BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

MARILYN J. LORE, Box Butte County Assessor, Appellant, vs. BOX BUTTE COUNTY BOARD OF EQUALIZATION, and LEON C. ACKERMAN, and MARY LOU ACKERMAN, Appellees.	)	CASE NO. 01A-52 FINDINGS AND ORDER

Filed October 14, 2003

Appearances:

For Leon C. Ackerman and Mary Lou Ackerman:	Terry Curtis, Esq. Curtiss, Moravek, Curtiss & Margheim P.O. Box 460 Alliance, NE 69301
For Marilyn Lore, Box Butte County Assessor:	Dennis D. King, Esq. Smith, King & Freudenberg, P.C. P.O. Box 302 Gordon, NE 69343-03020
For the Box Butte County Board of Equalization:	Russell W. Harford, Esq. Crites, Shaffer, & Harford P. O. Box 1070 Chadron, NE 69337

Before: Commissioners Hans, Wickersham and Reynolds.

Reynolds, Chair, for the Commission.

I.
STATEMENT OF THE CASE

The Box Butte County Assessor is responsible for determining the assessed value of real property within her county. The Assessor used the Sales Comparison Approach to value agricultural land within the County for tax year 2001. The sales used indicated there were three agricultural market areas. The Assessor determined the value of individual soil types based on sales in each market area. The Assessor then applied 80% of those values to each of the soil types present on each parcel of real property.

Leon C. Ackerman and Mary Lou Ackerman ("the Taxpayer") own agricultural land within the County. The Taxpayer protested the Assessor's value to the Box Butte County Board of Equalization ("the Board"). (E143:2). The Board granted the Taxpayer's protest in part. The Board, when granting the protest, valued the Taxpayer's agricultural land using a per acre value for agricultural land based on "an average number for the three market areas with a cap at the number shown by the initial appraised value." (E143:2).

The Assessor appealed Board's decision to the Commission. The Assessor alleged "The decisions by the Box Butte County Board of Equalization in each individual case wherin (sic) the value of the protested property was determined by taking an average of the value of the same class of property for each market area does not

promote uniformity and proportionality as required by law and as required by Nebraska Constitution and will result in an unacceptable quality of assessment in the County of Box Butte." (Appeal Form).

The Taxpayer filed a cross-appeal which alleged "the Box Butte County Board of Equalization correctly and lawfully determined that because of the unlawful division of Box Butte County into 'market areas' with unequal disproportionate and non-uniform land values there was an unconstitutional failure to value all agricultural land in Box Butte County uniformly and proportionately." (Answer of Appellee and Cross Appeal).

The Parties stipulated at the hearing that the only issue is the assessed value of the agricultural land component of the Taxpayer's properties ("the subject properties").

II.
ISSUES

The issues presented in these appeals are:

1. What is 80% of the actual or fair market value of the agricultural land component of the subject property?
2. What weight should be accorded the Assessor's uncontroverted expert testimony regarding value?
3. What is the equalized value of 80% of the actual or fair market value of the agricultural land component of the subject property?

III.
APPLICABLE LAW

An appellant must demonstrate by clear and convincing evidence that the county board of equalization's decision was incorrect and that the decision was either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7)(Cum. Supp. 2002). An appellant, under the "unreasonable or arbitrary" standard, must adduce clear and convincing evidence that the Board either failed to faithfully perform its official duties or that the Board failed to act upon sufficient competent evidence. The Appellant, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *Garvey Elevators v. Adams County Bd. of Equal.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV.
FINDINGS OF FACT

The Commission finds and determines as follows:

A.
PROCEDURAL FINDINGS

1. The Taxpayer owned the subject property on the January 1, 2001, assessment date. (E143:1).
2. The Taxpayer protested the Assessor's determination of value on or before July 1, 2001. (E143:2).
3. The Board granted the protest in part on or before July 25, 2001. (E143:2).

4. The Commission consolidated this appeal with 113 other appeals for purposes of hearing.
5. The Parties stipulated at the hearing that only the agricultural land value component of the subject property is at issue on appeal.

