BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Ladd D. Krings, Appellant, v. Garfield County Board of Equalization, Appellee.	Case No: 10A 087 & 10A 088 Decision Reversing The Determinations of the Garfield County Board of Equalization

For the Appellant: James Egley, Attorney for Taxpayer	**For the Appellee:** Dale Crandall, Garfield County Attorney

Heard before Commissioners Robert W. Hotz and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The subject property consists of two contiguous parcels in Garfield County, Nebraska, totaling 480 acres. One parcel is improved with a 756 square foot single-family dwelling. The parcels contain a combined 448.21 acres that are subject to a Warranty Easement Deed. The parcels are described on the appeal forms filed with the Commission (Exhibit 1:1, Exhibit 2:1), and on the property record cards (Exhibit 5:3-6).

II. PROCEDURAL HISTORY

The parcels were assessed at $39,895 (Case No. 10A-087), and $258,845 (Case No. 10A-088). Ladd Krings (Taxpayer) protested those values, and requested values of $18,000 and $152,320, respectively. (Exhibits 1:1, 2:1). The County Assessor recommended no changes and the Garfield County Board of Equalization (County Board) adopted the County Assessor's recommendations of $39,895 and $258,845, respectively. (Exhibits 1:1, 2:1). The Taxpayer appealed the County Board's determination for both parcels. The Tax Equalization and Review Commission (Commission) held a hearing on July 26, 2011.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo. See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).[1] 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." *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

> 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.

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. Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *Omaha Country Club v. Douglas Cty. Bd. of Equal.,* 11 Neb. App. 171, 645 N.W.2d 821 (2002). 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, 580 N.W.2d 561 (1998).

IV. VALUATION

Under Nebraska law,

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[1] "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 Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

> [a]ctual 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 2009). "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 2009). The Courts have held that "[a]ctual 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). 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 2009). All real property in [Nebraska] subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009). 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) (Reissue 2009).

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201(2) (Reissue 2009).

> Agricultural land and horticultural land means a parcel of land 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. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure.

Neb. Rev. Stat. §77-1359(1) (Reissue 2009). A parcel of land means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. See, Neb. Rev. Stat. §77-132 (Reissue 2009).

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

Neb. Rev. Stat. §77-1359(2) (Reissue 2009).

A. Summary of the Evidence

The Taxpayer asserted that the non-residential components of the subject property should have been assessed as agricultural land and horticultural land as defined in Neb. Rev. Stat. §77-1359.[2] He testified that he had purchased the property because of the income it produced through its enrollment in the Conservation Reserve Program (CRP). The Taxpayer testified he obtained payments from this enrollment until the subject property was enrolled in the Wetlands Reserve Program (WRP).

In June of 2009, the Taxpayer granted a perpetual Warranty Easement Deed (Deed) for 448.21 acres[3] of the subject property to the United States Commodity Credit Corporation (CCC) for the Wetlands Reserve Program (WRP) in exchange for a one-time payment of $242,034. (Exhibit 9:5). The remaining 31.79 acres of the subject property were not included within the scope of the Deed, and were valued differently by the County Assessor. (Exhibit 5:3, Exhibit 5:6). The Natural Resources Soil Conservation Service (NRCS) of the United States Department of Agriculture was the acquiring agency under the Deed. (Exhibit 9:5). The "Purposes and Intent" clause set forth on page 1 of the Deed states as follows:

> The purpose of this easement is to restore, protect, manage, maintain, and enhance the functional values of wetlands and other lands, and for the conservation of natural values including fish and wildlife and their habitat, water quality improvement, flood water retention, groundwater recharge, open space, aesthetic values, and environmental education. It is the intent of CCC to give the Landowner the opportunity to participate in the restoration and management activities on the easement area.

(Exhibit 9:5).

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[2] The Taxpayer offered no evidence regarding the market value of the residential improvement and did not otherwise dispute its market value.

[3] The acres of the subject property under the terms of the Deed are designated as "WRP" on the property record cards. E5:3, E5:6.

The Landowners reserved subordinate rights which were expressly stated in the Deed, including title, quiet enjoyment, control of access, recreation uses, and rights to subsurface resources. (Exhibit 9:6). The Landowner was expressly prohibited from certain uses of the land, but was allowed to engage in certain prescribed "compatible economic uses" with written authorization from the CCC, which included, but were not limited to, "managed timber harvest, periodic haying, or grazing." (Exhibit 9:6-8). In this regard, the Deed stated as follows:

> Compatible use authorization will only be made if, upon a determination by CCC in the exercise of its discretion and rights, that the proposed use is consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area. [The] CCC shall prescribe the amount, method, timing, intensity, and duration of the compatible use.

(Exhibit 9:7-8).

