

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

ROGER E. TREW,	)	
	)	
Appellant,	)	CASE NO. 04R-102
	)	
vs.	)	FINDINGS AND ORDER
	)	AFFIRMING THE DECISION OF THE
HARLAN COUNTY BOARD OF	)	HARLAN COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Roger E. Trew to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 S. 2nd Street, in the City of Kearney, Buffalo County Nebraska, on July 27, 2005, pursuant to a Notice and Order for Hearing issued May 10, 2005. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Roger E. Trew ("the Taxpayer") appeared at the hearing without counsel.

The Harlan County Board of Equalization ("the County Board") appeared through counsel, Bryan S. McQuay, Esq., the County Attorney for Harlan County, Nebraska.

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2003, as amended by 2005, Neb. Laws L.B. 15 §10) to state its final decision concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

## **I. STANDARD OF REVIEW**

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. §77-5016(8)(Cum. Supp. 2004, as amended by 2005 Neb. Laws L.B. 15 §9). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

## **II. FINDINGS**

The Commission finds and determines that:

### **A. PROCEDURAL FINDINGS**

1. The Taxpayer is the owner of record of certain real property described in the appeal as FCL E½SE¼, Section 2, East and West, Township 1 North, Range 17 West 6th PM, Harlan County, Nebraska ("the subject property").

2. The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2004, ("the assessment date") by the Harlan County Assessor was:

Land value	\$12,180.00
Improvement value	\$ <u>750.00</u>
Total value	<u>\$12,930.00.</u>

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

Land value	\$4,338.00
Improvement value	\$ <u>750.00</u>
Total value	<u>\$5,088.00.</u>

4. The County Board denied the protest. (E:1)
5. The Taxpayer timely filed an appeal of that decision to the Commission.
6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.
7. A Notice and Order for Hearing issued on May 10, 2005, set a hearing of the Taxpayer's appeal for July 27, 2005, at 10:00 a.m. CDST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.

**B.**  
**SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS**

1. The subject property was subject to taxation for the tax year 2004 as a 9.69 acre single family residential tract with a shed. (E14:1 and 2).

2. The Taxpayer kept 4 ducks, 5 guineas, and 2 goats in an enclosure on the subject property as of January 1, 2004.
3. The subject property is traversed by an irrigation canal.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
5. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for the tax year 2004 is:

Land value	\$12,180.00
Improvement value	\$ <u>750.00</u>
Total value	<u>\$12,930.00.</u>

6. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.
7. The decision of the County Board was correct and neither arbitrary nor unreasonable.
8. The decision of the County Board should be affirmed.

### **III. CONCLUSIONS OF LAW**

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998)
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those

identified in the Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016(3) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9).

4. Agricultural land and horticultural land means land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. Land retained or protected for future agricultural or horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or horticultural land. 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. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stat. §77-1359(1)(Reissue 2003)
5. Agricultural or horticultural products include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops. Neb. Rev. Stat. §77-1359(2)( Reissue 2003).
6. “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.” Neb. Rev. Stat. §77-112 (Reissue 2003).

7. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
8. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 8241 ( 2002).
9. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9). The Nebraska Supreme Court, in considering similar language, has held that “There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, 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.” *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

10. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
11. The term "unreasonable" can be applied to a decision of an administrative agency only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).
12. The Court has also held that "In an appeal to the county board of equalization or to [the Tax Equalization and Review Commission] and from the [Commission] to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment." *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).
13. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
14. "It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of

equalization.” *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58, (1991).

15. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).

