

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

NICHOLAS AND MICHELE ALOI,	)	
	)	
Appellant,	)	Case No 06R-431
	)	
v.	)	DECISION AND ORDER REVERSING
	)	THE DECISION OF THE LINCOLN
LINCOLN 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 Nicholas and Michele Aloï ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Wickersham presided at the hearing.

Michele Aloï was present at the hearing. Allen L. Fugate appeared as legal counsel for the Taxpayer.

Joe W. Wright, a Deputy County Attorney for Lincoln County, Nebraska, appeared as legal counsel for the Lincoln County Board of Equalization ("the County Board").

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) 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.  
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2006, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2006.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described in the table below ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Lincoln County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Pt W½NW¼ Section 33, Township 13, Range 30 ADA Tract 2 a 20 acre tract, Lincoln County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$42,300.00	\$11,852.00	\$42,300.00
Improvement	\$-0-	\$-0-	\$-0-
Total	\$42,300.00	\$11,852.00	\$42,300.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Amended Order for Hearing and Notice of Hearing issued on April 16, 2007, as amended set a hearing of the appeal for November 15, 2007, at 10:00 a.m. CST.
7. 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.
8. Actual value of the subject property as of the assessment date for the tax year 2006 is:

Land value	\$31,155.00
Improvement value	\$ -0-
Total value	<u>\$31,155.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over 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. “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).
3. 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).
4. 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).
5. “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).
6. 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).

7. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
8. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
9. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
10. The presumption remains until there is competent to the contrary is presented at which point the presumption disappears. From that point forward, the reasonableness of the valuation fixed by the County Board becomes one of fact based on all of the evidence presented. *Garvey Elevators, Inc. v. Adams County Bd. Of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).
11. The Commission can grant relief only if the evidence shows that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).

12. Evidence that the decision of the county board of was arbitrary or unreasonable must be clear and convincing evidence. *See, e.g. Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
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. 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).
15. 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).
16. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
17. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).
18. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of

property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

19. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

#### **IV. ANALYSIS**

The subject property is a 20 acre tract of unimproved land in rural Lincoln County, Nebraska. The County Assessor for purposes of valuation classified the subject property as rural residential land and that determination was affirmed by the County Board. The Taxpayer contends in part that the subject property is agricultural land and horticultural land as defined in section 77-1359 of Nebraska Statutes. Agricultural land and horticultural land was defined in the statute applicable to this appeal as “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 included 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). Agricultural land and horticultural land is assessed at 80% of its actual value for 2006. Neb. Rev. Stat. §77-201 (2) (Reissue 2003).

The subject property was acquired by the Taxpayer through an installment contract entered into during the year 1993 for \$20,000 or \$1,000 per acre. Final payment on the contract was made in 2006. Until 2004 the seller pastured cattle on the subject property pursuant to an oral lease. Cattle pastured on the subject property prior to 2004 also had use of the adjoining tract owned by the seller. In the fall of 2003 a fence was constructed separating the subject property from the larger parcel it had been a part of prior to its sale and purchase. The subject property after its severance from the larger tract did not have a source of water for livestock. The County Assessor testified that the subject property at 20 acres in size was not large enough to use economically or practically for pasture due to its size. The Taxpayer testified that the subject property was not pastured in 2004 due to a drought and the pasture needed to rest in 2005 because of the drought. The seller testified that he did not pasture the subject property in 2006 because he was developing part of the larger tract he had retained and had not fenced out the development.



The subject property adjoins an 11.2 acre residential parcel owned by the Taxpayer. The County Assessor whose family engages in ranching testified that the subject property was too small for use as a pasture by itself. The seller testified that 8 acres of grass were necessary for support of a cow and calf for 6 months. At that rate the subject property would support 2 cow calf pairs. The subject property does not have a source for stock water on it. After construction of the fence in 2003 the subject property did not have direct access to the larger tract retained by the seller until a gate was installed in 2007. The statutory test is whether the subject property was used to produce horticultural or agricultural products. Neb. Rev. Stat. §77-1359 (1) (Reissue 2003). Agricultural products include grass for grazing. Neb. Rev. Stat. §77-1359 (2) (Reissue 2003). The evidence is that the owner made the subject property unusable for agricultural and horticultural production as contemplated by the statute in 2003, by fencing out a tract without a water source and that was too small for grazing more than 2 cow calf pairs. The refusal of the County Board to classify the subject property as agricultural land and horticultural land was not unreasonable or arbitrary.

Regardless of whether the subject property was agricultural land and horticultural land or not the remaining inquiry is actual value of the subject property as of January 1, 2006. Even if the subject property had been classified as agricultural land and horticultural land it would still be necessary to determine its actual value as of January 1, 2006 because potential uses other than production of agricultural or horticultural products could influence its actual value. See Neb. Rev. Stat. §77-1343 (Supp. 2005). A determination of actual value is necessarily based on the highest and best use of property regardless of actual use. "Market forces create market value, so the analysis of market forces that have a bearing on the determination of

highest and best use is crucial to the valuation process.” *The Appraisal of Real Estate*, 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p 305. Highest and best use can be described as the foundation on which market value rests. *Id.* Land is to be valued at its highest and best use. 350 Neb. Admin. Code, ch. 50, §.002.04A (05/05). Highest and best use is defined as the most reasonable and most probable use of the property that will support its highest value. 350 Neb. Admin. Code, ch 10 § 001.13 (05/05). An analysis of highest and best use requires consideration of factors which would affect the potential use of land. Among the factors to be considered are whether a potential use is; physically possible, lawful, financially feasible, and whether it produces the greatest value. See. *The Appraisal of Real Estate*, 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p 307.

