

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

DON L. CLARKE,)	
)	CASE NO. 04SV-1
Appellant,)	04SV-2
)	04SV-3
vs.)	04SV-4
)	
DODGE COUNTY BOARD OF)	FINDINGS AND FINAL ORDER
EQUALIZATION,)	AFFIRMING DECISION OF
)	COUNTY BOARD OF EQUALIZATION
Appellee.)	
)	

Filed March 11, 2005

Appearances:

For the Appellant: Don L. Clarke
3313 South 90th Avenue
Omaha, NE 68124

For the Appellee: Stacey Hultquist, Esq.
Deputy Dodge County Attorney
435 North Park Avenue
Fremont, NE 68025

Before: Commissioners Lore, Reynolds, and Wickersham.

**I.
STATEMENT OF THE CASE**

Don L. Clarke ("the Taxpayer") and others own 10 tracts of land in Dodge County, Nebraska. The Taxpayer filed for an Application for Special Valuation for tax year 2004 concerning seven of those tracts. The 9.32 acre tract of land in Case Number 04SV-1 is legally described as Tax Lot 36 in Section 32, Township 20, Range 7, Dodge County Nebraska. (E23:1). The 9.59 acre tract of land in Case Number 04SV-2 is legally described as Tax Lot 37 and Tax Lot 39 in Section 32, Township 20, Range 7,

Dodge County Nebraska. (E22:1). The 24.45 acre tract of land in Case Number 04SV-3 is legally described as Tax Lot 27 and Tax Lot 30 in Section 32, Township 20, Range 7, Dodge County Nebraska. (E20:1). The 60.0 acre tract of land in Case Number 04SV-4 is legally described as Tax Lot 7 and Tax Lot 13 in Section 32, Township 20, Range 7, Dodge County Nebraska. (E24:1).

The Taxpayer acquired all of these tracts of land in either 1999 or 2000. The Taxpayer has three trailers located on the land in which the Taxpayer and his family stay approximately 30 nights each year when hunting or otherwise using the property as a retreat. The Taxpayer also takes an average of 20 pick-up truck loads a year of firewood from the property for personal use.

The Taxpayer timely filed an Application for Special Valuation for tax year 2004. (E35 - E38). The assessment manager/assessor for Dodge County recommended denial of the applications. (E35 - E38). The Taxpayer timely filed a protest of those recommendations. (E40:1 - 4). The Dodge County Board of Equalization denied the protests. (E1 - E4).

The Taxpayer appealed the Board's decision on September 7, 2004. (Appeal Form). The Commission served a Notice in Lieu of Summons on the Board on September 13, 2004, which the Board answered on September 29, 2004. The Commission issued an Amended

Order for Hearing and Amended Notice of Hearing to each of the Parties on January 6, 2005. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties. The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on March 8, 2005. The Taxpayer appeared personally at the hearing. The Board appeared through Stacey Hultquist, Esq., the Deputy Dodge County Attorney. Commissioners Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer. Commissioner Hans was excused from the proceedings.

The Commission afforded each of the Parties the opportunity to present evidence and argument. The Parties stipulated that in addition to the evidence adduced in this appeal the Commission, to the extent relevant, could receive and consider the evidence adduced in related cases identified as Commission Cases 03A-203; 03SV-1; 04A-31; 04A-32; 04A-33; 04A-34; and 04A-35. Thereafter the Commission took the matter under advisement, and the matter now comes on for decision.

II. ISSUE

The only issue before the Commission is whether the Board's decisions to deny the Taxpayer's Special Valuation Applications were incorrect and either unreasonable or arbitrary.

III.
APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the Board's decisions to deny his Special Valuation Applications were incorrect and (2) that the Board's decisions were either unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decisions. *See, e.g., Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV.
FINDINGS OF FACT

The Commission finds and determines that:

1. Special valuation is that value the land would have for agricultural or horticultural purposes or uses without regard to actual value for other purposes or uses. Neb. Rev. Stat. §77-1343 (Cum. Supp. 2004).
2. There is no clear and convincing evidence that the Taxpayer uses the subject property for "agricultural or horticultural" purposes as those terms are defined under state law.
3. The subject property is used for recreational purposes.

