

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Flying W, LLC,
Appellant,

v.

Buffalo County Board of Equalization,
Appellee.

Case No: 17A 0060
Decision and Order
Affirming the Determination of the
Buffalo County Board of Equalization

Case No. 17A 0061
Decision and Order
Reversing the Determination of the
Buffalo County Board of Equalization

For the Appellant:
Lynn Werner, Member
Flying W, LLC

For the Appellee:
Andrew W. Hoffmeister
Deputy Buffalo County Attorney

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property in Case No. 17A 0060 is a 320 acre agricultural parcel located in Buffalo County, Nebraska. The legal description of the Subject Property is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 3. The Parcel ID of this parcel is 060122000.

The Subject Property in Case No. 17A 0061 is a 314.04 acre agricultural parcel located in Buffalo 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 5. The Parcel ID of this parcel is 060123000.

The two parcels of the Subject Property are adjacent to one another and are each halves of a single section (S-T-R: 13-12-14) under the rectangular survey system.¹ The parcel in Case No. 17A 0060 (North Half) lies directly to the north of the parcel in Case No. 17A 0061 (South Half). Both parcels are located in Agricultural Market Area 1 of Buffalo County.

¹ “Within the rectangular survey system, townships are six miles square, or 36 square miles, while sections are one mile square or one square mile. A standard section therefore includes 640 acres. . . . The rectangular survey system . . . can also subdivide sections and portions thereof by one-half[.]” The Appraisal Institute, The Appraisal of Rural Property 88 (2nd Ed. 2000).

II. PROCEDURAL HISTORY

The Buffalo County Assessor (the County Assessor) determined that the assessed value of the Subject Property in Case No. 17A 0060 was \$1,033,720 for tax year 2017. Flying W, LLC (the Taxpayer) protested this assessment to the Buffalo County Board of Equalization (the County Board) and requested an assessed valuation of \$812,618. The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$1,033,720.²

The County Assessor determined that the assessed value of the Subject Property in Case No. 17A 0061 was \$1,634,920 for tax year 2017. Flying W, LLC protested this assessment to the County Board and requested an assessed valuation of \$800,000. The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$1,634,920.³

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on March 11, 2019. Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The parties stipulated to the receipt of exchanged Exhibits 1 to 60 and agreed to a supplement to Exhibit 9.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board 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 Ex 1.

³ Ex 2.

⁴ See Neb. Rev. Stat. §77-5016(8) (Reissue 2018), *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 Subject Property unless the Taxpayer establishes the County 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 The Commission's Decision and Order shall include findings of fact and conclusions of law.¹³

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

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(9) (Reissue 2018).

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. 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).

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

¹¹ Neb. Rev. Stat. §77-5016(8) (Reissue 2018).

¹² Neb. Rev. Stat. §77-5016(6) (Reissue 2018).

¹³ Neb. Rev. Stat. §77-5018(1) (Reissue 2018).

full description of the physical characteristics of the real property and an identification of the property rights valued.¹⁴

“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.”¹⁵ Nebraska courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”¹⁶ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of the Nebraska Revised Statutes and has the same meaning as assessed value.¹⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁹ Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value.²⁰

Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.²¹

B. Summary of the Evidence

Dr. Tom Werner testified on behalf of the Taxpayer. Dr. Werner is not a member of Flying W LLC, but he is involved in the operation and management of its farmland. He holds an undergraduate degree in ranch management and feed production from the University of Nebraska and has extensive experience in farming and ranching. Among other things, Dr. Werner described legal restrictions that prevent the Subject Property from functioning as fully irrigated land.

The section has one well, which is located on the southeast quarter (i.e., the east half of the South Half). Due to legal restrictions imposed by the local Natural Resources District (NRD), no other wells may be drilled on the section. This well provides water to six irrigation pivots. Four of these are typical central pivots located in the center of each quarter, which provide irrigation

¹⁴ Neb. Rev. Stat. §77-112 (Reissue 2018).

¹⁵ Neb. Rev. Stat. §77-112 (Reissue 2018).

¹⁶ *Omaha Country Club* at 180, 829.

¹⁷ Neb. Rev. Stat. §77-131 (Reissue 2018).

¹⁸ See Neb. Rev. Stat. §77-1301(1) (Reissue 2018).

¹⁹ Neb. Rev. Stat. §77-201(1) (Reissue 2018).

²⁰ Neb. Rev. Stat. §77-201(2) (Reissue 2018).

²¹ Neb. Rev. Stat. §77-132 (Reissue 2018).

to a circular area roughly touching the parcel boundaries, but leaving the corners of the roughly square quarters unirrigated. Another central pivot is located in the center of the section and is used to irrigate the central corners. The sixth pivot is a “windshield wiper” style pivot located on the eastern border of the property, which can be used to irrigate the corners between the North and South Half of the section on the eastern boundary.