#### **IV. ANALYSIS**

The Taxpayer asserted that the subject property should be subject to taxation as agricultural and horticultural land. The only evidence in support of that contention was the Taxpayer's testimony that as of the assessment date he had 4 ducks, 5 guineas, and 2 goats in an enclosure on the subject property as of the assessment date. The goats were held for breeding purposes and the Taxpayer testified that it was his intention to develop a herd of goats if he acquired more land. Eggs are collected from the ducks and guineas. The collected eggs are consumed by the Taxpayer or his family or given to friends. The Taxpayer testified that guinea eggs are worth \$5.00. per dozen but he has never sold any. The ducks, guineas, and goats are confined to an area enclosed with a security fence. The enclosed area contains a pond used for swimming and watering the goats, ducks, and guineas, a shed, a camper trailer, a fire pit and various items stored on the property by the Taxpayer. The enclosure is on the west side of the canal. The area on the east side of the canal is unfenced and is about 2/3rd of the subject property. (E9:1) The Taxpayer maintains a deer stand, walking trail and camping site on that portion of the subject property. The Taxpayer testified that he had purchased the subject property

as a get away, but that he had been raised on a farm and wanted to get back to agriculture. The Taxpayer does not reside on the property but visits it on weekends about twice a month. His son also uses the subject property on weekends and cares for the animals. The Taxpayer and his family use the subject property for camping, hiking and swimming. The unfenced area east of the canal is maintained as wild life habitat.

Real property to be classified as single family residential property must be used predominately or intended to be used as a dwelling place or abode whether occupied by the owner, tenant or lessee, and where occupancy is for a period of time usually year round as opposed to a transitory occupancy for a single family or two families. 350 Neb. Admin Code, ch10, § 0051A (03/04). Real property to be classified as recreational must be used predominately 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. 350 Neb. Admin Code, ch10, § 0051E (03/04). The Harlan County Assessor has classified other real property in the county as recreational land. (Reports and Opinions of the Property Tax Administrator for the year 2004, pg 58). The uses described by the Taxpayer best fit the definition of recreational land. The Taxpayer did not however introduce evidence that the subject property would have a different value if classified by the assessor as recreational land. The contention of the Taxpayer that the subject property should be classified and assessed as agricultural and horticultural land is not supported by the evidence. Keeping 2 goats, 4 ducks and 5 guineas on less than 1/3 of the subject property in conjunction with recreational use of all

of the subject property does not constitute a primary use of the subject property for the production of agricultural products as required by Neb. Rev. Stat. §77-1359(1)(Reissue 2003).

The Taxpayer did not offer his opinion of actual value for the subject property as of the assessment date. The Taxpayer did testify that the subject property was worth \$15,000.00 to him. The Taxpayer did not provide any other evidence of actual value as of the assessment date.

## V. ORDER

### IT IS THEREFORE ORDERED:

1. That the decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2004, as follows:

Land value	\$12,180.00
Improvement value	\$ <u>750.00</u>
Total value	<u>\$12,930.00</u>

is affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Harlan County Treasurer, and the Harlan County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2003).
3. That any request for relief, by any party, which is not specifically provided for by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2004.
6. This order is effective for purposes of appeal August 4, 2005.

**Signed and Sealed.** August 4, 2005.

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Wm. R. Wickersham, Chairperson

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Susan S. Lore, Commissioner

**SEAL**

**ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS L.B. 15 §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.**

#### **DISSENT**

The majority opinion ignores the Taxpayer's uncontroverted testimony that he purchased two separate tracts of land, separated by a canal owned by the Corps of Engineers. (E10:3). The subject property in this case should be two separate parcels rather than one. The larger portion of the subject property appears to be recreational, with trails, camp site, picnic table and fire pit. The 2004 Report and Opinion of the Property Tax Administrator for Harlan County (2004 R&O: Harlan Cty.) indicate that property type 06 is recreational. 2004 R&O: Harlan Cty., p.88. There were no sales of this property type for the 2004 study period. 2004 R&O: Harlan Cty., p. 89. The abstract includes only one unimproved recreational property (no size) valued at \$3,100. 2004 R&O: Harlan Cty., p. 58. There are 34 improved recreational properties with land (no size) valued at an average of \$2,795. p. 58.

The smaller portion of the subject property that contains the pond, and enclosures for livestock and fowl is used predominantly for agricultural use. The uncontroverted testimony is the daily presence of the critters and only weekend presence of humans in order to refill the pond and set out more feed for the animals. The smaller portion is clearly put to an agricultural use. The only evidence of value is the \$15,000 that the taxpayer paid for the parcels.

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Robert L. Hans, Commissioner  
Dissenting