

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

JOSEPH P. KENNEY
APPELLANT,

V.

WHEELER COUNTY BOARD
OF EQUALIZATION,
APPELLEE.

CASE NOS: 20A 0054 &
20A 0055

**DECISION AND ORDER
AFFIRMING THE DECISIONS
OF THE WHEELER COUNTY
BOARD OF EQUALIZATION**

For the Appellant:

Joseph P. Kenney,
Pro Se

For the Appellee:

Joseph McNally,
Wheeler County Attorney

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

I. THE SUBJECT PROPERTY

The Subject Properties are a 636.86-acre parcel and a 318.77-acre parcel located in Wheeler County, Nebraska. The legal descriptions and Property Record Files (PRF) of the Subject Properties are found at Exhibits 11 and 12.

II. PROCEDURAL HISTORY

The Wheeler County Assessor (the County Assessor) determined the assessed values of the Subject Properties were \$956,345 and \$459,345, respectively, for tax year 2020. Joseph P. Kenney (the Taxpayer) protested these assessments to the Wheeler County Board of Equalization (the County Board). The County Board issued a

combined decision for both parcels that determined the taxable values of the Subject Properties for tax year 2020 was \$1,415,690.¹

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on October 5, 2021. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1 through 18 were admitted into evidence.

III. STANDARD OF REVIEW

The Commission's review of the County Board's determination 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

¹ Exhibit 1. The County Board appears to have combined the assessed values of both parcels in its decision ($\$956,345 + \$459,345 = \$1,415,690$).

² See Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County 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 County Freeholder Bd.*, 276 Neb. 1009, 1019, 759 N.W.2d 464, 473 (2009).

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

⁴ *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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

The 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 that the County Board's valuation was unreasonable or arbitrary.⁸

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 take notice of judicially cognizable facts, 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

⁵ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁶ *Omaha Country Club v. Douglas County 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 County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. of Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

⁸ *Bottorf v. Clay County Bd. of Equal.*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

⁹ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹⁰ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹¹ Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

IV. RELEVANT 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 Neb. Rev. Stat. § 77-1371, (2) income approach, and (3) cost approach.¹³ Nebraska courts have held that actual 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 Neb. Rev. Stat. § 77-201 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

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value.¹⁸ Agricultural land and horticultural land means a parcel of land, excluding land associated with a

¹² Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹³ Neb. Rev. Stat. § 77-112 (Reissue 2018).

¹⁴ *Omaha Country Club* at 180, 829.

¹⁵ Neb. Rev. Stat. § 77-131 (Reissue 2018).

¹⁶ See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

¹⁷ Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

¹⁸ Neb. Rev. Stat. § 77-201(2) (Reissue 2018).

building or enclosed structure located on the parcel, 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.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 Under Neb. Rev. Stat. § 77-1359:

(2)(a) 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.

(b) Agricultural or horticultural purposes includes the following uses of land:

(i) 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

(ii) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production; and

(c) Whether a parcel or land is primarily used for agricultural and horticultural purposes shall be determined without regard to whether some or all of the parcel is platted and subdivided into separate lots or developed with improvements consisting of streets, sidewalks, curbs, gutters, sewer lines, water lines, or utility lines.²¹

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 the Nebraska

¹⁹ Neb. Rev. Stat. § 77-1359(1) (Reissue 2018).

²⁰ Neb. Rev. Stat. § 77-132 (Reissue 2018).

²¹ Neb. Rev. Stat. § 77-1359(2) (Reissue 2018).

Constitution.²² Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²³ 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.²⁴ 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.²⁵ 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.²⁶ If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that the valuation placed on the property when compared with valuations placed on other similar properties is grossly excessive and is the result of systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.²⁷ There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.²⁸

²² *Neb. Const.*, Art. VIII, § 1.

²³ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²⁴ *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).

²⁵ *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²⁶ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge Cty/ Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

²⁷ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²⁸ *Id.* at 673, 94 N.W.2d at 50.

V. FINDINGS OF FACT

A. Summary of the Evidence

1. Conservation Reserve Program Acres

The Conservation Reserve Program (CRP) is administered by the United States Department of Agriculture Farm Service Agency. CRP was established to promote conservation goals, including achieving a net water savings by reducing the use of irrigation on cropland. CRP is a voluntary program in which agricultural producers enter a contract with the federal government for a number of years to remove acres of irrigated land from agricultural production. In exchange, the property owners receive yearly payments.

According to the Property Record Files for both Subject Properties, the increases in assessed values from tax year 2019 to tax year 2020 were largely due to the reclassification of grassland acres and CRP acres. The reclassification was due to the requirements of legislation enacted in 2019 and effective to tax year 2020 assessments. A complete explanation follows.