The well produces water at a rate of 1,500 to 1,600 gallons per minute, which is adequate to fully irrigate two of the four quarters, but is not adequate to fully irrigate the entire section. As a result, the Taxpayer is unable to plant all four quarters with corn or soybeans, which produce the highest financial return among crops that are typical in the region. Instead, crops that require less water are planted, such as wheat and edible peas, to compensate for its inability to fully irrigate all four quarters. The five non-irrigated corners in the North Half cover approximately 30 acres. They are not used for crop production, but are instead kept in native grasses.

According to Dr. Werner, the restrictions on drilling additional wells to supply the Subject Property with irrigation create conditions that negatively impact the market value of the Subject Property. First, because the well is located on the South Half, the North Half cannot be sold separately without losing the water rights necessary to irrigate it. And second, the inadequate supply of water for the section makes crop failure more likely; the Taxpayer experienced crop failure sometime after purchasing the Subject Property in 2016. When asked to quantify the effect of this condition on the Subject Property, Dr. Werner opined that the value of the parcels should be somewhere between the set value for irrigated cropland and dryland cropland.²²

Ethel Skinner, the Buffalo County Assessor, testified on behalf of the County Board. Ms. Skinner holds the State Assessor Certificate and has been a licensed appraiser since 1991. She testified that her office values agricultural land by determining the soil type and LCG of the land.²³ She testified that her office conducted a sales study including all arm’s-length sales from the market area of the Subject Property during the period of October 1, 2013 through September 30, 2016, to determine the appropriate per acre price for each LCG. She acknowledged that the Subject Property had not been inspected recently and that she had not inspected the Subject

²² The values for the North Half, which was assessed incorrectly as irrigated grassland, were roughly halfway between the value for irrigated cropland and dryland cropland. See Exs. 3 and 10 through 12.

²³ See 350 Neb. Admin. Code Ch. 14 § 004.08. In summary, the Department of Revenue’s regulations require agricultural land to be broken into three general categories of use: irrigated cropland, dryland cropland, and grassland. Each of these categories of use is then further broken down into four LCGs based on soil type and the production capacity associated with the soil. Soil types are set by the USDA and the NRCS, and the applicable soil types were not a matter of dispute at the hearing. A complete list of soil types and corresponding LCGs for Buffalo County is found at Ex 10.

Property in preparation for the hearing. She also acknowledged that the aerial photographs²⁴ of the Subject Property and the testimony of the Taxpayer showed that the vast majority of the North Half was misclassified as to land use, and the land use analysis on the property record cards for both halves failed to reflect the existence of dryland or grassland corners on both parcels, a shelter belt, and roads and ditches. Ms. Skinner expressed the opinion that the assessment relied upon by the County Board was incorrect, but because she had not inspected the Subject Property, she could not provide the correct information to the Commission.

As noted above, Nebraska law recognizes a presumption that the County Board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. Nebraska courts also recognize that the appraisal of real estate is not an exact science.²⁵ The assessment of the Subject Property and determination of taxable value by the County Board in this case were made without inspecting the land,²⁶ nor did it appear that a readily available aerial photograph was utilized.²⁷ At the hearing, the Commission received ample competent evidence to conclude that the presumption in favor of the County Board's determination had been rebutted.

NORTH HALF

The County Assessor assessed 5 acres of the North Half as grassland, 5.75 acres as irrigated cropland, and 309.25 acres as irrigated grassland.²⁸ The evidence adduced at the hearing established that approximately 30 acres of the North Half is grassland (non-irrigated), and the other 285 acres is irrigated cropland.²⁹ Based upon the evidence received, 285 acres of the North Half should be classified as irrigated cropland, with a soil type of 4807 and an LCG³⁰ of 4A1, 30 acres should be classified as grassland, with a soil type of 4807 and an LCG of 4G, and 5 acres

²⁴ See, Exhibit 8:1.

²⁵ See, e.g., *Matter of Bock's Estate*, 198 Neb. 121, 251 N.W.2d 872 (1977).

²⁶ No inspection of the Subject Property was made from the time the Protest was filed by the Taxpayer in June 2017 until the time of the hearing in March 2019.

²⁷ What was received at the hearing as Exhibit 8:1, was an aerial photograph that was properly and timely exchanged by the Taxpayer to the County Board prior to the hearing. The County Board was given ample time to provide rebuttal, or, in this case, to make corrections prior to the hearing. Additionally, the County Assessor had ample time to review the misclassification of the land use of the North Half and provide the County Board and the Taxpayer with a new opinion of value prior to the hearing.

²⁸ See, Exhibit 3.

²⁹ Exhibits 8, 9, 10, and 11. The majority of the grassland acres would have an LCG of 4G and be valued at \$1,525 per acre, the remainder would have an LCG of 3G and be valued at \$1,600 per acre. LCG's are explained at footnote 30 below.

