

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

CHERYL A. FEALA,)	
)	
Appellant,)	CASE NO. 05R-201
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
DODGE COUNTY BOARD OF)	DODGE COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Cheryl A. Feala 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 February 22, 2006, pursuant to a Notice and Order for Hearing issued December 7, 2005. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Cheryl A. Feala ("the Taxpayer") appeared at the hearing without counsel.

The Dodge County Board of Equalization ("the County Board") appeared through counsel, Stacey Hultquist, Esq., a Deputy County Attorney for Dodge County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) 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. STANDARD OF REVIEW

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. §77-5016(8)(Supp. 2005). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

II. FINDINGS

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described in the appeal as Tax Lot 7, Section 17, Township 17, Range 6, Dodge County, Nebraska ("the subject property").

2. The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Dodge County Assessor was:

Land value	\$39,710.00
Total value	<u>\$39,710.00.</u> (E1:4 and E16:1).

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

Land value	\$4,620.00
Total value	<u>\$4,620.00.</u> (E1:4).

4. The County Board determined that the actual or fair market value of the subject property as of the assessment date was:

Land value	\$33,450.00
Total value	<u>\$33,450.00.</u> (E1:1)

5. The Taxpayer timely filed an appeal of that decision to the Commission.

6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.

7. An Order for Hearing and Notice of Hearing issued on December 7, 2005, set a hearing of the Taxpayer's appeal for February 22, 2006, at 3:00 pm. 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.

9. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the burden of proof in favor of the County Board.

10. The decision of the County Board was neither arbitrary nor unreasonable.

11. The decision of the County Board should be affirmed.
12. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for the tax year 2005 is:

Land value	\$33,450.00
Total value	<u>\$33,450.00.</u>

III. CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission is over all 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)
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016 (3) (Supp 2005).
4. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
5. "Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the

uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).

6. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
7. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
8. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
9. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
10. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005). The Nebraska Supreme Court, in considering similar language, has held that “There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary

presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.” *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

11. 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).
12. 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).
13. The Court has also held that “In an appeal to the county board of equalization or to [the Tax Equalization and Review Commission] and from the [Commission] to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.” *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

14. "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).
15. "It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization." *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58, (1991).
16. "It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based." *Bottorf v. Clay County Bd. Of Equalization*, 7 Neb. App. 162, 167, 580 N.W.2d 561, 565, (1998).
17. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).
18. The appraisal of real estate is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874, (1977).
19. Properly adopted rules and regulations have the force and effect of law. *Alexander v. J. D. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).

IV. DISCUSSION

The subject property is an island in the Platte River near North Bend. The parcel lies in a flood plain and is unimproved. The parcel was purchased with other lands in 2000. The island is separated from other lands of the Taxpayer unless the river is low. (E4:1). The Taxpayer did not have legal title on the assessment date to a small tract of land (T.L. 10) separating the subject property from other parcels owned by the Taxpayer. (E3:1). Failure of the Taxpayer to obtain legal title to the intervening tract was an error which was corrected in January of 2006. (E5). The subject property is located in a state game refuge. See, Neb. Rev. Stat. §77-706 (Reissue 2004). Property in a game refuge is subject to various restrictions found in section 37-708 of the Nebraska Statutes. The restriction that is pertinent in this instance is as follows: "It shall be unlawful within the boundaries of the state game refuges designated in section 37-706 for any person (a) to hunt or chase with dogs any game birds, game animals, or other birds or animals of any kind or description whatever, (b) to carry firearms of any kind, or (c) from October 15 through January 15 each year to operate a motorboat as defined in section 37-1204". Neb. Rev. Stat. 37-708(1) (Reissue 2004).

The County Assessor's office determined that the subject property should be classified as single family residential property and valued it at \$39,710 for tax year 2005. (E16:1). Single family residential land is predominately used or intended to be used as a dwelling place or abode whether occupied by the owner, tenant or lessee, and where occupancy is for a period of time usually year around as opposed to a transitory occupancy by a single family or two families. 350 Neb. Admin. Code, ch. 10, §001.05A (03/04). As noted there are no improvements on the

property and it is unsuitable for any residential use. Classification of the subject property as single family residential and valuation on that basis was arbitrary and unreasonable.

On consideration of the Taxpayer's protest the County Board determined that the subject property was recreational land and valued it on that basis. (E4:7, 8, and 9). Recreational land is real property that is predominately 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 allows relaxation, diversion, and entertainment. 350 Neb. Admin Code, ch. 10, §001.05E (03/04). The subject property is impacted by restrictions which limit its uses for hunting and boating. Neb. Rev. Stat. §37-708 (Reissue 2004). The Taxpayer testified that she has been on the subject property once, that to her knowledge no other person has been on it since 2000, and that she views the parcel as a buffer to keep people away from other property in which she has an interest.

