

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

James T. O'Rourke,
Appellant,

v.

Dawes County Board of Equalization,
Appellee.

Case Nos: 11A-060, 11A-061, & 11A-062

Decision and Order Affirming the Dawes
County Board of Equalization

For the Appellant:

James T. O'Rourke,
Pro Se.

For the Appellee:

J. Adam Edmund,
Deputy Dawes County Attorney.

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property, which is located in Dawes County, Nebraska, includes a 54.52 acre parcel in Case Number 11A 060, a 362.01 acre parcel in Case Number 11A 061, and a 1.51 acre parcel in Case Number 11A 062. The Subject Property's legal descriptions are found at Exhibits 1 through 3. The Property Record Cards for the Subject Property are found at Exhibits 4 through 6.

II. PROCEDURAL HISTORY

The Dawes County Assessor determined that the assessed value of the Subject Property was \$157,000 in Case Number 11A 060 for tax year 2011. James T. O'Rourke (herein referred to as the "Taxpayer") protested this assessment to the Dawes County Board of Equalization (herein referred to as the "County Board") and requested an assessed valuation of \$137,640 for tax year 2011. The County Board determined that the assessed value for tax year 2011 was \$157,000 in Case Number 11A 060.¹

¹ E1.

The Dawes County Assessor determined that the assessed value of the Subject Property was \$81,645 in Case Number 11A 61 for tax year 2011. The Taxpayer protested this assessment to the County Board and requested an assessed valuation of \$72,990 for tax year 2011. The County Board determined that the assessed value for tax year 2011 was \$81,645 in Case Number 11A 61.²

The Dawes County Assessor determined that the assessed value of the Subject Property was \$340 in Case Number 11A 062 for tax year 2011. The Taxpayer protested this assessment to the County Board and requested an assessed valuation of \$290 for tax year 2011. The County Board determined that the assessed value for tax year 2011 was \$340 in Case Number 11A 62.³

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged Exhibits 4 through Exhibit 14. The Commission held a hearing on July 16, 2012.

III. STANDARD OF REVIEW

The Commission’s review of the determination of the County Board of Equalization is de novo.⁴ 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.”⁵

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

² E2.

³ E3.

⁴ See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁵ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁹ 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.¹⁰

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.”¹¹ 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.”¹²

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

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ 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).

¹⁰ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹¹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

of the physical characteristics of the real property and an identification of the property rights valued.¹³

“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.”¹⁴ The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”¹⁵ 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.¹⁶ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁷ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁸

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.¹⁹

“Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.”²⁰

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.²¹

¹³ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁴ *Id.*

¹⁵ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁶ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁷ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁸ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁹ Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).

²⁰ Neb. Rev. Stat. §77-132 (Reissue 2009).

²¹ Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

The Nebraska Department of Revenue's Property Assessment Division (herein referred to as "PAD") has issued regulations regarding the assessment of agricultural and horticultural land.²² Land Capability Groups (herein referred to as "LCGs"), a key component of PAD's assessment system, are defined as follows under the regulations:

Land Capability Groups are groups of soils that are similar in their productivity and their suitability for most kinds of farming. It is a classification based on the capability classification, production, and limitations of the soils, the risk of damage when they are used for ordinary field crops, grassland, and woodlands, and the way they respond to treatment. Land Capability Groups are determined by the Department of Revenue, Property Assessment Division based upon the dryland capability classification.²³

PAD's regulations recognize the soil suitability system developed by the Natural Resource Conservation Service (herein sometimes referred to as "NRCS").²⁴ In this regard, the regulations state as follows: "Land Capability Classification is a system for showing the suitability of soils for most kinds of crops. These are determined by Natural Resources Conservation and Service."²⁵

PAD's regulations require county assessors to inventory and categorize each parcel of agricultural land using the following classes: (1) irrigated cropland; (2) dryland cropland; (3) grassland; and (4) wasteland.²⁶ The county assessor is then required to use a soil conversion legend created by PAD to assign agricultural land to an appropriate LCG.²⁷

In addition to the soil conversion legend, the regulations provide LCG definitions and guidelines for use by county assessors for purposes of assessing agricultural and horticultural land.²⁸ The regulations also permit county assessors to develop additional LCG sub-classifications if needed to achieve uniform and proportionate valuation.²⁹

²² 350 Neb. Admin. Code, ch. 14 (3/2009).

²³ 350 Neb. Admin. Code, ch. 14, §002.41 (3/2009).

