

**NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

LEO G. PAVELKA,)	
)	
Appellant,)	CASE NO 05A-004
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE ADAMS
ADAMS COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	
)	

The above-captioned case was called for a hearing on the merits of an appeal by Leo G. Pavelka to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on May 24, 2006, pursuant to a Notice and Order for Hearing issued February 6, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Leo G. Pavelka, ("the Taxpayer") was present at the hearing without legal counsel.

The Adams County Board of Equalization ("the County Board") appeared through legal counsel, Charles A. Hamilton, a Deputy County Attorney for Adams County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) to state its final decision and order 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.
FINDINGS**

The Commission finds and determines that:

1. The Taxpayer is the owner of record of an interest in certain real property described as SW¹/₄, Section 11, Township 8, Range 9, Adams County, Nebraska, ("the subject property").
2. Taxable value of the subject property placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Adams County Assessor, value as proposed by the Taxpayer in a timely protest, and taxable value as determined by the County Board is shown in the following table:

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Description: residual interest in SW¹/₄, Section 11, Township 8, Range 9, Adams County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$99,620.00	\$16,000.00	\$75,465.00
Improvement	\$	\$	\$
Total	\$99,620.00	\$16,000.00	\$75,465.00

3. The Taxpayer timely filed an appeal of the County Board's decision to the Commission.
4. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
5. An Order for Hearing and Notice of Hearing issued on February 6, 2006, set a hearing of the Taxpayer's appeal for May 24, 2006, at 3:00 p.m. CDST.

6. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. For reasons stated below, the Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary, and the decision of the County Board should be affirmed.
8. Taxable value of the subject property for the tax year 2005 is:

Land value	\$75,465.00
Total value	<u>\$75,465.00.</u>

II. CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission in this appeal 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 to this appeal.
3. “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).

4. 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. Neb. Rev. Stat. §77-112 (Reissue 2003).
5. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
6. “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, 829 (2002).
7. 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. Neb. Rev. Stat. §77-131 (Reissue 2003).
8. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
9. The Taxpayer must establish by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005) *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 621 N.W.2d, 523, (2001).

10. "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).
11. 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).
12. A decision is unreasonable 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).
13. "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).

III. DISCUSSION

The subject property was classified by the assessor as 4 acres R & D; 1.12 acres OTHER NON AG-L; and 155.83 acres RECREATION LAN. (E2:8). No value was assigned to the R & D portion of the parcel. (E2:8). The portion of the property classified by the Assessor as RECREATION LAN is subject to an easement granted to the Commodity Credit Corporation of the United States of America for participation in its Wetlands Reserve Program ("WRP"). (E2:3). Permitted uses of the portion of the subject property after grant of the easement are recreational including hunting and fishing and including leasing of such rights for economic gain, pursuant to applicable State and Federal regulations that might be in effect. (E2:14). The

Taxpayer might under some circumstances be allowed to graze the property, harvest timber, or hay it. (E2:15). Those potential uses were not authorized as of the assessment date. Given the constraints of the easement, the Taxpayer's potential use of a large portion of the subject property is substantially restricted after grant of the easement. The constraints of the easement are not applicable to a 1.12 acre triangle of land next to the county road which was classified by the Assessor as OTHER NON AG-L. (E11). No portion of the subject property had been farmed or grazed since granting of the easement. There were no improvements on the subject property as of the assessment date. The Taxpayer's protest asserted that the Assessor's determinations were not in accordance with State guidelines or with market value. (E1:2). The State guidelines that Taxpayer relied on are in 350 Neb. Admin. Code, ch 14 §004.04E, (03/04). The noted regulation provides that land enrolled in the WRP should be classified at its current use such as grassland or timbered grassland. 350 Neb. Admin. Code, ch 14 §004.04E, (03/04).

While the cited rule and regulation may require classification of that portion of the subject property in the WRP as grassland, that classification does not determine actual value. The cited rule and regulation recognize that participation in a given governmental program may have an affect on actual value of a parcel regardless of its use classification. If participation in the program has an effect on actual value then a separate market analysis is required to differentiate the actual value of participating properties from all other similarly classified parcels. Id. Based on sales of lands subject to identical easements the County Board determined that a market existed for the residual interest in the subject property (primarily recreational uses) held by the Taxpayer. (E3:1). The sales considered by the County Board occurred both within and without Adams County. (E3:1). An Appraiser for the County testified that each sale had

been verified as an arms length transaction by an assessor's office or an independent appraiser.

Pertinent information concerning the various sales is shown in the following table as derived from exhibits supporting Exhibit 3.

Exhibit	Sale Date	Sale Price	Size	Price/Acre
E8:15	03/06/01	\$56,220	76.90A	\$731.08
E7:5	03/08/01	\$18,000	38.84A	\$463.44
E6:1	08/21/01	\$14,800	76.00A	\$194.74
E7:2	10/07/04	\$24,000	38.84A	\$617.92
E8:16	11/09/04	\$27,220	76.90A	\$353.97

Two parcels, the 76.90 acre parcel and the 38.84 acre parcel, sold twice. One parcel, the 76.00 acre parcel, is adjacent to the subject property.

