

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Marcel J. Vinduska Rev Trust,
Marcel J. Vinduska, Trustee,
Appellant,

v.

Sarpy County Board of Equalization,
Appellee.

Case No: 16A 0130

Decision and Order Vacating and Reversing
the Determination of the Sarpy County
Board of Equalization

For the Appellant:

Jarel G. Vinduska, Co-Trustee,
Pro Se

For the Appellee:

Andrea Gosnold-Parker,
Deputy Sarpy County Attorney

The appeal was heard before Commissioners Steven Keetle and James Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a 122.12 acre parcel located in Sarpy County, Nebraska. The legal description of the Subject Property is found at Exhibit 2. The property record card for the Subject Property is found at Exhibit 4.

II. PROCEDURAL HISTORY

The Sarpy County Assessor (County Assessor) determined that the assessed value of the Subject Property was \$478,875 for tax year 2016. Marcel J. Vinduska Rev Trust (Taxpayer) protested this assessment to the Sarpy County Board of Equalization (County Board) and requested an assessed valuation of \$133,093. The County Board determined that the taxable value of the Subject Property for tax year 2016 was \$406,915.¹

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

¹ Exhibit 1.

Report, the parties stipulated to the receipt of exchanged exhibits. The Commission held a hearing on November 3, 2017.

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 County Board's valuation was unreasonable or arbitrary.⁸

² See, Neb. Rev. Stat. §77-5016(8) (2016 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(9) (2016 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. Bd. of Equal. for Buffalo Cty.*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. Cty. Bd. Of Equal. of York Cty.*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

⁸ *Bottorf v. Clay Cty. Bd. of Equal.*, 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,

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.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) (2016 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5018(1) (2016 Cum. Supp.).

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

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

¹⁴ *Omaha Country Club v. Douglas Cty. Bd. of Equal., 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. 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.²⁰

“Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road.”²¹ “Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site.”²²

Under Nebraska law, 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....²³

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 Neb. Rev. Stat. §77-1359 (3) (Reissue 2009).

²² Neb. Rev. Stat. §77-1359 (4) (Reissue 2009).

²³ Title 350 Neb. Admin. Code ch. 14, §002.54. Rev. 3/15/09.

Recreational shall mean, “all parcels of real property 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 simply allows relaxation, diversion and entertainment.”²⁴ Predominant use shall mean, “the most common, frequent, or prevailing use of the land.”²⁵

“Real property shall mean all land, buildings, fixtures other than trade fixtures, improvements, certain mobile homes, cabin trailers and similar property, mineral interests, and all privileges pertaining to real property.”²⁶

B. Summary of the Evidence

The Subject Property consists of 119.59 acres of agricultural and horticultural land receiving special valuation and 2.53 site acres.²⁷ There are four leased cabins located on the Subject Property, however, these cabins are improvements on leased land which are owned by others and not part of the Subject Property. These cabins are located in a floodplain and “grandfathered” into the area; if they were to be removed from the Subject Property, they could not be rebuilt. The Taxpayer alleged that the Subject Property includes land enrolled in the Conservation Reserve Program (CRP) program that should be classified as grassland instead of dry cropland. The Taxpayer also alleged that the valuation model used by the County Assessor to determine the taxable value of the farm site and the farm home site was unreasonable and arbitrary.

The County Board adopted the recommendation of the referee to reduce the value of the dryland cropland and additionally reclassified the land designated as timber to wasteland.²⁸ The referee’s recommendation and the attached 2016 Ag Values BOE 2016 and Sarpy County Equalization Model purport to support an 8% reduction to Irrigated Cropland and an 11.5% reduction to dryland values in Sarpy County to “equalize with adjoining counties”.²⁹ To accomplish this, the referee averaged the median per acre values for adjoining counties and

²⁴ Title 350 Neb. Admin. Code, ch. 10, §001.05E. Rev. 3/15/09.

²⁵ Title 350 Neb. Admin. Code, ch. 10, §001.05E. Rev. 3/15/09.

²⁶ Title 350 Neb. Admin. Code ch. 10 §001.01(3/09).

²⁷ E4:15-18

²⁸ E4:4-6

²⁹ Exhibit 4:12-13

“state sales” to come up with an “equalized” per acre value.³⁰ However, “Simply averaging the results of the adjustment process to develop an averaged value fails to recognize the relative comparability of the individual transactions as indicated by the size of the total adjustments and the reliability of the data and methods used to support the adjustments.”³¹ Thus, simply averaging assessed values is not a professionally acceptable way to “equalize with adjoining counties.” Therefore the Commission finds that presumption in favor of the County Board’s determination has been rebutted. This same evidence also demonstrates that the determination of the County Board reducing the value of the dryland acres was unreasonable and arbitrary.