2. Agricultural Assessments Prior to Tax Year 2020

In 2019, the Nebraska Legislature amended Neb. Rev. Stat. §77-1363 by inserting one sentence: “Land capability groups shall be Natural Resources Conservation Service specific to the applied use and not all based on a dryland farming criterion.”²⁹ Our decision in these appeals is primarily based on our understanding of the effect of this language on the taxable value of agricultural land and horticultural land³⁰ beginning in tax year 2020.

Under Nebraska law, agricultural land is a distinct class of real property and is divided into multiple subclasses.³¹ Irrigated cropland,

²⁹ LB 372, §1, as codified at Neb. Rev. Stat. § 77-1363 (Cum. Supp. 2020).

³⁰ Hereinafter referred to as “agricultural land.”

³¹ Neb. Rev. Stat. § 77-103.01 (Reissue 2018).

dryland cropland, and grassland are the most predominant use subclasses of agricultural land. CRP land is also assessed as an additional subclass of agricultural land.³² To properly assess a parcel of agricultural land, county assessors analyze each acre of the parcel. Fundamental to this analysis is identifying soil types. The process of identifying and analyzing soil types, and their ultimate productivity when put into either irrigated cropland, dryland cropland, or grassland uses, starts with information from the United States Department of Agriculture, Natural Resources Conservation Service (NRCS). The NRCS assigns each soil type with a four-digit code and provides the soil type codes to the Property Assessment Division (PAD) of the Nebraska Department of Revenue. PAD then classifies each soil type into one of eight Land Capability Groupings (LCG) for irrigated cropland, dryland cropland, and grassland.³³ This soil conversion process conducted by PAD includes multiple soil types in each of these LCGs. As a result, the eight LCGs for each agriculture subclass are as follows:

Irrigated	1A1	1A	2A1	2A	3A1	3A	4A1	4A
Dry	1D1	1D	2D1	2D	3D1	3D	4D1	4D
Grass	1G1	1G	2G1	2G	3G1	3G	4G1	4G

Soils that are used for irrigated cropland are included under the designation “A.” Soils used for dryland cropland are designated with a “D,” and soils used for grassland are designated as “G.” Soils deemed to be most productive are classified as 1A1, 1D1, and 1G1. Soils deemed to be least productive are classified as 4A, 4D, and 4G. All acres used for irrigated cropland, dryland cropland, and grassland are classified under one of these LCGs. CRP acres may also be classified by LCG.

PAD provides the soil classifications for each county to each county assessor. Each county assessor is then required to utilize the soil

³² 350 NAC Chapter 14, §004.04E (3/15/09).

³³ An LCG is defined as, “a grouping of various soils according to their limitations for field crops, the risk of damage if they are used for crops, and the way they respond to average management.” Title 350 Neb. Admin. Code, Chapter 14, Section 004.08E, Revised 3/15/09.

surveys as directed by the Property Tax Administrator (PTA) of PAD.³⁴ Prior to the enactment of LB 372, PAD classified each four-digit soil type it received from the NRCS in an LCG, based upon a dryland capability classification per Rules & Regulations.³⁵

3. Agricultural Assessments Beginning Tax Year 2020

As a result of the enactment of LB 372, the classification of agricultural land as described above changed. Rather than designating the irrigated cropland and grassland productivity levels at the same level that those soil types had when used as dryland cropland, the productivity level for each soil type when used as irrigated cropland or as grassland was independent of the dryland cropland productivity level.

4. Agricultural Assessments by the Wheeler County Assessor for Tax Year 2020

As can be seen in the Property Record Files, the Wheeler County Assessor included a reclassification of soil types by LCG in the assessments for tax year 2020. For the Subject Properties, this generally resulted in acres that were classified in tax year 2019 as 4G, 4G1, 4G-CRP, and 4G1-CRP to be converted to 3G, 3G1, 3G-CRP, and 3G1-CRP respectively for tax year 2020.³⁶ As a result, most of the acres involved in these appeals were not only reclassified but were also assessed at a higher per acre value, whether classified as grassland or as CRP.

³⁴ Neb. Rev. Stat. § 77-1363 (Cum. Supp. 2020) (“County assessors shall utilize soil surveys from the Natural Resources Conservation Service of the United States Department of Agriculture as directed by the Property Tax Administrator.”).

³⁵ “Land Capability Groups are determined by the Department of Revenue, Property Assessment Division based upon the dryland capability classification.” Title 350 Neb. Admin. Code, Chapter 14, Section 002.41, Revised 3/15/09.

³⁶ See, Exhibit 11:3-4 and Exhibit 12:2-3.