The County Board determined that each acre of the subject property subject to the WRP easement had a taxable value of \$445. 00. (E2:8 and E1:2). An Appraiser for the County testified that the County Board arrived at that value by averaging a sale at \$600.00 and \$512 per acre, to obtain an average value of \$556.00. The average value was then factored by .8 to arrive at \$445.00. The origin of the averaged numbers is unclear.

Qualified agricultural land and horticultural land shall be valued for purposes of taxation at eighty percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2003). Qualified 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).

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). A decision that the portion of the subject property encumbered by the WRP easement could have its taxable value determined as agricultural and horticultural land qualified for assessment at 80% of actual value is not appropriate because it could not, on the assessment date, be used for agricultural purposes.

The average of all sales of residual interests for which information was produced is \$472.23/acre. The median of the sales is \$463.44/acre. The County Board's decision assigning taxable value to the portion of the parcel subject to the WRP easement was arbitrary. See. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).

The County Board determined that the 1.12 acres of the subject property not subject to the WRP easement had an actual value of \$6,120.00. (E2:8 and E1:2). An Appraiser for the County testified that value was obtained based on a value of \$6,000.00 for the first acre and \$1,000.00 per acre for each additional acre. The Appraiser further testified that the described valuation method was consistently applied to similar tracts in the County. The tract is adjacent

to a county road. (E11). No evidence of restrictions on use of the 1.12 acre tract was received by the Commission.

The Taxpayer testified that he arrived at his opinion of taxable value for the subject property based on the 2001 sale of an adjoining tract subject to a WRP easement and a calculation of basis to be used for income tax purposes upon granting of the easement. Evidence of five sales of parcels subject to WRP easements is more persuasive. The Taxpayer did not offer evidence concerning the 1.12 acre portion of the subject property.

On formation of the Commission the standard of review applicable to decisions of a County Board of Equalization was expressed in Section 77-1511 of Nebraska Statutes. The section read in pertinent part as follows: “The Tax Equalization and Review Commission shall hear appeals *and cross appeals* taken under section 77-1510 as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary *or unless evidence is adduced establishing that the property of the appellant is assessed too low.*”. (*emphasis added*) Neb. Rev. Stat. §77-1510 (repealed 2001 Neb. Laws LB 465 §12). In 1999 the following provision was enacted and codified as section 77-5016(7) of Nebraska Statutes: “The Commission shall hear all appeals and cross appeals taken under section 77-5007 as in equity and without a jury and determine de novo all questions raised before the county board of equalization or the Property Tax Administrator which relate to the liability of the property to assessment or the amount thereof. The commission shall affirm the action of the board or Property Tax Administrator unless evidence is adduced establishing

that the action of the board or the Property Tax Administrator was unreasonable or arbitrary.”.

1999 Neb. Laws LB 140 §4. After enactment of LB 140 in 1999, two sections with differing provisions governed Commission review of appeals from a county board of equalization. In 2001 Section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws LB 465 §12.

Finally in 2002 a provision providing for the taxing of costs in the event of a cross appeal by a county board of equalization was repealed. 2002 Neb. Laws LB 994 §33, repealing Section 77-1513 of Nebraska Statutes. After that repeal all references to cross appeals by a county board of equalization and to review by the Commission if it determined that an assessment was “too low” had been removed. The Commission is unaware of any section of Nebraska Statutes giving a County Board of Equalization authority to file a cross appeal from its own decision and none was filed in this case. The Taxpayer, like the County Board, is entitled to know the issues on appeal. *Gordman Properties Co. v. Board of Equalization*, 225 Neb. 169, 403 N.W.2d 366 (1987). Without a cross appeal and without the repealed section of statute giving notice that an increase in actual value could be determined on appeal, the Commission cannot find that actual value of the subject property exceeded actual value as determined by the board.

The evidence presented in support of the Taxpayer’s position is not persuasive. Taxable value as determined by the County Board is less than actual value as supported by the evidence. The Commission is required to affirm the decision of the County Board.

**V.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2005, is affirmed.

2. Taxable value of the subject property for the tax year 2005 is:

Land value	\$75,465.00
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Total value	<u>\$75,465.00.</u>
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3. This decision, if no appeal is timely filed, shall be certified to the Adams County Treasurer, and the Adams County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).

4. Any request for relief, by any party, which is not specifically provided for by this order is denied.

5. Each party is to bear its own costs in this proceeding.

6. This decision shall only be applicable to tax year 2005.

7. This order is effective for purposes of appeal June 20, 2006.

Signed and Sealed. June 20, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

William C. Warnes, 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 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.