B.
SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The Assessor and Taxpayer each adduced evidence establishing the Board's decision was incorrect, unreasonable, and arbitrary, and that the Board's value is unreasonable.
2. None of the Parties adduced any evidence suggesting that the Board's decision concerning the agricultural land value component of the Taxpayer's property was correct.
3. None of the Parties adduced any evidence suggesting that the Board's decision concerning the agricultural land value component of the Taxpayer's property was reasonable.
4. None of the Parties adduced any evidence suggesting that the Board's decision concerning the agricultural land value component of the Taxpayer's property was "not arbitrary."
5. None of the Parties adduced any evidence suggesting that the Board's valuation decision concerning the agricultural land value component of the Taxpayer's property was reasonable.

6. The Taxpayer adduced no evidence of actual or fair market value or 80% of actual or fair market value for the agricultural land components.

7. The Board adduced no evidence of actual or fair market value or 80% of actual or fair market value for the agricultural land components.

8. The Assessor testified without objection as to her expert opinion of 80% of actual or fair market value for the agricultural land component for the subject property as of the assessment date.

9. The Assessor's expert testimony is the only evidence of 80% of the actual or fair market value of the agricultural land component for the subject property in the *de novo* hearing before the Commission.

V.
ANALYSIS

A.
THE STATUTORY PRESUMPTION

The Assessor and Taxpayer each adduced evidence establishing the Board's decision was incorrect, unreasonable, and arbitrary, and that the Board's value is unreasonable. The Board offered no evidence to the contrary.

The Commission must affirm the Board's decision unless evidence is adduced that the decision is incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). A

taxpayer must overcome this "statutory presumption" in order to prevail. The Taxpayer must first provide clear and convincing evidence that the Board's decision is incorrect, and that the Board either failed to faithfully perform its official duties or failed to act upon sufficient competent evidence. The Taxpayer must then demonstrate by clear and convincing evidence that the Board's values are unreasonable. *Garvey Elevators v. Adams County Bd. of Equal.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

The Board granted the protest, and determined 80% of actual or fair market value for the agricultural land component of the subject property, using a formula where "an average number for the three market areas with a cap at the number shown by the initial appraised value (sic)." (E144:2). The law requires value to be determined by using professionally accepted mass appraisal methods: the sales comparison approach; the cost approach; or the income approach. Neb. Rev. Stat. §77-112 (Cum. Supp. 2002). The formula used by the Board is not one of the professionally accepted mass appraisal methods. No one, not even the Board, attempted to defend either the Board's decision or the Board's determination of 80% of actual or fair market value for the agricultural land component of the subject property.

The Taxpayer and the Assessor have adduced sufficient clear and convincing evidence to overcome the statutory presumption.

B.
THE ISSUES

The Taxpayer failed to adduce any evidence of either actual or fair market value or 80% of the actual or fair market value of the agricultural land component of the subject property. In spite of this defect, the Taxpayer alleges that the assessed value of the subject property should be reduced to the lowest per acre assessed values established in the three agricultural market areas.

The Appeal, cross-appeal and evidence frames the issues before the Commission. Those issues are (1) 80% of the actual or fair market value of the agricultural land component of the subject property as of the assessment date; (2) the weight which should be given to the Assessor's uncontroverted expert testimony; and (3) the equalized assessed value of the subject property.

C.
THE ACTUAL OR FAIR MARKET VALUE OF THE SUBJECT PROPERTY

The first issue is the actual or fair market value or 80% of the agricultural land component of the subject property as of January 1, 2001. Neither the Taxpayer nor the Board adduced any evidence of actual or fair market value of the agricultural land component for the property. The Assessor testified without

objection as to 80% of the actual or fair market value of the agricultural land component of the subject property.

The Nebraska Rules of Evidence provide that a witness may be qualified as an expert based on education, training or experience. The law requires an assessor to submit to a test of his or her knowledge of professionally accepted mass appraisal methods before assuming office. Neb. Rev. Stat. §77-421 (Cum. Sup. 2002). The law requires an assessor to hold a certificate demonstrating the "qualifications, fitness and ability of the person tested actually to perform the duties of the county assessor." Neb. Rev. Stat. §77-1330 (Cum. Supp. 2002). The law requires an assessor to complete an annual course of training conducted by the Property Tax Administrator. Neb. Rev. Stat. §77-415(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 442, §2). An assessor who satisfies these requirements of law may be qualified as an expert based on education and training under the Nebraska Rules of Evidence.