Farm Home Site and Farm Site

The County Assessor and the County Board determined that 2.53 acres located on the Subject Property were site acres, of which 1.53 acres were a farm site³² and one acre was a farm home site.³³ The Taxpayer leases the site acres to the owners of four seasonal cabins owned as improvements on leased land. These site acres are surrounded by land classified as timber by the County Assessor which were reclassified as waste by the County Board.³⁴ While the site acres on the Subject Property were leased to the owners of four seasonal cabins owned as improvements on leased land rather than as a traditional farm home site and farm site acres, the Assessor and County Board valued those acres as farm home site and farm site acres because the remainder of the parcel was classified as agricultural and horticultural land.

Jarel Vinduska testified on behalf of the Taxpayer. He testified that the Taxpayer disagreed with the classification and resulting valuation of the 2.53 site acres on the Subject Property as “farm site” and “farm home site.” He asserted that these acres should instead be valued on a per acre basis as if they were not site acres, but rather at the same average rate as the agricultural and horticultural acres of the parcel. He further alleged that the valuation model used by the County Assessor to determine the taxable value of the farm site and the farm home site was unreasonable and arbitrary.

³⁰ E4:14. The Commission notes that the County Board and the Taxpayer did not argue that this portion of the County Board’s determination was unreasonable or arbitrary.

³¹ Appraisal Institute, *The Appraisal of Real Estate*, at 308 (13th ed. 2008)

³² E4:16-17

³³ E4:16-17

³⁴ E4:4-6

The Taxpayer offered as support for its position concerning the value of the site acres the sale of a property up the hill from the Subject Property (the Upland property)³⁵ and the sale of a property located in flood plain land similar to the Subject Property (the Floodplain property)³⁶. The Taxpayer argued that, because the Upland property sold for an average of \$6,990 per acre and the Floodplain property sold for \$7,200 per acre, therefore the market value of the site acres of the Subject Property should be \$7,000. However, neither the Upland property nor the Floodplain property have any farm home site acres, farm site acres, or improvements; they are entirely agricultural and horticultural land.³⁷ Under Nebraska law, farm home site acres and farm site acres are not agricultural or horticultural land.³⁸ Comparable properties share similar use (residential, commercial/industrial, or agricultural), physical characteristics (size, shape, and topography), and location.³⁹ Therefore, the Upland sale and the Floodplain sale, sales of only agricultural and horticultural land, which is a different class of property, are not comparable to the farm home site acres or farm site acres of the Subject Property. The Upland property and the Floodplain property are not comparable properties to the Subject Property or comparable sales appropriate for use in determining the value of site acres. The only sales of rural property with site acres in the record before the Commission are the sales used in the County Assessor's rural land valuation model (the Model).⁴⁰

The County Assessor testified that the Model was developed to allocate the value contributed by rural home sites, farm home sites, and farm sites, to the assessed value of predominantly agricultural and horticultural parcels in Sarpy County. The County Assessor acknowledged that, due to zoning requirements in Sarpy County, there are no rural residential property sales of just one acre, but that if it were possible to sell a single residential acre it would likely sell for \$70,000 to \$80,000, not the adjusted \$58,900 allocated by the Model to the "first acre," i.e., the farm home site. The value for the farm home site acre reflects an allocation of total residential value among all of the site acres, both farm home site and farm site, due to this limitation. The Model indicates that the County Assessor allocates the rural residential value across the site acres on a three-tiered system, with the greatest per acre value being assigned to the first acre, a lower

³⁵ Exhibit 6

³⁶ E7

³⁷ Exhibit 6 & 7

³⁸ See Neb. Rev. Stat 77-1359 (2016 Cum. Supp.)

³⁹ See generally, International Association of Assessing Officers, *Property Assessment Valuation*, at 169-79 (3rd ed. 2010).

⁴⁰ Exhibit 4:52-59

level of value being assigned to the second through fourth acres, and an even lower level of value being assigned to any additional site acres.⁴¹

Agricultural and Horticultural Land Subject to Special Valuation

The County Board reduced the value of the acres classified as dryland by approximately 11.50%, which, as indicated earlier in this opinion, was unreasonable and arbitrary. Jarel Vinduska testified that he believed the dryland acres should be classified as grassland and alleged that they were enrolled in the CRP program. The Taxpayer did not offer evidence of the number of acres of the Subject Property which were enrolled in the CRP program, such as an FSA report or other documentation of enrollment. The Taxpayer did not provide any information regarding the sales of CRP acres in Sarpy County or any other county in Nebraska.