The Taxpayer testified that he first obtained permission from the appropriate authority to graze cattle on the property under the Deed for the summer of 2010. He further testified that he signed the warranty easement deed under the impression that he would be able to graze some cattle on the property. The Taxpayer testified he received permission to graze 117 cow/calf pairs on the property for the summer of 2010, resulting in grazing income of $22,340. The Taxpayer also stated that income from the grazing was likely entirely absorbed by expenses necessary to prepare the subject property for grazing, and that sandy road conditions limited access to the subject property and restricted the types of activities the property could support.

While the Taxpayer provided a copy of a Compatible Use Authorization For WRP Easements (Authorization) for the property, the Commission notes that the document is signed only by Ladd Krings, and presents no evidence of approval by the NRCS. (Exhibit 24:1). However, the Authorization appears to indicate standard conditions of the NRCS concerning the grazing operation which are relevant to the current appeal.

The Authorization for the property indicates that on May 6, 2010, Ladd Krings, as "Landowner/Rep" under the Deed, intended to seek approval to graze the WRP acres "to improve grass vigor, health, condition & diversity, improve wildlife habitat, and help control undesirable species." (Exhibit 24:1). The Commission notes that no grazing had taken place on the subject property for "20+ years" prior to January 1, 2010. (Exhibit 24:1).

Under a section of the Authorization entitled "Effect & Compatibility," it was stated that, "[g]razing will compact sandy soils, incorporate plant litter, allow native plants to spread, and

discourage invasive species. Wetland areas will be compacted and vegetation reduced. Upland and wetland wildlife habitat will be improved." (Exhibit 24:1).

The Authorization also contained Special Conditions, limiting the amount and duration of the grazing: "Grazing shall take place between May 1st and October 1st, 2010. Pastures will have a minimum 60 days rest before being grazed again… NRCS must approve numbers of animals and amount of time cattle will remain on pastures **before** grazing takes place." (Exhibit 24:1). (Emphasis in original). Additionally, the "Wetlands Reserve Program (WRP) Compatible Use Guidelines on Easements" stated as follows:

> (1) Compatible uses are important management tools to achieve wetland functions and values and maximize wildlife habitat. Compatible uses further the long-term protection and enhancement of the wetland and other natural values of the easement area. (2) Compatible use implementation can provide management of plant succession and improve habitat diversity on easement lands…. (5) Compatible use activities must consider the target species and their habitat needs from the existing management plan (focus is on migratory birds and T & E species).

(Exhibit 24:7). Specifically regarding grazing, the Authorization required:

> the grazing plan will be developed to ensure the long-term function of the easement area and restore, protect, or maintain the native plant communities on the site. The grazing plan must meet the needs of species of concern or target species from an attached management plan. The grazing will contribute to the establishment and maintenance of quality wildlife habitat and other wetland functions and values of the site.

(Exhibit 24:8). The Authorization signed by the Taxpayer, albeit not by the NRCS, would have expired October 1, 2010. (Exhibit 24:1).

The Commission notes that an additional signed Authorization contains similar terms for the grazing of 85 cow/calf pairs between June 1, 2011 and August 15, 2011, with an expiration date of August 15, 2011. (Exhibit 24:4). That Authorization pertained to grazing on the property no less than 18 months after January 1, 2010, which is the date statutorily required as the date of valuation for the subject property. The Taxpayer further testified that the subject property was not used for any recreational purposes during the relevant time period.

The County Assessor testified that the acres of the subject property under the terms of the Deed did not qualify to be valued as "agricultural land and horticultural land" but was instead valued at 100% of its actual value. She also testified that there was no existing market for WRP sales that might otherwise indicate the effect the Deed might have on the actual value of the

subject property. A real estate broker testified on behalf of the Taxpayer, and opined that WRP sales should be discounted by 50%, but the real estate broker did not provide any evidence of sales to support his opinion.

B. Is the Property Under the Terms of the Deed "Agricultural Land and Horticultural Land"?

If the subject property is "agricultural land and horticultural land" it must be valued for purposes of taxation at 75% of its actual value. Neb. Rev. Stat. §77-201(2) (Reissue 2009). Otherwise, if the subject property is not "agricultural land and horticultural land" it is valued at 100% of its actual value. The statute defining agricultural land and horticultural land reads as follows:

> (1) Agricultural land and horticultural land means a parcel of land 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. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure.
> (2) 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. Agricultural or horticultural purposes includes the following uses of land:
>
> > (a) 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
> > (b) 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.

Neb. Rev. Stat. §77-1359 (Reissue 2009). In sum, land cannot be classified as "agricultural land and horticultural land" unless it is "primarily used" for "agricultural or horticultural purposes."