The Assessor in this case has held office since 1992; holds an assessor's certificate; and has satisfied all of the continuing education requirements imposed by law. The Assessor, based on her education, training and experience, is qualified under the Nebraska Rules of Evidence as an expert to testify as to the value of the subject property.

D.
WEIGHT AFFORDED TO AN ASSESSOR'S UNCONTROVERTED OPINION OF VALUE

The Commission is bound by the Nebraska Rules of Evidence in a formal proceeding. Neb. Rev. Stat. §77-5016(1) (Cum. Supp. 2002). This appeal, however, was an informal proceeding. Nothing in state law prohibits the Commission from recognizing an expert in an informal proceeding. The Commission, in an informal proceeding, may "admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs." Neb. Rev. Stat. §77-5016(1) (Cum. Supp. 2002). The Assessor is qualified as an expert. The Commission, as the finder of fact, determines the weight to be given this testimony.

The Taxpayer and the Board allege that her use of agricultural market areas to value agricultural land is contrary to law. Two judicial decisions address the use of agricultural market areas. The first is *Bartlett v. Dawes County Board of Equalization*, 259 Neb. 954, 613 N.W.2d 810 (2000). The taxpayers in *Bartlett* appealed their assessed values for 1998. These values were based on a 1998 Commission order adjusting values of all agricultural land within each of the agricultural market areas. Taxpayers from the two agricultural market areas who received increases protested the resulting values. The Dawes County Board of Equalization denied the protests. The Taxpayers appealed the Board's decisions to the Commission, which denied

relief. The Taxpayers then appealed to the Nebraska Supreme Court.

The Court ruled in *Bartlett* that:

> "Although TERC's order claims to be adjusting subclasses of agricultural land, a "market area" is not a subclass of agricultural land recognized by our statutes. Subclasses of agricultural land property must be based on soil classification for purposes of taxation. . . Subclasses of agricultural land must be based on soil classification, not upon where the land is located. . . Assuming without deciding that market area analysis is a professionally accepted mass appraisal method for establishing value, the problem in this case is that the "market areas" were used by TERC as a basis for ordering adjustments for purposes of equalization under §77-5026."

Id., at 962 - 963, 817 - 818. The Supreme Court's decision only applied to Commission orders adjusting values during each annual equalization process.

The Court of Appeals issued a decision based on *Bartlett.* In *Schmidt v. Thayer County Board of Equalization*, 10 Neb. App. 10, 624 N.W.2d 63 (2001), however, the Court faced different facts. The taxpayer in *Schmidt* owned a quarter-section of agricultural land. The Thayer County Assessor, using the Sales Comparison Approach, divided Thayer County into two agricultural

market areas. The assessor valued agricultural land within each market area based on sales within the area. The Court in *Schmidt* held:

> "While the Supreme Court in *Bartlett* assumed without deciding that market area analysis is a professionally accepted mass appraisal method for establishing actual value, it rejected the use of market values in that case as violative of the statutory scheme set out by the Legislature. 'The evidence in this case indicates that the market areas established by the assessor were not, in fact, based on soil classification, but, instead, were based on assessment-to-sales ratios. Subclasses of agricultural land must be based on soil classification, not upon where the land is located. The market areas do not constitute subclasses of agricultural land as defined by our statutes.' "

Id. at 21, 71. The Court of Appeals expanded the scope of *Bartlett* to prohibit county assessors from using agricultural market areas as a subclass to value agricultural land unless the market areas were based on soil classifications.

The Supreme Court Rules of Practice and Procedure, Rule 2(E)(5), states:

> "Opinions of the Court of Appeals which the deciding panel has designated "For Permanent Publication" shall be followed as precedent by the courts and tribunals

inferior to the Court of Appeals until such opinion is modified or overruled by the Nebraska Supreme Court."

This conclusion, however, does not answer the question at hand. That question is the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property as of the assessment date. The Taxpayer failed to adduce any evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property. The Board failed to adduce any evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property. Only the Assessor, as an expert, offered evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property. The Commission received that evidence without objection from either the Board or the Taxpayer.

E.
ASSESSED VALUE OF THE SUBJECT PROPERTY

The Assessor was the only Party to offer any evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property. The Assessor is qualified as an expert based on her education, training, experience, and

certification to render an opinion of value. The Assessor opined that 80% of the actual or fair market value of the agricultural land as of the assessment date was $101,735. (E143:4).