V.
ANALYSIS

The uncontroverted evidence establishes that the Taxpayer has placed three trailers on the property, which he and his family use to stay overnight on the property approximately 30-nights each year. The Taxpayer and his family use the property for hunting purposes, which results in approximately four deer being taken from the property each year. The Taxpayer also removes, on average, approximately 20 pick-up truck loads of firewood from the property each year for personal use. The Taxpayer does not plant or replant any trees, and no commercial timbering or other harvesting of trees occurs on the property. The Taxpayer contends that his removal of pick-up truck loads of firewood from the subject property constitutes an agricultural or horticultural use. This argument can only be supported if the removal of firewood for personal use constitutes an agricultural or horticultural use of the property as those terms are used in state law.

State law defines "agricultural or horticultural land" as:

"(1) . . . land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. Land retained or protected for future agricultural or

horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or horticultural land. Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land . . . (2) Agricultural or horticultural products shall include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops . . ."

Neb. Rev. Stat. §77-1359 (Cum. Supp. 2004). The term "production" is not defined in state law or in the rules and regulations of the Department of Property Assessment and Taxation. Special valuation, however, is designed to serve a distinct and vital purpose. "Special valuation . . . allows persons wishing to continue to engage in agriculture as a livelihood without being forced to discontinue their agricultural endeavors as a result of a heavy tax burden." 350 Neb. Admin. Code, ch. 11, §11-001. (4/2003).

The rules of the Department of Property Assessment and Taxation also provide additional guidance concerning "recreational" property, which is defined as:

". . . parcels of real property used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. Some of the uses would include fishing, hunting, camping, boating, hiking, picnicking, and the access or view that simply allows relaxation, diversion and entertainment."

350 Neb. Admin. Code, ch. 10, §001.05E (3/2004). There is no evidence in the record that the Taxpayer puts the subject property to an agricultural or horticultural use. The clear and convincing evidence in the record establishes that the subject property is used for primarily or predominantly as a retreat and for hunting. Recreational property such as the subject property is not eligible for special valuation. Neb. Rev. Stat. §77-1343 (Cum. Supp. 2004).

The Board was not incorrect, and was neither unreasonable nor arbitrary in denying the Taxpayer's Special Valuation Protests for tax year 2004. The Board's decisions must accordingly be affirmed.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the Board's action was incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004).
3. The Board is presumed to have faithfully performed its official duties . . . The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's decision becomes one of fact based upon all the evidence presented. The burden of showing such decision to be unreasonable rests on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
4. The Taxpayer has failed to adduce clear and convincing evidence that the Board's decisions were incorrect and either unreasonable or arbitrary. The Board's decisions must accordingly be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Dodge County Board of Equalization's Orders denying the Taxpayer's Special Valuation Application Protests for tax year 2004 for the following properties are affirmed:
 - a. The 9.32 acre tract of land in Case Number 04SV-1, legally described as Tax Lot 36 in Section 32, Township 20, Range 7, Dodge County Nebraska.
 - b. The 9.59 acre tract of land in Case Number 04SV-2 is legally described as Tax Lot 37 and Tax Lot 39 in Section 32, Township 20, Range 7, Dodge County Nebraska.
 - c. The 24.45 acre tract of land in Case Number 04SV-3 is legally described as Tax Lot 27 and Tax Lot 30 in Section 32, Township 20, Range 7, Dodge County Nebraska.
 - d. The 60.0 acre tract of land in Case Number 04SV-4 is legally described as Tax Lot 7 and Tax Lot 13 in Section 32, Township 20, Range 7, Dodge County Nebraska.
2. Any request for relief by any Party not specifically granted by this Order is denied.
3. This decision, if no appeal is filed, shall be certified to the Dodge County Treasurer, and the assessment

manager/assessor for Dodge County, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004).

4. This decision shall only be applicable to tax year 2004.
5. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 15th day of March, 2005.

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

Seal

Wm. R. Wickersham, Chair

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE APPEAL MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW IN NEBRASKA REVISED STATUTE §77-5019 (REISSUE 2003). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.

PLEASE NOTE: You will only be notified of a change in assessed value for your property for tax year 2005 if the 2005 assessed value differs from the 2004 assessed value as determined by your Assessor or County Board of Equalization. The Commission's decision has no impact on that determination. You should contact your Assessor's Office after March 19, 2005, to determine your property's assessed value for 2005. If you are unsatisfied with that value, you must file a protest before July 1, 2005. If you fail to file a protest, there can be no change to the Assessor's determination of the 2005 assessed value for your property.