

COPY

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, Appellant, v. LANCASTER COUNTY BOARD OF EQUALIZATION and TREETOP, INC., Appellees.

Case No. 07SV-138

DECISION AND ORDER SUBSTITUTING PARTY 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 18, 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, a Special County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

Steven E. Guenzel, Vice-President, Treetop, Inc., ("the Taxpayer") was present without legal counsel.

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2007) 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 County Assessor is authorized to bring and maintain the above captioned appeal.
2. The parcel of real property to which this appeal pertains is described as S $\frac{1}{2}$ W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 19, Township 12, Range 5 , ADA Lot 18 in Lancaster County, Nebraska, ("the subject property").
3. The Assessor determined that the subject property was not qualified for special valuation as of January 1, 2007.
4. The Taxpayer protested the County Assessor's determination.
5. The County Board reversed the County Assessor's determination.
6. The County Assessor timely filed an appeal of the County Board's decision with the Commission.

7. The County Board and Treetop, Inc. were each served with a Notice in Lieu of Summons and duly answered that Notice.
8. An Order for Hearing and Notice of Hearing issued on October 2, 2007, as amended by an Order issued on November 8, 2007, set a hearing of the appeal for December 18, 2007, at 11:00 a.m. CST.
9. 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.
10. Treetop Inc., is a successor in interest to Steven E. and Judy L. Guenzel.
11. The subject property was not eligible for special valuation as of January 1, 2007.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016 (7) (Supp 2007).
2. 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).
3. 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)

4. The eligibility of land for the special valuation provisions of this section shall 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).
5. "At any time, the county assessor may determine that land no longer qualifies for special valuation pursuant to sections 77-1344 and 77-1347. 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. 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. 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. 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. The valuation notice relating to the land subject to the county assessor's disqualification notice shall be sent in accordance with subsection (2) of section 77-1315

and the valuation may be protested pursuant to section 77-1502. Neb. Rev. Stat. 77-1347.01 (Supp 2007).

6. 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).
7. "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." Neb. Rev. Stat. §77-1359 (1) (Cum. Supp. 2006).
8. "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).
9. "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(2) (Cum. Supp. 2006).

10. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
11. 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).
12. The presumption remains until there is competent evidence to the contrary presented, at which point the presumption disappears. From that point forward, the reasonableness of the valuation fixed by the County Board becomes one of fact based on all of the evidence

presented. *Garvey Elevators, Inc. v. Adams County Bd. Of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

13. The Commission can grant relief only if there is clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
14. Proof that the decision 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).
15. "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).
16. 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).
17. 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).
18. The Commission may substitute a successor in interest as a party. Neb. Rev. Stat. §77-5016.09 (Supp. 2007).

IV. ANALYSIS

The subject property is a parcel in rural Lancaster County. The parcel is a 20 acre tract based on its legal description. Improvements on the parcel include a greenhouse with a combination garage, storage and work shed. The improvements were constructed and used for the commercial production of tomatoes. Tomatoes were last produced during the year 2003. Attempts were subsequently made to find another operator or to salvage materials from the greenhouse and shed. Neither effort had been successful as of January 1, 2007. The County Assessor classified one acre of the subject property as a site for the buildings. (E18:1). The balance of the parcel is grassland or treed. (E16). The grasslands have not been pastured or hayed for several years. There are two walnut groves on the parcel. The groves were planted several decades ago. Nuts from the trees have been harvested for personal use of the owners. A Vice President of Treetop, Inc. testified that the trees were grown for the production of walnut veneer. Treetop, Inc. has not attempted a harvest of the walnut trees or determined their value for production of veneer.

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.

Some products however require time for development and production can be deemed to include time for development. The future production described for the subject property was a possible harvest of walnut trees. The walnut trees had been planted on the subject property for several decades. The walnut trees have not been examined or appraised by anyone with the qualifications to advise a seller. There is no evidence of a management plan for the subject property.

The Taxpayer argued that the subject property had to be classified as agricultural and horticultural land because it was not being used for commercial, residential or some other purpose. That argument is misplaced. Classifications for the valuation of land are developed by assessors as necessary for the uniform and proportionate valuation of land in a county. See, Neb. Rev. Stat. §77-103.01 (Reissue 2003) and Neb. Rev. Stat. §77-1363 (Cum. Supp. 2006). Classification for valuation ensures that like lands receive like valuations. A determination that land is agricultural and horticultural land for purposes of section 77-1359 or section 77-1344 of

Nebraska Statutes is for a different purpose, preferential assessment. If land does not meet the definition found in section 77-1359 of Nebraska Statutes it may be classified in any manner that will result in its uniform and proportionate valuation with other land that likewise is not agricultural land or horticultural land.

Commercial production of tomatoes on the subject property ended in 2003 because it wasn't profitable. The evidence in this appeal is that no other commercial production has occurred on the subject property for several years. The determination of the County Board that as of January 1, 2007, 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 was attributable to the subject property was unreasonable or arbitrary.

**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 vacated and reversed.

**VI.
ORDER**

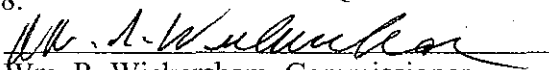
IT IS ORDERED THAT:


1. Treetop, Inc., is substituted as a party and Steven E. and Judy L. Guenzel are removed as parties.
2. The Caption of the appeal be reformed to reflect the interest of Treetop, Inc.

3. 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.
4. The subject property was not eligible for special valuation as of the assessment date, January 1, 2007.
5. 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).
6. Any request for relief, by any party, which is not specifically provided for by this order is denied.
7. Each party is to bear its own costs in this proceeding.
8. This decision shall only be applicable to tax year 2007.
9. 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.