

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Richard T. McNiff,
Appellant,

v.

Franklin County Board of Equalization,
Appellee.

Case No. 14A 033

Decision and Order Affirming the
Determination of the Franklin County Board
of Equalization

For the Appellant:
Richard T. McNiff,
Pro Se

For the Appellee:
Henry C. Schenker,
Franklin County Attorney

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a 211.99 acre parcel located in Franklin County, Nebraska. The legal description of the Subject Property is found at Exhibit 2, page 7. The property record card for the Subject Property is found at Exhibit 2.

II. PROCEDURAL HISTORY

The Franklin County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$455,180 for tax year 2014. Richard T. McNiff (the Taxpayer) protested this assessment to the Franklin County Board of Equalization (the County Board) and requested an assessed valuation of \$251,168. The County Board determined that the taxable value for tax year 2014 was \$455,180.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (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 and identified the

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sole issue in this appeal as that of the classification of irrigated cropland that the Taxpayer asserted should be classified as dryland cropland. The Commission held a hearing on July 9, 2015.

III. STANDARD OF REVIEW

The Commission’s review of the determination of the County Board of Equalization is de novo.² 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.”³

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.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁷ 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.⁸

² See, Neb. Rev. Stat. §77-5016(8) (2014 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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ *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.”⁹ 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.”¹⁰ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹¹

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.¹²

“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.”¹³ The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”¹⁴ 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.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

⁹ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

¹² Neb. Rev. Stat. §77-112 (Reissue 2009).

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

¹⁴ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁶ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009)

¹⁷ 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.¹⁸

“Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.”¹⁹ 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.²⁰

“Cropland is that part of an agricultural or horticultural parcel, normally used for the production of crops or rotation pasture. Cropland may be irrigated or dryland cropland.”²¹

Dryland cropland is land that is primarily used for crop production without irrigation. Dryland Cropland includes all cultivated row crops, small grains, and seeded hay and forage crops grown under dryland conditions. Alfalfa or alfalfa and brome grass used for hay, is considered cropland. Permanent brome grass used for grazing is considered grassland.²²

“Irrigated Cropland includes all land where irrigation is used, whether for cultivated row crops, small grains, seeded hay, forage crops, or grasses.”²³ “Irrigable Lands are lands having soil, topographic, drainage, and climatic conditions favorable for irrigation and located in a position where a water supply is or can be made available.”²⁴

Land capability groups (LCG) 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

¹⁸ Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).

¹⁹ Neb. Rev. Stat. §77-132 (Reissue 2009).

²⁰ Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

²¹ 350 Neb. Admin. Code, ch. 14 §002.21 (03/09).

²² 350 Neb. Admin. Code, ch. 14 §002.21A (03/09).

²³ 350 Neb. Admin. Code, ch. 14 §002.21B (03/09).

²⁴ 350 Neb. Admin. Code, ch. 14 §002.38 (03/09).

Capability Groups are determined by the Department of Revenue, Property Assessment Division based upon the dryland capability classification.”²⁵

B. Findings of Fact

The Taxpayer disputes only one issue in this appeal, the classification of 111.92 acres of agricultural land and horticultural land as irrigated cropland. The Taxpayer argues that the 111.92 acres should be classified as dryland cropland.

Richard T. McNiff testified on behalf of the Taxpayer. McNiff testified that the only available irrigation water to the Subject Property was surface water from the Republican River. He asserted that over a period of many years the Nebraska Department of Natural Resources (the DNR) issued Closing Notices or Opening Notices to landowners authorized to divert water from the Republican River. McNiff testified that at least from January 1, 2013 to January 1, 2015, he had not been allowed to divert any surface water to the Subject Property to irrigate the 111.92 acres. The Taxpayer received Closing Notices from the DNR effective January 1, 2013,²⁶ January 1, 2014,²⁷ and January 1, 2015,²⁸ and had received no Opening Notices during the same time period. The Taxpayer argued that since the Subject Property received no irrigation water for both the 2013 and 2014 growing seasons the 111.92 acres should be reclassified as dryland.

Because of the unavailability of Republican River surface water during 2013 and 2014, McNiff also asserted that the 111.92 acres should be valued lower than irrigated acres because of the inability to irrigate from the Republican River as described above. As assessed, of the 111.92 acres, 111.82 acres were valued at \$3,035 per acre, and .1 acre was valued at \$2,220 per acre.²⁹ McNiff asserted that 5.18 acres should be valued as dryland at \$1,675 per acre, that 12.17 acres should be valued as dryland at \$1,460 per acre, and that 94.57 acres should be valued as dryland at \$1,175 per acre.³⁰

²⁵ 350 Neb. Admin, ch. 14 §002.41 (03/09).

²⁶ Exhibit 3:3.

²⁷ Exhibit 3:2.

²⁸ Exhibit 3:1.

²⁹ Exhibit 2:8.