³⁰ LCG, or 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." 350 Neb. Admin. Code, Ch. 14 § 002.39 (3/15/09).

should be classified as grassland, with a soil type of 6717 and an LCG of 3G. Based upon the evidence received, using the appropriate soil types and LCGs, and applying the per acre assessments that were applied in the same tax year for the same soil types, the Commission finds that the taxable value of the North Half should be \$1,400,375.³¹

Under the Commission's Rules & Regulations, the Commission cannot find a taxable value in excess of the highest taxable value for which notice was given by the County Assessor, the County Board of Equalization, or the Property Tax Administrator, unless notice of a higher taxable value and the intent to offer proof in its support is given by a party.³² In this case, the evidence adduced at hearing demonstrated that the equalized taxable value of the North Half of the Subject Property should have been \$1,400,375. However, since the required notice was not given, the Commission is limited to the highest taxable value for which notice was given. Therefore, we find that the taxable value of the North Half should be \$1,033,720 for tax year 2017.

SOUTH HALF

The evidence adduced at the hearing included aerial maps and soil maps of the Subject Property. The Commission also took notice of the relevant soil survey by the USDA Natural Resources Conservation Service.³³ The soil types present in the South Half include Valentine Fine Sand, rolling (4807); Valentine loamy fine sand, 3 to 17 percent slopes (4822); Thurman-Valentine loamy fine sands, 2 to 6 percent slopes (6717); Anselmo fine sandy loam, 0 to 3 percent slopes (9007); and Anselmo fine sandy loam, 3 to 6 percent slopes (9008).³⁴ The northwest corner is native grass; the southwest, southeast, and the two south-center corners are dryland cropland. Additionally, the South Half includes wooded shelter belt, which does not produce crops. Based upon the evidence received, the Commission finds that the correct land uses and LCG codes for the South Half were as follows for tax year 2017:

³¹ 285 acres 4A x \$4,725 + 30 acres 4G x \$1,525 + 5 acres 3G x \$1,600 = \$1,400,375. See, 2017 Reports & Opinions of the Property Tax Administrator, Buffalo County, page 29.

³² 442 Neb. Admin. Code, Ch. 5 § 016.02A (2011).

³³ See Neb. Rev. Stat. § 77-5016(3) (Reissue 2018) and 442 Neb. Admin. Code, Ch. 5 § 031.02 (2011).

³⁴ Exhibit 9.

Soil Type	Use	LCG	Acres	Acre Value ³⁵	Total
4807	Grass	4G	3.74	\$1,525	\$ 5,703.50
4807	Irrigated	4A	33.45	\$4,725	\$158,051.25
6717	Grass	3G	0.14	\$1,600	\$ 224.00
6717	Irrigated	3A	135.37	\$5,150	\$697,155.50
6717	Dry	3D	8.46	\$2,275	\$ 19,246.50
9007	Irrigated	2A	73.37	\$5,500	\$403,535.00
9007	Grass	2G	0.68	\$1,650	\$1,122.00
9007	Dry	2D	6.96	\$2,550	\$ 17,748.00
9008	Dry	2D	12.86	\$2,550	\$ 32,793.00
9008	Irrigated	2A	7.76	\$5,500	\$ 42,680.00
9008	Grass	2G	0.58	\$1,650	\$ 957.00
4822	Irrigated	4A	22.25	\$4,725	\$105,131.25
Tree	Tree	N/A	4.42	\$465	\$ 2,055.30
Road/Ditch	Road	N/A	4	\$0	\$ 0
TOTAL			314.04		\$1,486,402.30

Accordingly, we find that the taxable valuation for the South Half (Parcel No. 060123000) for tax year 2017 is \$1,486,402.

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 determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable. In Case No. 17A 0060, the

³⁵ Per acre values were taken from Exhibit 11, or where necessary, from the *2017 Reports and Opinions of the Property Tax Administrator for Buffalo County*. See 442 Neb. Admin Code, Ch. 5 § 031.02 (2011).

Commission is barred by rule from raising the value of the Subject Property; thus, the decision of the County Board must be affirmed. In Case No. 17A 0061, the decision of the County Board should be vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Buffalo County Board of Equalization is affirmed in Case No. 17A 0060. The decision of the Buffalo County Board of Equalization is vacated and reversed in Case No. 17A 0061.³⁶
2. The assessed value of the Subject Property for tax year 2017 is:
Case No. 17A 0060, Parcel ID 060122000: \$1,033,720
Case No. 17A 0061, Parcel ID 060123000: \$1,486,402
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Buffalo County Treasurer and the Buffalo County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2018.)
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 2017.
7. This Decision and Order is effective for purposes of appeal on October 17, 2019.³⁷

Signed and Sealed: October 17, 2019

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

³⁶ 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.

³⁷ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.