The Taxpayer testified that no use is made of the subject property and that she believes it should be assessed as agricultural and horticultural land and should be valued as waste land. Agricultural land and horticultural land means land eligible for assessment at 80% of its actual value 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. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stats. §§77-201(2) and 77-1359 (1) (Reissue 2003). Agricultural or horticultural products 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 (2) (Reissue 2003). Wasteland includes those land types that cannot be economically and are not suitable for recreational or agricultural use or production. Some of those land types would be blowouts, riverwash (recent unstabilized alluvial deposits), marshes, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. 350 Neb. Admin. Code Ch 14 §001.05A (03/04). The definitions make clear that to be eligible for classification as agricultural and horticultural land that some production must take place on the parcel. The Taxpayer testified no production had taken place. The subject property is not agricultural land and horticultural land eligible for assessment at 80% of its actual value. *US Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 588 N.W.2d 575, (1999). While not eligible for valuation at 80% of its actual value the subject property could be agricultural and horticultural land. *Id.* The Taxpayer testified that the subject property should be classified as waste land. Waste land can be agricultural and horticultural land. 350 Neb. Admin. Code Ch 14 §001.05A (03/04). To be classified as waste land the parcel must have no productive use except in association with other land. *Id.* Other islands in the river are used for recreational purposes. (E17, 18, and 19). It is clear that the subject property has potential for recreational use and cannot be classified as waste land.

As noted above, current use of the subject property by the Taxpayer does not allow it to fit neatly in the definition of recreational land promulgated by the Property Tax Administrator but that is not the end of the Commission's inquiry. "Market forces create market value, so the analysis of market forces that have a bearing on the determination of highest and best use is crucial to the valuation process." *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p 305. Highest and best use can be described as the foundation on which market value rests. *Id.* Land is to be valued at its highest and best use. 350 Neb. Admin. Code, ch. 50, §.00204A (03/04). Highest and best use is defined as the most reasonable and most probable use of the property that will support its highest value. 350 Neb. Admin. Code Ch 10 §001.13 (03/04). All real property other than qualified agricultural and horticultural land is valued for taxation at its actual value. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004). The Commission cannot determine that actual value of the subject property, as determined by the County Board is unreasonable or arbitrary.

V. ORDER

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2005, as follows:

Land value	\$33,450.00
Total value	\$33,450.00

is affirmed.

2. This decision, if no appeal is timely filed, shall be certified to the Dodge County Treasurer, and the Dodge County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
- 3 Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this matter.
5. This decision shall only be applicable to tax year 2005.
6. This order is effective for purposes of appeal May 15, 2006.

Signed and Sealed. May 15, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

William C. Warnes, Commissioner

SEAL

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 PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.

Commissioner Hans, dissenting,

In order to be classified as waste land under 350 Neb. Admin Code, ch. 10, §001.05F (03/04), land must be within or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. The subject property (“the Island”) was not contiguous to other production agricultural land owned by the Taxpayer on January, 1, 2005, and therefore fails to meet the definition of “waste land” that the taxpayer seeks.

The County classified and assessed the Island property as recreational land. In order to be classified as recreational land the land must actually be used for a recreational purpose or if not actually used for recreation, then there must be intent on the part of the owner to use it for recreational purposes. See, 350 Neb. Admin Code, ch. 10, §001.05E (03/04). The Taxpayer testified that the Island has not been used for recreational purposes for as long as she has owned it and that she has no intention of even allowing anyone on the island, she simply wants this land to “protect” the rest of the farm. The island property does not meet the requirements necessary to be classified as recreational land under 350 Neb. Admin Code, ch. 10, §001.05E (03/04). The County’s valuation of the subject property is therefore unreasonable and arbitrary.

While the Island tract is not agricultural and horticultural land eligible for assessment at 80% of its actual value because it cannot be classified as waste land, it is never the less, agricultural and horticultural land, to be valued at 100% of agricultural value. See, *U.S. Ecology, Inc. v. Boyd County Board of Equalization*, 6 Neb.App. 956, 578 NW2d 877 (1999), Affirmed by *U.S. Ecology, Inc. v. Boyd County Board of Equalization*, 256 Neb. 7, 588 NW2d 575 (1999). Unfortunately the record before the Commission does not indicate what soil types the subject

property contains because the County instead classified it as recreational land. The only information before the Commission concerning agricultural land values by soil types include per acre Agland values in the area of the Island that are \$1,000 for dryland and between \$400 and \$575 for grassland values. (E14:4). If these agricultural land values are taken from 80% of value to 100% of value they become \$1,250 ($\$1,000 \div .80$) for dryland and between \$500 ($\$400 \div .80$) and \$719 ($\$575 \div .80$) per acre. The record before the Commission does not indicate if these Agland values are at the high end or low end of the Agricultural land values in the County. Even using the highest of these values would result in a valuation of \$29,125 ($\$1,250$ per acre x 23.3 acres) for the subject property, a reduction in the valuation of the subject property by \$4,325 ($\$33,450 - \$29,125 = \$4,325$). I would have granted the taxpayer some relief based on the misclassification of the property by the county, and would have reduced the value of the subject property by at least \$4,325 for a reduction to \$29,125 for tax year 2005. The value of the subject property might even be as low as \$11,650 ($\500 per acre x 23.3 acres = \$11,650) or even lower if based in whole or in part on wasteland values.

Robert L. Hans, Commissioner