The PRF for the Subject Property does not indicate the number of acres enrolled in the CRP program.⁴² The County Assessor testified that for Tax Year 2016 he was unable to obtain sales information regarding uninfluenced CRP property sales from the Property Assessment Division of the Department of Revenue, as the sales file did not supply that information until 2017.⁴³ The County Assessor further testified that the only sales of CRP land in Sarpy County were influenced by factors other than agricultural and horticultural use. The County Assessor observed, within Sarpy County, the sales prices of influenced CRP acres were much higher than the influenced sales prices of grassland and close to influenced sales of dry cropland. Because of this trend and lack of other information regarding the uninfluenced value of CRP acres in Sarpy County, the County Assessor applied the uninfluenced or special value of dryland acres to CRP acres for tax year 2016 rather than the grassland value.

The Commission finds and determines that the assessed value of CRP acres in Sarpy County for tax year 2016 is the special value determined by the County Assessor for dryland cropland, prior to the unreasonable and arbitrary adjustment by the County Board.

Jarel Vinduska testified that the Taxpayer agreed with the County Board's reclassification as waste of all of the land previously classified as timber by the County Assessor. He testified that

⁴¹ E3:121. Only the first two tiers of value apply to the Subject Property because the total site acreage is less than four acres.

⁴² See, E4

⁴³ See, Neb. Rev. Stat. 77-1327 (2016 Cum. Supp).

the portion of the Subject Property designated as timber by the County Assessor contained trees and old river wash with channels that filled up with water making the land unsuitable for agricultural or horticultural use. The Taxpayer offered pictures of portions of the Subject Property showing trees, undergrowth, and water.⁴⁴ Mr. Vinduska testified that some family members hunt on the Subject Property but that the leases for the site acres do not allow the use of the other acres and that there are no hunting leases on the Subject Property. The County Assessor testified that the portion of the Subject Property classified as timber was located in a floodway but consisted of stabilized alluvial land that had been stabilized for years and is not in danger of being washed out.⁴⁵ The County Assessor further testified that it was his opinion that the acres he classified as timber were disqualified from being classified as waste because their primary use was for recreational purposes. The timber acres were used for the enjoyment of the cabins and for hunting.

The Subject Property is classified as agricultural and horticultural property subject to special valuation.⁴⁶ As such the influence of non-agricultural and horticultural uses on the value of the acres on the Subject Property is not to be considered when determining assessed values.⁴⁷ The evidence before the Commission does not indicate that the acres classified as timber by the Assessor could be used for an agricultural or horticultural purpose.

The County Board determined that the land classified as by the Assessor as timber should instead be classified as wasteland. The record before the Commission fails to demonstrate that this determination of the County Board was unreasonable and arbitrary.

Based on all of the evidence presented the Commission finds and determines that the Assessed value of the land component of the Subject Property for Tax Year 2016 is \$452,915.⁴⁸

⁴⁴ E8:2-4

⁴⁵ See Exhibit 4:20-21

⁴⁶ E: 1.

⁴⁷ 350 NAC 11 §005.02.

⁴⁸ 62.04 acres of Dryland at \$369,655 (E4:17) + 1 acre Home Site \$35,000 (E4:16) + 1.53 acres farm site \$12,240 (E4:16) + 57.55 acres waste \$8,636 (E4:16) = 452,915.

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.”⁴⁹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ The constitutional requirement of uniformity in taxation extends to both rate and valuation.⁵⁵ 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 [sic].”⁵⁶ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”⁵⁷

B. Summary of the Evidence

The Taxpayer alleged that the Subject Property was not being assessed in a manner uniform and proportional with other properties in the County. The evidence presented to the Commission

⁴⁹ *Neb. Const.*, Art. VIII, §1.

⁵⁰ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

⁵¹ *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).

⁵² See, *Cabela's Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

⁵³ *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

⁵⁴ *Equitable Life v. Lincoln Cty. 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).

⁵⁵ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

⁵⁶ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

⁵⁷ *Id.* at 673, 94 N.W.2d at 50.

indicates that all properties in Sarpy County are assessed using the same assessment models that were used to determine the assessed value of the Subject Property, whether these acres are farm home site, farm site, agricultural or horticultural land, or waste.

VI. 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 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/the determination of the County board is Vacated and Reversed.

VII. ORDER

IT IS ORDERED THAT:

1. The decision of the Sarpy County Board of Equalization determining the value of the Subject Property for tax year 2016 is vacated and reversed.⁵⁸
2. The assessed value of the Subject Property for tax year 2016 is:

<u>Land:</u>	<u>\$452,915</u>
Total:	\$452,915
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2016 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 2016.
7. This Decision and Order is effective for purposes of appeal on June 12, 2018.

⁵⁸ Taxable 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.

Signed and Sealed: June 12, 2018.

Steven A. Keetle, Commissioner

SEAL

James D. Kuhn, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.