross Income for 2007 was $2,285. Total expenses for the year 2007 other than depreciation were $9,355 ($12,018 - $2,633 = $9,355). For the year 2005 income from the sale of hay was $1,911, agricultural program payments $477, and custom hire was $891. (E2:6). Total expenses for the year 2005 other than depreciation were $3,943 ($6,847 - $2,904 = $3,943). Evidence of income and expenses for the year 2006 are not in evidence for this appeal. In both years for which income and expense data is available the operating costs excluding depreciation exceed gross income.

Records of the haying operation have been kept for the years 2005 and 2007.

There is no evidence that the Taxpayers have made any effort to increase production or lower expenses.

The income generated from haying and government support programs seems stable. Expenses far exceed the income on a consistent basis. It is not possible to conclude that the Taxpayers are using the subject property for the 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 the intent to make a profit. The Taxpayers are not using the subject property 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.

Because no part of the subject property is 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 it is unnecessary to consider whether the primary use of the subject property is 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.

The subject property is not agricultural land or horticultural land and is not qualified for special valuation.

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 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 reversed.
2. The subject property is not eligible for special valuation for the tax year 2007.
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 2007.
7. This order is effective for purposes of appeal on January 15, 2010.

Signed and Sealed. January 15, 2010.

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Wm. R. Wickersham, 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.

Commissioner Hotz, dissenting in part and concurring in the result.

While I agree that the County Board's decision should be reversed and that the subject property is not eligible for special valuation, I write separately to dissent from the portion of the presiding officer's Decision and Order (Decision) that concludes there is no commercial production on any part of the subject property.

It is not entirely clear what the law requires since the term "commercial" was brought into the equation in relation to agricultural land and horticultural land, as enacted in Neb. Rev. Stat. Section 77-1359(2) by Laws 2006, LB808, Section 35. I do not disagree with the Decision when it suggests that "a statute should be construed to give effect to purposeful change in its provisions." The origin of this uncited position may likely be traced to the general rule that, "it will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto." *No Frills Supermarket, Inc. v. Nebraska Liquor Control Comm*., 246 Neb. 822, 523 N.W.2d 528 (1994). However, a construction that concludes, as the Decision does, that adding the term "commercial" requires a showing of intent to make a net profit evidenced by multiple years of actual net profits (as shown in federal income tax filings) extends this rule too far.

The Decision notes that "commercial production" is a term undefined in Nebraska law, yet prefers a more restrictive common definition of "commercial" over an alternate common meaning which would just as adequately fit within the statutory scheme. I would not stress so little, as the Decision does, the definition of "commercial" as being "of, in or relating to commerce" in the analysis of what constitutes "commercial production." And, in my view, the

Decision's more narrow construction of "commercial production" is more restrictive than the language of the statute demands.

The Decision in this appeal finds that "commercial production means production with the intent to make a profit." Yet, there are a variety of opinions on this point. For example, the Tax Commissioner opines that commercial production means "agricultural or horticultural products produced *for the primary purpose of obtaining a monetary profit.*" Directive 08-04 (December 23, 2008)(emphasis added). Additionally, in floor debate on LB808, the chairman of the Legislature's Revenue Committee stated that the insertion of the term commercial "removes the preferential assessment for those that are not farming commercially." Floor Debate, 99th Leg., 2d Sess. 11109-11110 (March 22, 2006). And finally, this Commission, in a prior decision affirmed by the Nebraska Supreme Court[1] concluded, "In this appeal the evidence is that corn and hay have been produced each year and that the Taxpayer has *attempted to maximize revenues* through cooperation with adjoining land owners. Those factors are sufficient to make a determination that use of the subject property has met the commercial production requirement." *Agena v. Lancaster County Board of Equalization and Johnson* (January 18, 2008)(emphasis added).

The Decision in this case concludes that a consistent showing of expenses exceeding income is tantamount to no intent to make a profit. Construing "commercial production" in a property tax scheme as requiring a showing of intent to make a net profit, particularly when measured by a federal income tax scheme, seems quite unnecessarily complicated. If intent to make a profit is the hurdle that must be cleared in order to satisfy the commercial production

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[1] *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 758 N.W.2d 363 (2008).

requirement -- based upon a consistent showing of income exceeding expenses -- and a failure to show profit becomes evidence that such an activity was merely a residential hobby, then one would wonder what to do with enterprises (that by all other appearances look like what Nebraskans call farms) reporting losses to the Internal Revenue Service in years when grain prices have significantly fallen or large amounts of depreciation on new equipment come onto the books. Such a construction would tend to produce unreasonable and inconsistent results.