5. Testimony of Joseph Kenney

Joseph Kenney offered his own testimony. Kenney cited the Department of Revenue's regulations directing agricultural land to be assessed at 75% of actual value and for agricultural acres enrolled in CRP to be classified at its current use, usually grassland uses.³⁷ In relation to the parcel in Case No. 20A 0054, the Taxpayer had 533.7 acres enrolled in the CRP program.³⁸ Regarding the parcel in Case No. 20A 0055, 249.8 acres were enrolled in the CRP program.³⁹

Kenney acknowledged the average acre value for CRP land contained in the Property Tax Administrator's 2020 Reports & Opinions for Wheeler County was \$1,707 per CRP acre.⁴⁰ However, Kenney asserted the CRP acres present on the Subject Properties should be valued at grassland values, which are generally lower. Kenney pointed out the PRFs demonstrate two different values per acre between grassland uses and CRP enrolled acres. Kenney also acknowledged he was receiving yearly payments per the CRP contracts.

6. Testimony of Leroy Behnk

The Taxpayer called Leroy Behnk to testify. Behnk had been a real estate broker for 16 years. He had brokered agricultural properties in Wheeler County. Behnk testified he was familiar with the Subject Properties, as well as an adjoining agricultural property (the Beverly Trust Property).

³⁷ Exhibit 5:19; Title 350 Neb. Admin. Code, ch 14, 006.04C(3) (3/15/09).

³⁸ Exhibit 11:3.

³⁹ Exhibit 12:2.

⁴⁰ Exhibit 3:27.

Behnk stated he was asked to provide an opinion of value for the sale of the Beverly Trust Property in April 2019. In preparing that opinion, Behnk stated he performed a market analysis and ultimately concluded the Beverly Trust property should be valued at approximately \$1,000 per acre. Behnk stated the Beverly Trust property ultimately sold for \$975 per acre in April 2020. He stated the soils on the Beverly Trust property and the Subject Properties were both Valentine soils and were similar to each other. Behnk also noted the Beverly Trust property had acres enrolled in the CRP program, but the number of acres were not specified. Using the Beverly Trust property sale as the basis for an opinion of value of the Subject Properties, Behnk opined the Subject Properties would have a market value of \$1,000 per acre as of January 1, 2020.

B. Analysis

The opinions of Kenney and Behnk regarding the value of the Subject Properties are competent evidence sufficient to rebut the presumption the County Board had faithfully performed its duties. However, these opinions did not demonstrate by a clear and convincing basis that the County Board's decisions were arbitrary or unreasonable.

In particular, the Taxpayer's opinion the CRP acres on the Subject Properties brought in no more revenue than if they were used as grassland not in CRP was unsupported by any evidence other than testimony giving no basis for that opinion. While this testimony is afforded some weight, it does not clearly and convincingly demonstrate the County Board's valuation was arbitrary or unreasonable.

Additionally, no evidence, other than testimony, was provided to support Behnk's opinion the Beverly Trust property was comparable to the Subject Properties.⁴¹ Without such evidence, the Commission cannot find the Beverly Trust property can be exclusively used as the basis for the assessed value of all of the acres of the Subject Properties.

The Nebraska Supreme Court has held that even an expert's unsupported opinion of value is not competent evidence of the actual value of real property.⁴² Without a sufficient evidentiary basis in the record to support the testimony provided by Kenney and Behnk, the Commission finds the Taxpayer has not met the burden to demonstrate by clear and convincing evidence the County Board's decision was arbitrary or unreasonable.

VI. CONCLUSION

The Commission finds there is competent evidence to rebut the presumption the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. However, the Commission also finds there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For the reasons set forth above, the determination of the County Board should be affirmed.

VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Wheeler County Board of Equalization determining the values of the Subject Properties for tax year 2020 are affirmed.
2. The taxable values of the Subject Properties for tax year 2020 are:

Parcel ID 0000615.00: \$ 956,345

Parcel ID 0000603.01: \$ 459,345

⁴¹ No property record file for the Beverly Trust property was provided. The Order for Hearing and Notice issued to the Taxpayer on March 31, 2021, includes the following: **PROPERTY RECORD FILES:** *Each party shall provide, as an exhibit, copies of the county's Property Record File for any parcel that party will assert is a comparable parcel. NOTE: A screen shot or print out of a web page is not a Property Record File. A Property Record File is only maintained in the office of the County Assessor and should be obtained from that office before the hearing.*

⁴² See, *McArthur v. Papio-Missouri River Natural Resources District*, 250 Neb. 96, 547 N.W.2d 716 (1996).

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Wheeler County Treasurer and the Wheeler 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 2020.
7. This Decision and Order is effective for purposes of appeal on July 5, 2023.⁴³

Signed and Sealed: July 5, 2023

SEAL



Robert W. Hotz, Commissioner

James D. Kuhn, Commissioner

⁴³ 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.