

COPY

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

NORMAN H. AGENA, LANCASTER)
COUNTY ASSESSOR,)
)
Appellant,)
)
v.)
)
LANCASTER COUNTY BOARD OF)
EQUALIZATION)
)
and)
)
DIRK S. JOHNSON, ET AL.,)
)
Appellees.)

Case No 07SV-041

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 December 10, 2007, pursuant to an Order for Hearing and Notice of Hearing issued October 2, 2007. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Norman H. Agena, the County Assessor, was present at the hearing. Vincent Valentino was present as legal counsel for the County Assessor.

William E. Peters, Special County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

Dirk S. Johnson ("the Taxpayer") was present at the hearing. Kile W. Johnson was present 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 Lot 46 Section 9, Township 9, Range 6, 6th Principal Meridian, 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 October 2, 2007, set a hearing of the appeal for December 10, 2007, at 11:00 a.m. CST.
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. The county board of equalization shall decide the protest within thirty days after the filing of the protest. 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 (Supp. 2007).
14. 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 (Supp. 2007).
15. 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).

16. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
17. 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).
18. The Commission can grant relief only if 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 acre parcel. (E17). Improvements include a residence and a farm utility building. (E17). The improvements were constructed by the Taxpayer after purchase of the property in 1997. The farm utility building is used in conjunction with the residence. There are 17.57 acres of the parcel which are used for the production of corn or hay by a tenant. The tenant has also leased two adjoining parcels for a total of 60 acres to be farmed as a unit. Otherwise, the Taxpayer is not directly involved in crop production. The parcel lies outside the zoning jurisdiction of any municipality but is subject to zoning restrictions enacted by Lancaster County.

Agricultural or horticultural land which has an actual value reflecting purposes or uses other than agricultural or horticultural purposes or uses is eligible for special valuation if it is located outside the corporate boundaries of any sanitary improvement district, city, or village or if within the corporate boundaries of a city or village and it is subject to a conservation or preservation easement approved by the governing body of the city or village. Neb. Rev. Stat. §77-

1344 (Supp. 2007). If the subject property is not agricultural land and horticultural land it is not eligible for special valuation.

Agricultural or horticultural land means that land as defined in section 77-1359 of Nebraska Statutes. Neb. Rev. Stat. §77-1343 (Cum. Supp. 2006). 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.” Neb. Rev. Stat. §77-1359 (Cum. Supp. 2006).

One term within the definition of agricultural land and horticultural land 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 definition of agricultural land and horticultural land have not been defined by the Legislature. For example if land is not 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, it is not 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 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 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 and is adopted by the Commission. Whether or not an activity is undertaken with a view to making a profit and the generation of deductible expenses for the calculation of taxable income requires consideration of a number of factors. See, *Wood*, 548 T.M., *Hobby Losses*. 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 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.

Section 77-1359 of Nebraska statutes requires a determination that the primary use of a parcel be for commercial production before it can be deemed agricultural land and horticultural land. 17.57 acres of the subject property are used for commercial production; the balance of the parcel is used for residential purposes. Given the definition of parcel found in section 77-132 of Nebraska Statutes and the use of that term in section 77-1359 of Nebraska statutes it is clear that the parcel as a whole is to be considered when determining whether or not a parcel is agricultural land or horticultural land. The remaining question is then whether the subject property (parcel) is primarily used for the 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. Primarily can be defined as first of all or in the first place. *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 1800. Primary can be defined as the "first in rank or importance." *Id.*

The majority of the County Board considered three factors to make its determination that the subject property should not be disqualified for special valuation; 1) whether the parcel had an Farm Service Agency ("FSA") number assigned to it; 2) whether gross income was generated from 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 and 3) whether the majority of acres in the parcel were used for the 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. The first two factors are applicable to a determination of whether or not commercial production occurred on the parcel. It is only the third factor that relates to a determination of primary use. The Chief Field Deputy for the County Assessor ("Deputy Assessor") testified that disqualification for special

valuation was determined based on several factors as shown in Exhibit 18. In addition to the factors shown in Exhibit 18, size of the parcel, improved or unimproved status, and common ownership or control with other parcels, as well as the relative contributions to value of the parcel's components were also considered. A County Commissioner testified that the income derived from commercial production should be compared to the primary source of income of the user of the parcel in addition to the factors described above as a basis for the County Board's decision and the factors discussed by the Deputy Assessor .

The size of the parcel was considered by the County Assessor to be a factor to be considered for a determination of the primary use of a parcel. The minimum site size allowed by Lancaster County zoning regulations for construction of a residence without creation of a subdivision or a zoning variance is 20 acres. (E10:6 and E11:1). The effect of that requirement is that the minimum size tract for a residential use outside of a subdivision is 20 acres. There are no restrictions on the size of a parcel used for commercial production. The Taxpayer testified that the parcel was bought with the hope of placing a residence on it. A taxpayer's motivation for purchase of a parcel is a factor to be considered when it is necessary to make a determination of its primary use. A purchase date far removed from the date on which a determination is made may however, make that factor an unreliable indicator. In this appeal the subject property was purchased in 1995 and a residence constructed in 2002. (E17:1). The date for a determination of the primary use of the parcel is January 1, 2007. The evidence is that the subject property was purchased for construction of a residence, that a residence was constructed and that no further changes in use have occurred. The Taxpayer's motivation for purchase of the subject property, residential use, is a factor to be considered in a determination of the primary use of the subject property.