The Commission has no power of remand. The Commission must base its decision on the record before it. Neb. Rev. Stat. §77-5016(3)(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Commission must, therefore, conclude that 80% of the actual or fair market value of the agricultural land component of the Taxpayer's properties, as of the assessment date, was $101,735.

F.
EQUALIZED VALUES OF THE SUBJECT PROPERTY

The Taxpayer and the Board allege the Assessor's values are not equalized with comparable properties.

Equalization is required under Article VIII, of the Nebraska Constitution which provides:

> "(1) 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 . . . (4) the Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a

different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all real property within the class of agricultural land and horticultural land. . . ”

Equalization is the process of ensuring that all taxable properties are placed on the assessment rolls at a uniform percentage of actual value. *Cabela’s, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb.App. 582, 635, 597 N.W.2d 623, 597 (1999). The burden of proof is on the complaining Taxpayer to establish a uniformity clause violation. *Collier v. Logan County,* 169 Neb. 1, 6, 97 N.W.2d 879, 884 (1959). Here the Taxpayer failed to adduce any evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component for the subject property or that of any other property. The Taxpayer, without evidence of actual or fair market value, or some other standard for comparison to actual value, cannot establish a Uniformity Clause violation. *Kearney Convention Center v. Buffalo County Board of Equalization,* 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999); *Scribante v. Douglas County Board of Equalization,* 8 Neb.App. 25, 588 N.W.2d 190 (1999).

G.
CONCLUSION

The evidence adduced extinguishes the statutory presumption in favor of the Board. Eighty percent of the actual or fair market value of the agricultural land component of the subject property is at issue. Neither the Taxpayer nor the Board adduced any evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property. The only evidence of value offered is the Assessor's expert testimony. The Commission must base its decision on the record before it. Neb. Rev. Stat. §77-5016(3)(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Commission, in the absence of any other evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property, must accept the Assessor's expert opinion as the assessed value of the subject property.

The Commission, in the absence of evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property or other property from the Taxpayer, cannot conclude that the subject property's assessed values are not equalized. The Commission must therefore fix the assessed values of the subject property for 2001 in those amounts testified to by the Assessor.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and the subject matters of this appeal.
2. Agricultural real property is to be valued at 80% of actual or fair market value.
3. The Board's formula for determining 80% of actual or fair market value of the agricultural land component of the subject property is not a professionally accepted mass appraisal methodology. The Board, in using this formula, failed to act upon sufficient competent evidence. The Board's value, derived from this formula, is unreasonable.
4. The Taxpayer and the Assessor have each satisfied their burdens of persuasion. The statutory presumption is extinguished. The Board's decision must be vacated and reversed.
5. The Taxpayer cannot prevail in a valuation appeal or in an equalization appeal without evidence of the actual or fair market value or 80% of the actual or fair market value for the agricultural land component of the Taxpayer's agricultural real property, or without some other standard for comparison to actual value in an equalization appeal.
6. The Commission must accept the Assessor's uncontroverted expert opinion of value as the value of the subject property.

VII.
ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Box Butte County Board of Equalization's decision granting the Taxpayer's protests in Case Number 01A-53 is vacated and reversed.
2. The Taxpayer's Cross-Appeal is denied.
3. The Taxpayer's real property in Case Number 01A-53, legally described as the S1/2NE1/4; W1/2; W1/2SE1/4 of Section 14, Township 25, Range 47, Box Butte County, Nebraska, shall be valued for taxation as follows for tax year 2001:

Land	
Agricultural land	$101,735
Farm Home Site	$ 5,000
Farm Building Site	$ 6,000
Roads	$ -0-
Improvements	
House	$ 34,378
Outbuildings	$ 15,420
Total	$162,533

4. Any request for relief by any Party not specifically granted by this order is denied.
5. This decision, if no appeal is filed, shall be certified to the Box Butte County Treasurer, and the Box Butte County

Assessor, pursuant to Neb. Rev. Stat. §77-5016(7)(Cum. Supp. 2002).

6. This decision shall only be applicable to tax year 2001.

7. Each party is to bear its own costs in this matter

IT IS SO ORDERED.

Dated this 14th day of October, 2003.

_____
Robert L. Hans, Commissioner

_____
Wm. R. Wickersham, Vice-Chair

Seal _____
Mark P. Reynolds, Chair