

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

Mildred Hindmarsh  
Appellant,

v.

Washington County Board of Equalization  
Appellee

Case No: 10A-143

Decision Affirming the County Board of  
Equalization

**For the Appellant:**

Thomas B. Thomsen,  
Sidner, Svoboda, Schilke, Thomsen, Holtorf,  
Boggy, Nick & Placek

**For the Appellee:**

Edmond Talbot  
Deputy Washington County Attorney

Heard before Commissioners Hotz and Salmon

**I. THE SUBJECT PROPERTY**

The Subject Property is a 235.13 acre agricultural parcel located in Washington County, Nebraska. The legal description of the subject property is found at Exhibit 1:1. The property record card for the subject property is found at Exhibit 4:3-5 and Exhibit 5.

**II. PROCEDURAL HISTORY**

The Washington County Assessor determined that the assessed value of the subject property was \$650,060 for tax year 2010. Mildred Hindmarsh (the Taxpayer) protested this assessment to the Washington County Board of Equalization (the County Board) and requested an assessed valuation of \$589,895. The County Board determined that the assessed value for tax year 2010 was \$648,760. (E1)

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on January 6, 2012.

**III. STANDARD OF REVIEW**

When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the “board of equalization has faithfully performed its official duties in

making an assessment and has acted upon sufficient competent evidence to justify its action.”  
*Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008)  
(Citations omitted).

That presumption 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. From that point forward, 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.

*Id.* The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value) . The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.” Neb. Rev. Stat. §77-5016(8) (2011 Supp.). The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it. Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

## IV. VALUATION

### A. Law

Under Nebraska law,

[a]ctual 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 2009). "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 2009). The Courts have held that "[a]ctual 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).

Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009). All real property in Nebraska subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009). 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) (Reissue 2009).

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009). 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) (Reissue 2009). A parcel of land means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. See, Neb. Rev. Stat. §77-132 (Reissue 2009).

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 shall be defined as agricultural land or horticultural land.

Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

Wasteland includes land that cannot be used economically and are [sic] not suitable for agricultural or horticultural purposes. Such land types include but are not limited to, blowouts, riverwash (recent unstabilized alluvial deposits), marshes, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. To qualify for wasteland the land must be lying in or adjacent to and in common ownership or management with land used for agricultural or horticultural purposes. Some of these areas could be developed or reclaimed for some beneficial use by land shaping, revegetation, drainage, or possibly other special practices. Until they are reclaimed, developed, or restored to agricultural production or recreational use, they should be classified as wasteland. Other land which may be classified as wasteland are the permanent easement acres associated with the Bureau of Reclamation or irrigation districts, which are defined as open canals or ditches, laterals, drains, and service roads for the canal system. Assessors need to verify or be aware of the type of deed or easement that may be filed for these areas before making any determination of classification.

350 Neb. Admin. Code, ch 14, §002.54 (0/15/09). “Timberland and Forestland is land which is wooded by nature or humans and consisting of a dense growth of trees and underbrush such that it is not suitable for grazing.” 350 Neb. Admin. Code, ch 14, §002.29 (date).

## **B. Argument**

The Taxpayer asserted that the unique location of the subject property resulted in frequent flooding that was not properly accounted for by the soil classification system and land valuation grouping (LVG) systems utilized by the County Assessor. The Taxpayer also argued 43 acres of trees on the subject property should be valued as wasteland, and not as timberland.

## **C. Evidence**

### **a. Frequency of Flooding**

Julia Hindmarsh testified on behalf of the Taxpayer. She said that the subject property was used in a share-crop agreement for agricultural and horticultural purposes. Hindmarsh described the subject property as being situated between an elbow of the Elkhorn River and Highway 30. She testified that because of the location of the subject property, whenever the Elkhorn River has flooded, some of the subject property has flooded as well. Hindmarsh said that the unique location of the property between the river and the highway kept the water from receding as quickly as other properties. She testified that between 2001 and 2010 the property had some degree of flooding on four occasions (2001, 2007, 2008, and 2010).<sup>1</sup> Hindmarsh testified that the flooding had damaged crops and limited crop production; reducing corn production one season from approximately 200 bushels per acre to approximately 90 bushels per acre, and had impacted, but not as severely, soy bean production.

The Taxpayer provided the Commission with 2007 Farm Service Agency aerial photography, indicating soil classifications for the subject property, and showing that a portion of the subject property was classified as “6327 Fontanelle silty clay loam, frequently flooded.” E12. According to the Agland Inventory Table in the property record file, (E4:5), 19.82 acres of the subject property consisted of dryland; classified with a soil symbol of 6327, with a soil name of fontanelle silty clay, and with an LVG of 4D1. Hindmarsh asserted that the soil classification system did not properly take into account the frequency of the flooding. Hindmarsh gave an opinion of value of \$470,000 for the subject property.