³⁰ See Exhibit 2:10. Without explanation, the Taxpayer requests that 5.18 acres with an LCG of 2A1 be valued at \$1,675 per acre, but that the remaining 94.47 acres with an LCG of 2A1 be valued at \$1,175 per acre. The Taxpayer’s calculations appear to be based upon the Franklin County 2014 Average Acre Value Comparison from the 2014 Reports & Opinions issued by the

McNiff also raised issues relating to soil types and flooding. He asserted that there were soil type inaccuracies relating back to a soil review letter dated March 9, 1987.³¹ However, even if the Commission agreed that the soil types of the Subject Property were inaccurately determined, no evidence was offered to quantify what effect these inaccuracies had on the actual value of the Subject Property for tax year 2014. McNiff also provided photographs of flooding on the Subject Property that occurred in 2005.³² The Commission finds that the evidence received regarding soil types and flooding was relating to actions or events at least nine years prior to the effective date of this appeal and, therefore, has little weight in our consideration of the actual value of the Subject Property for tax year 2014.

As to the Taxpayer's assertion that since there was no Republican River surface water available to irrigate the Subject Property in 2013 and 2014 the 111.92 acres should be assessed at a value less than irrigated acres, the Commission notes that there was no evidence of sales of acres with similar water availability limitations to support this assertion. As to the Taxpayer's assertion that the 111.92 acres should be classified as dryland rather than as irrigated, there was evidence to conclude that the land was *primarily used* for crop production *with* irrigation and would therefore not be properly classified as dryland cropland.³³ In prior years, DNR had given many Opening Notices and Closing Notices to the Taxpayer to divert irrigation water from the Republican River. Based upon the foregoing, the Commission finds that the 111.92 acres were not primarily used for crop production without irrigation and it was appropriate that they were not classified as dryland.

The Franklin County Assessor, Linda Dallman, testified regarding the assessment of the Subject Property for tax year 2014. According to the Property Valuation Protest, Form 422, the former County Assessor had recommended to the County Board, at the time of the protest proceeding, that the 111.92 acres be reclassified as dryland.³⁴ Dallman explained that she had taken office as the County Assessor in 2015 and that she could not explain with certainty why the former County Assessor had made that recommendation to the County Board after initially

Property Tax Administrator. See Exhibit 2:23. The Commission is authorized to take notice of the Reports and Opinions of the Property Tax Administrator as contained in exhibits from Statewide Equalization proceedings.

³¹ Exhibit 9. See also Exhibit 2:8.

³² See Exhibit 4:1-3.

³³ Dryland cropland is land that is primarily used for crop production *without* irrigation. 350 Neb. Admin. Code, ch. 14 §002.21A (03/09)(emphasis added).

³⁴ See Exhibit 1.

classifying the acres as irrigated. She speculated that it may have been because of the Closing Notices, as noted above.

Dallman testified that Franklin County agricultural land and horticultural land is divided into two discrete market areas. Market Area One consists only of the Republican River and canal area, with surface water availability. Market Area Two includes the remainder of the County, where no surface water is available. Dallman testified that Market Area Two acres were valued higher than comparable land in Market Area One.

Dallman explained that all agricultural land and horticultural land in Franklin County was assessed based upon LCG's (soil types) and recent sales. Dallman testified there were no recent comparable sales with the same DNR Closing Notice restrictions for 2013 and 2014 and with no well water irrigation. She stated that there were only five sales of any agricultural land and horticultural land in Market Area One for the relevant three year time frame.

Dallman testified to her belief that the Subject Property should be classified as irrigated cropland and that there were no sales to justify a valuation of any amount less than comparable soil types in Market Area One. She supported this opinion in part by the fact that the 111.92 acres were enrolled in a Farm Service Agency (FSA) Preventative Plan for 2014 as irrigated acres and the Taxpayer received payments under the Plan based upon the acres being irrigated.

The record in this appeal does not support the Taxpayer's assertion that the 111.92 acres should be assessed at per acre values less than other properties in the County that are classified as irrigated. It may have been appropriate for the County Assessor to classify the Subject Property as irrigable land since the DNR had a history of allowing the diversion of water from the Republican River. Irrigable Lands are lands "having soil, topographic, drainage, and climatic conditions favorable for irrigation and located in a position where a water supply is or can be made available."³⁵ However, Dallman testified that she did not have sufficient sales to justify a lower valuation even if she made that distinction. We therefore find there is no clear and convincing evidence that the valuation per acre of the 111.92 acres should not be the same as other irrigated acres in Market Area One of Franklin County.

³⁵ 350 Neb. Admin. Code, ch. 14 §002.38 (03/09).

V. 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 decision of the County Board should be affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Franklin County Board of Equalization determining the taxable value of the Subject Property for tax year 2014 is affirmed.
2. The taxable value of the Subject Property for tax year 2014 is \$455,180.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Franklin County Treasurer and the Franklin County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and 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 2014.
7. This Decision and Order is effective for purposes of appeal on July 29, 2015.³⁶

Signed and Sealed: July 29, 2015

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

³⁶ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.