The County Assessor had determined that actual value of the subject property as of January 1, 2006, was \$42,300.00. (1:1). That determination was affirmed by the County Board. (E1:1). The Taxpayer testified that she believed actual value of the subject property as of January 1, 2006, was \$20,000.00. The Taxpayer asserted that the subject property was unfit for development and that it lacked access. The Taxpayer based her estimate of value on information gained as a title insurance agent reviewing various real estate transactions in Lincoln County. The Taxpayer did not present information regarding sales of comparable parcels in support of her opinion. There is no evidence beyond the assertions of the Taxpayer that the subject property could not be developed. An aerial view of the subject property and the surrounding area shows a road leading to the adjoining 11.2 acre tract owned by the Taxpayer. (E37:10). The photo shows a road reaching the southeast corner of the subject property. (E37:2). The County Assessor and two county appraisers testified that actual value of the

subject property as of January 1, 2006, was \$31,155. The presumption in favor of the County Board's decision that actual value of the subject property as of January 1, 2006, was \$42,300.00 is extinguished. The County Assessor's estimate of actual value was derived from use of tables used to value small parcels in Lincoln County. The evidence is that the tables are based on an analysis of sales over a period of time. The data on which the County Assessor relied for development of the tables was not presented. The County Assessor did present evidence of four sales which she believed supported the estimate of actual value derived from use of the tables noted above. (E37:12-24). An analysis of the sales shows that price paid for a 33.37 acre tract in December of 2005, was \$2,000 per acre. (E37:13). That parcel is level, the subject property is not, however, actual value per acre of the subject property as redetermined by the County Assessor was \$1,558 per acre ( $\$31,155 \div 20 = \$1,557.75$ ). (E37:25).

The evidence is that parcels the size of the subject property, 20 acres, have sold in Lincoln County for far more than the value that could be attributed to agricultural or horticultural uses. An Appraiser testified that it was those sales that caused the County Assessor to develop an entirely new classification of real property "rural residential" to avoid undue comparison with agricultural land and horticultural land. The only evidence that the subject property could not be used as a residential site is the testimony of the Taxpayer that it is too rough to develop. That testimony is not supported by photographs of the subject property. There is no evidence of any legal impediments to use of the subject property as a residential site. The highest and best use of the subject property regardless of its actual use is as a rural residential parcel. That is the basis for redetermination of actual value by the Assessor and is the most reasonable conclusion to be reached on the evidence before the Commission.

The protest filed by the taxpayer with the County Board recited as reasons for the protest “Vacant pasture canyon, unfit for development. (No access) Land adjacent valued at 592.61 @ acre”. (E37:2). A report of a meeting with a referee shows a number of topics were discussed. The rough terrain of the subject property, the lack of roads, comparability of parcels the Taxpayers believed were used by the County Assessor, the highest and best use of the subject property, and the valuation of the neighboring tract. (E37:4). The Taxpayer at the hearing on her appeal presented evidence without objection that taxable value of the subject property was not equalized with other similar parcels. During closing argument the County Board asserted that equalization had not been raised as an issue before the Board. Jurisdiction may be raised at any time. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equal.*, 7 Neb. App. 499, 583 N.W. 353, (1998). The Commission has jurisdiction only over those issues raised in the County Board proceedings. *Id.* The Taxpayer clearly raised the issue of whether or not the subject property was properly classified. “Misclassifying property may result, ... in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief.” *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534, (1983). The Commission has already determined however that the subject property was properly classified. The Taxpayer also asserted in her protest the subject property should be valued on the same basis as the larger adjoining tract. That claim is best understood in the context of the Taxpayer’s claim that the subject property was not properly classified. There is no evidence that the Taxpayer presented to the County Board the issue of taxable value of the subject property as equalized with other small parcels classified as agricultural land and horticultural land or as rural residential. The Commission does not have

jurisdiction to consider that issue as raised by the Taxpayer for the first time at the hearing before the Commission. *Harrison Square Partnership v. Sarpy County Bd. of Equalization*, 6 Neb.App. 454, 574 N.W.2d 180 (1998).

The Taxpayer had clearly raised the issues of the highest and best use of the subject property, its proper classification and its actual value in the proceedings before the County Board. Those issues have been decided by the Commission and are the sole basis for relief that may be granted. Actual value of the subject property as of January 1, 2006, is reduced to \$31,155.00, further relief is denied.

**V.  
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has 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 vacated and reversed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, is vacated and reversed.
2. Actual value of the subject property for the tax year 2006 is:

Land value	\$31,155.00
Improvement value	\$ <u>-0-</u>
Total value	<u>\$31,155.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Lincoln County Treasurer, and the Lincoln County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2006.
7. This order is effective for purposes of appeal on December 17, 2007.

**Signed and Sealed.** December 17, 2007.

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Wm. R. Wickersham, Commissioner

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Nancy J. Salmon, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**