John Myoshi, General Manager of the Lower Platte North Natural Resources District, was called by the Taxpayer and testified concerning flooding and soil conditions of the subject property. Myoshi testified that the subject property had incurred increased flooding from the Elkhorn River in recent years. He asserted that the agricultural and horticultural production of the property had been adversely affected by the flooding. He also suggested that the soil classification for the subject property should be lowered by two classes. Myoshi did not quantify any reduction in market value of the subject property due to the frequency of flooding, nor did he

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<sup>1</sup> Hindmarsh testified that approximately 50% of the acres were flooded for three days in 2008, and that a majority of the acres were flooded in 2010 for 27 days.

quantify the market value of the subject property if it were to be lowered by two soil classifications.

Nebraska law recognizes agricultural land and horticultural land as a separate and distinct class of property and requires that agricultural land and horticultural land be divided into subclasses of real property based upon soil classification standards. Neb. Rev. Stat. §77-1363 (2010 Cum. Supp.). The Property Tax Administrator is required to convert these subclasses of real property into land capability groups (LVG) so that the groupings reflect uses that are appropriate for the valuation of the land. *Id.*

While the Taxpayer presented opinion testimony that portions of the subject property should be lowered by as much as two soil classifications, and argued for a new LVG based upon the frequency of flooding to the subject property, no evidence was presented to quantify a different market value for the subject property as a result of the proffered soil classification adjustment or different LVG due to frequency of flooding.

#### **b. Classification of Trees**

The Taxpayer offered further testimony of Julia Hindmarsh alleging that the 43 acres of trees on the subject property should be valued as wasteland instead of as timberland. These 43 acres were valued by the County Assessor as Timberland. E4:5, E5:13. 15.03 acres of the subject property were assigned LVG 2T1, with a taxable value of \$1,045 per acre. And 27.97 acres of the subject property were assigned LVG 3T, with a taxable value of \$820 per acre. E4:5, E5:13.

Hindmarsh testified that these 43 acres border a bank of the Elkhorn River and are frequently flooded. She said that the land was not used for hunting or any other recreational purposes. Hindmarsh asserted that these 43 acres were overvalued. Her opinion was that the 43 acres should be valued at \$200 per acre.

There was not clear and convincing evidence to contradict the County Assessor's determination that the 43 acres are timberland; wooded with a dense growth of trees.<sup>2</sup> While Hindmarsh testified that the wooded acres sometimes flooded, the evidence did not indicate the 43 acres did not have the characteristics of timberland, even though there may have been some

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<sup>2</sup> 350 Neb. Admin. Code, ch 14, §002.29.

riverwash as is characteristic of wasteland.<sup>3</sup> The Taxpayer failed to provide the required evidence that the 43 acres of trees were overvalued.

## V. EQUALIZATION

### A. Law

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999). In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the subject property and comparable property is required. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987). Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964). If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment. There must be something more, something which in effect amounts to an intentional

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<sup>3</sup> 350 Neb. Admin. Code, ch 14, §002.54 (0/15/09).

violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

## **B. Argument**

The Taxpayer argued that, “[i]f the Washington County Board of Equalization has not taken into account the frequency of flooding...then it cannot have equalized its value fairly and proportionately with other land in Washington County.” Appellant’s Reply Brief, pg 5.

## **C. Summary of the Evidence**

### **a. Frequency of Flooding**

The Taxpayer offered the testimony of Julia Hindmarsh that comparable agricultural land and horticultural land in Dodge County sold at \$3,000 to \$4,000 per acre. Other than that testimony, the Taxpayer offered no evidence of market value of comparable land that had susceptibility to flooding. The Commission notes that even if comparing the Dodge County sales to the highest assessed acres of the subject property (those with an LVG of 2D1 and a taxable value of \$2,535 per acre), the subject property would have had a comparable market value of \$3,380 per acre.<sup>4</sup>

### **b. Classification of Trees**

The Taxpayer offered two parcels of property from other counties as comparable properties, one parcel located in Cuming County, E20:1-2, and one parcel located in Dodge County. E20:3. The Taxpayer presented evidence of the assessed values of the parcels, but no additional evidence of market value was presented. Assessed value is not in and of itself direct evidence of actual value. See *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974).

Based upon the foregoing evidence, the Commission finds there is not clear and convincing evidence that the County Board’s determination of value violated the uniformity clause of the Nebraska Constitution.

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<sup>4</sup> E4:5.  $\$3,380 / .75 = \$2,535$  per Neb. Rev. Stat. §77-201(2), which requires a taxable value of 75% of market value.

**VI. CONCLUSION**

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is not clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable. For all of the reasons set forth above, the determination of the County Board should be affirmed.

**VII. ORDER**

IT IS ORDERED THAT:

1. The Decision of the Washington County Board of Equalization determining the value of the subject property for tax year 2010 is Affirmed.
2. That the Assessed value of the Subject property for tax year 2010 is:

Land	\$525,125.00
<u>Improvements</u>	<u>\$123,635.00</u>
Total	\$648,760.00

3. This decision and order, if no appeal is timely filed, shall be certified to the Washington County Treasurer and the Washington County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2010 Cum. Supp.)
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 2010.

7. This order is effective for purposes of appeal on February 17, 2012.

Signed and Sealed: February 17, 2012

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2010 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.