The Taxpayer also testified that a tenant had farmed the parcel for several years after its purchase but had relinquished the lease because the small tract was difficult to farm. The Taxpayer then leased the subject property to a new tenant in conjunction with the owners of adjoining parcels for a total of 60 acres. Difficulty or an inability to engage in commercial production on a parcel without the addition of other contiguous land is a factor to be considered when determining the primary use of a parcel. In this case the cooperative leasing of adjoining parcels and the motivation for that arrangement are an indication that the parcel's primary use is not for commercial production.

“Value can have many meanings in real estate appraisal: the applicable definition depends on the context and usage. In the market place value is commonly perceived as the anticipated benefits to be received in the future”. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p 20. “The economic concept of value is not inherent in the commodity, good, or service to which it is ascribed; it is created in the minds of the individuals who make up the market. Id p 29. Typically four independent factors create value; utility, scarcity, desire, and effective purchasing power. Id p. 29. “Utility is the ability of a product to satisfy a human want, need or desire.” Id. p 29. “Scarcity is the present or anticipated supply of an item relative to the demand for it.” Id. p 30. “Desire is a purchaser's wish for an item to satisfy human needs (e.g., shelter, clothing, food, companionship) or individual wants beyond the essential required to support life.” Id. p 30. “Effective purchasing power is the ability of an individual or group to participate in a market ---- that is, to acquire goods with cash or its equivalent.” Id. p 30.

The value of a parcel of real estate is the sum of its component parts. *See, The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001). “The value of owner-occupied residential

property is based primarily on the expected future advantages, amenities, and pleasures of ownership and occupancy.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p. 35. “The value of income-producing real estate is based on the income it will generate in the future.” *Id.* In the context of this appeal if greater utility is assigned to a use it will have a greater value. Greater value is then an indicator of the primary use of the parcel. Actual values of components of the subject property as determined by the County Assessor as of January 1, 2007, were not disputed. The total actual value of the residence, farm utility building, and their sites as determined by the County Assessor was \$205,972.00 (\$155,972.00 + \$50,000.00). (E17:1). Special value, solely for agricultural or horticultural use of the land used for commercial production was \$29,245.00. (E17:3). Actual value, for all uses, of the land used for commercial production as determined by the County Assessor was \$142,500.00. (E17:1). The relative values of the components of the subject property are \$205,972.00 for actual value for land and improvements with a residential use, and \$29,245 special value for land with commercial production. These relative values do not indicate that the parcel’s primary or most important use is for commercial production or that it is primarily used for that purpose.

The acres devoted to differing uses on the parcel are 17.57 acres for commercial production and the balance as roads and sites for the residence and farm utility building. (E16 and E17:3). Page 6 of Exhibit 24 is a map showing USDA determined uses of various parts of the subject property. The map shows 17.63 acres of grass and oats. (E24). The difference between 17.57 acres and 17.63 acres is not material in this appeal. The fact that the number of acres used for commercial production exceeds the number of acres used for all other purposes indicates that commercial production is the primary use of the subject property.

The Property Tax Administrator, in Directive 07-01, advised that criteria other than area could be applied. (E21:3). The Property Tax Administrator also advised that "primarily used" meant "for the most part" and that case law usually referred to "primarily" as more than 51%. (E21:3). A comparison of the size of areas of use within a parcel is suited to use of the "for the most part" and "51%" criteria. The Property Tax Administrator, in Directive 07-01, indicated that other criteria uniformly applied could be used. Other factors such as the relative values of the components of the subject property strongly indicate that the most important or primary use of the subject property is for residential purposes.

The County Board's determination that the primary use of the subject property was commercial production was based solely on the relative number of acres devoted to each use as found on the parcel. Use of that factor alone was unreasonable. The determination of the County Board should be reversed.

The factors considered in this appeal to determine the primary use of the parcel are based on the facts presented. Factors in addition to those discussed in this appeal may be presented in other appeals and will be considered as presented. An exhaustive list of factors is not possible based on the facts of this appeal or perhaps never possible. It is however the consideration of all factors as applicable for each parcel rather than reliance on a single factor that is necessary to make a reasonable determination of primary use for a parcel.

The County Board has indicated that it believes the statutes considered in this appeal should be construed in a manner to make their application constitutional. The Commission may not consider constitutional issues. *In re Metropolitan Utilities Dist. of Omaha*, 179 Neb. 783, 140

N.W.2d 626, (1966). Nor may the Commission construe statutes that are unambiguous. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000).

**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 as of the assessment date, January 1, 2007, is vacated and reversed.
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 Lancaster County Treasurer, and the Lancaster 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.

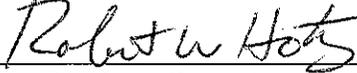
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on January 18, 2008.

Signed and Sealed. January 18, 2008.




Wm. R. Wickersham, Commissioner


Nancy J. Salmon, Commissioner


Robert W. Hotz, Commissioner


William C. Warnes, 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.