²⁴ See, 350 Neb. Admin. Code, ch. 14, §002.40 (3/2009).

²⁵ 350 Neb. Admin. Code, ch. 14, §002.40 (3/2009).

²⁶ 350 Neb. Admin. Code, ch. 14, §004.04 (3/2009).

²⁷ 350 Neb. Admin. Chapter 14Admin. Code, ch. 14, §004.08B (3/2009) It is the Commission's understanding that the conversion legend referenced in this regulation correlates codes contained on NRCS soil maps with LCG categories.

²⁸ 350 Neb. Admin. Code, ch. 14, §004.08C-H (3/2009).

²⁹ 350 Neb. Admin. Code, ch. 14, §004.09 (3/2009).

B. Summary of the Evidence

James T. O'Rourke, the Taxpayer, testified at the hearing. O'Rourke is a retired professor of range management with a PhD in range management and a minor in soils. Prior to retirement, O'Rourke testified that he taught range management at Utah State University and Chadron State College.

O'Rourke testified that PAD's soil classification system is not based on sound scientific principles and results in the Subject Property being overvalued for tax year 2011. O'Rourke specifically asserted that PAD's system is inappropriate because it assigns use classifications to real property prior to assigning soil capability classification groupings or LCGs. He further asserted that the Soil Conservation Service and NRCS (sometimes referred to herein as "SCS/NRCS") soil capability classifications were determined by professionals with scientific expertise, and that Nebraska assessors without the appropriate expertise engaged in the assignment of real property to subclasses or LCGs.³⁰

O'Rourke asserted that his review of the Subject Property's assessment under PAD's system indicated that there was not a discernible or consistent pattern for assigning a particular SCS/NRCS soil capability group to a LCG. Rather, his review indicated that a single SCS/NRCS soil capability group appeared within multiple LCGs within a single use classification. For example, with respect to a portion of the Subject Property classified as "Irrigated" under PAD's use classification system, the NRCS's soil capability group designated as category "II" appears within assigned LCGs 1A, 2A, 3A, and 4A.³¹

O'Rourke further asserted that the County's assessment of the Subject Property does not satisfy PAD's regulations requiring the use of soil capability for purposes of classifying agricultural land. O'Rourke also contended that the County Assessor's valuation of 3G, 4G, and 4G1 LCGs on an equal per acre basis is unreasonable.³²

³⁰ O'Rourke's testimony sometimes uses the term Soil Conservation Service ("SCS") together with the term Natural Resource Conservation Service ("NRCS").

³¹ E1:9.

³² E1:9.

C. Analysis

The Commission finds that O'Rourke's assertions are competent evidence that rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. If PAD intends to value all agricultural land on the basis of the soil capability alone, then evidence from experts indicating that PAD's soil capability classification system does not appropriately indicate the soil capabilities of soil types would be relevant to determining the actual value of the Subject Property.

The Commission does not find, however, that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. O'Rourke contended that PAD assigned soil types to different LCGs based solely on production capability. While this assertion may be true, it is equally possible that PAD assigned soil types to LCGs based not only on production capability, but also on the degree of desirability of the soil type on the open market. For example, if a property classified under NRCS category "VIII" demanded the same price on the open market in Nebraska as compared to a NRCS category VI or VII property, PAD could reasonably group these soil capability groups together for purposes of determining the Subject Property's actual value.

The Commission notes that no testimony or evidence from any individual or organization with personal knowledge of the construction of PAD's classification system was presented to the Commission. O'Rourke made reasonable inferences on the possible method of the construction of PAD's system and PAD's desired results. The Commission notes, however, that other possible reasonable inferences exist as well, and without clear and convincing evidence that the County Board's decision was arbitrary or unreasonable the Commission must affirm the County Board.

V. CONCLUSION

The Commission finds that there is 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 appeal of the Taxpayer is denied.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Dawes County Board of Equalization determining the value of the Subject Property for tax year 2011 is affirmed.³³
2. The assessed value of the Subject Property for tax year 2011 is: 11A 060 = \$157,000; 11A 061 = \$81,645; 11A 062 = \$340.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Dawes County Treasurer and the Dawes County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 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 and Order shall only be applicable to tax year 2011.
7. This Decision and Order is effective for purposes of appeal on November 27, 2013.

Signed and Sealed: November 27, 2013.

Thomas D. Freimuth, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.

³³ Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.