Take for example a rural acreage owner who receives revenues from corn and hay production on 19 acres of a 20 acre parcel. Since he leases the ground to someone else to grow and harvest crops, he has no expenses, and he can consistently show net profits. Thus, he would satisfy this Decision's commercial production requirement. Yet the same 19 acres of corn and hay would no longer satisfy the Decision's intent to make a profit construction of commercial production if only a few factors are changed, all wholly unrelated to the *use* of the land. If the same acreage owner were to purchase a small tractor and some tilling, planting, and baling equipment, buy some fertilizer and seed, sell the harvested corn and hay, and then show his income and expenses, including depreciation on equipment, on his federal income tax forms, the same land, used for the same purposes (to grow and sell hay and corn) would no longer be classified as agricultural but instead residential, if his income did not exceed his expenses. What cannot go unnoticed in this example is that whether he leases the land to someone else or farms it himself the use of the land is no more or less agricultural and it is no more or less being used for commercial purposes. Under the analysis of the Decision, if he leases the ground to someone else, it should be classified as agricultural land; but if he farms it himself, it should be assessed as residential. I cannot concur in such reasoning. Whether land classifications in a property tax

system should change from year to year for each particular parcel based upon things like changing grain prices or personal property depreciation schedules is a matter of public policy for the Legislature, not an intermediate appellate tribunal,[2] to decide. To construe Section 77-1359(2), as the Decision has here, will yield inconsistent and unreasonable results. Such a construction ultimately demands a consistent showing of net profit when no such requirement is found anywhere in the language of the statute.

In my reading of the statutory scheme, agricultural land and horticultural land includes land used for agricultural or horticultural purposes. Neb. Rev. Stat. Section 77-1359(1). In order to qualify as an agricultural or horticultural purpose, the land must be used for "commercial production." Neb. Rev. Stat. Section 77-1359(2). And the commercial production must involve "any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture." *Id.* The statute says nothing about "intent to make a profit," or, as this Decision says, "primarily motivated by a desire to make a profit." The Legislature very well may have changed the meaning of the definition of the classification of agricultural or horticultural land when it added the term "commercial" to Section 77-1359(2), but I cannot conclude as the Decision does, that change now demands a showing of intent to make a profit by showing multiple years of actual net profits.

In the present case, the Taxpayer testified he purchased the 21.69 acre parcel in 1989 for approximately $1,200 per acre. He constructed a machine shed in 1997 and began a haying operation. He constructed the house in 1998. In 2005 and 2007, approximately 18 acres were

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[2] The Tax Equalization & Review Commission was created to be an intermediate appellate tribunal. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 284, 753 N.W.2d 802, 812 (2008).

dedicated to brome grass or prairie hay. Gross income for both 2005 and 2007 exceeded $2,200, with hay sales in the amount of $1,911 in 2005 and $1,912 in 2007. (E2:6, E12:1).

Thus, I would find that the sales of agricultural or horticultural products, as is found in this appeal, are commerce, even when such sales do not result in a consistent showing of net profits, and as such satisfy the requirement of "commercial production" as used in Neb. Rev. Stat. Section 77-1359(2). Therefore, I cannot conclude, as this Decision does, that there is no commercial production on any part of the parcel.

However, I must concur in the result of the Decision because of another statutory change: the insertion of the term "parcel" in Neb. Rev. Stat. Section 77-1359(1) by 2006 Neb. Laws LB808, Section 35. By inserting that term, the primary use aspect of greenbelt analysis shifted dramatically for tax years 2007 and 2008.[3] Unlike the term "commercial production," the term "parcel" is defined in Nebraska statutes. As is applicable in this case, parcel means "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. "The addition of the word "parcel" was intended to require a county assessor to consider the entire tract of land, including any homesite, to determine whether the predominate use of the *parcel* was for agricultural purposes." *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 862, 758 N.W.2d 363, 373 (2008)(emphasis in original). Thus, the insertion of the term "parcel" into the definition of "agricultural land and horticultural land" at Neb. Rev. Stat. Section 77-1359(1) gives the effect

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[3] I note that 2008 Neb. Laws LB777, Section 1, subsequently amended Neb. Rev. Stat. Section 77-1359(1), effective January 1, 2009, to exclude "any building or enclosed structure and the land associated with such building or enclosed structure located on the parcel" from the definition of agricultural land and horticultural land. The present case must be decided based upon the law as it existed on January 1, 2007.

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.

In this case, the market value of the residence and the land under the residence in 2007 was $237,219 ($187,219 + $50,000) (E9:1). The 2007 market value for the remainder of the parcel was $27,899 (E9:3). A representative of the County Assessor's Office, Robert Ogden, testified that in his opinion the agricultural use of the parcel was not its primary use.

Thus, I would find that while the property has some agricultural and horticultural uses, the *parcel* is not *primarily used* for agricultural or horticultural purposes. When weighing the relative uses of the entire parcel, as the statute requires for tax year 2007, I would find that the agricultural use is outweighed by the residential use.

Therefore, I concur only in the result of the Decision, that the decision of the Lancaster County Board of Equalization should be reversed.

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Robert W. Hotz, Commissioner