1. "Agricultural or Horticultural Purposes"

"Agricultural or horticultural purposes" is part of the definition of "agricultural land and horticultural land" in §77-1359(1) but is itself defined in §77-1359(2). As is relevant in this appeal, to have "agricultural or horticultural purposes," land must be used for the "commercial production" of any plant or animal product.

2. "Agricultural or Horticultural Purposes" under a "Conservation Easement"

Additionally, "agricultural or horticultural purposes" includes some uses of land for "conservation easements" under §77-1359(2)(a), and for removing land from production under §77-1359(2)(b).

With respect to §77-1359(2)(b), none of the uses of the subject property under the terms of the Deed are for the purpose of the removal of land from production as of January 1, 2010 (it is noted that the land was removed from production under the terms of the CRP noted above, but removal under the CRP ceased in June of 2009 upon consummation of the Deed transaction). Rather, as noted above, the Deed allows the Landowners to engage in "managed timber harvest, periodic haying, or grazing" (Exhibit 9:7-8) on the property, provided that they receive written authorization from the CCC. Therefore, because agricultural production is allowed on the land under the Deed and actually occurred in the form of limited grazing in 2011, Section §77-1359(2)(b) is not applicable.

For a use to be considered to have "agricultural or horticultural purposes" as a "conservation easement" under §77-1359(2)(a), four factors must be present: the land is (1) "retained or protected," (2) for future, (3) "agricultural or horticultural purposes," (4) under a "conservation easement" as provided in the Conservation and Preservation Easements Act (CPEA). The CPEA defines a "conservation easement" as

> a right, whether or not stated in the form of an easement, restriction, covenant, or condition in any deed, will, agreement, or other instrument executed by or on behalf of the owner of an interest in real property imposing a limitation upon the rights of the owner or an affirmative obligation upon the owner appropriate to the purpose of retaining or protecting the property in its natural, scenic, or open condition, assuring its availability for agricultural, horticultural, forest, recreational, wildlife habitat, or open space use, protecting air quality, water quality, or other natural resources, or for such other conservation purpose as may qualify as a charitable contribution under the Internal Revenue Code;

Neb. Rev. Stat. §76-2,111(1)(Reissue 2009). The easement created by the Deed is a "conservation easement" as defined by the CPEA because it is a deed executed by the landowner imposing a limitation upon the rights of the landowner (and affirmative obligations upon the landowner) with the purpose of retaining or protecting the property in its natural condition, assuring its availability for wildlife habitat.

The terms of the Deed, however, do not retain or protect the land for future "agricultural or horticultural purposes." Rather, the Deed creates a perpetual easement for wildlife habitat protection purposes. There is no term of years after which the land could be converted back to some pre-Deed use. Moreover, by the terms of the Deed creating the "conservation easement," all future uses of the land must comply with the "Purposes and Intent" clause as well as all other terms of the Deed in perpetuity, rather than agricultural or horticultural purposes. Therefore, the subject property's use cannot be considered to have "agricultural or horticultural purposes" as a "conservation easement" under §77-1359(2)(a).

3. "Agricultural or Horticultural Purposes" when used for "Commercial Production"

Even though the property under the terms of the Deed was not used for agricultural or horticultural purposes under subsections (a) and (b) of §77-1359(2), it must also be determined whether, under §77-1359(2), the property was used for the commercial production of any plant or animal product. Again, all uses of the land were subject to the terms of the Deed. The grazing in 2010 and 2011 occurred only as a "compatible economic use" in compliance with the terms of the Authorization. This involved a limited number of cow/calf pairs grazing the grassland for a limited time period as a management tool "to achieve wetland functions and values and maximize wildlife habitat." However, even though the grazing was only allowed so long as it complied with the terms of the Authorization, this use of the land could be considered to be "commercial production."

4. "Primarily Used"

The Deed controlled all uses of the property beginning June of 2009. Any and all uses of the land after that time had to be consistent with the terms of the Deed. While the terms of the Deed permitted recreational uses, there was no actual recreational use of the land at any relevant time. The Taxpayer testified that the use of the land for the grazing of cattle was specifically authorized beginning the summer of 2010, but only to the extent it complied with the terms of the Deed. All uses of the land pursuant to the terms of the Deed and the Authorization were the result of a one-time payment to the Landowner in the amount of $242,034 in 2009. (Exhibit 9:5).

Exhibit 21 demonstrates that the property under the terms of the Deed was not "primarily used" for "agricultural or horticultural purposes" within the meaning of Neb. Rev. Stat. §77-1359(1) (Reissue 2009). Exhibit 21 is a United States Department of Agriculture's Natural Resources Conservation Service's document entitled "Nebraska Fact Sheet: Wetlands Reserve Program." Exhibit 21 provides as follows in pertinent part:

> ***Overview***
> The Wetlands Reserve Program (WRP) provides technical and financial assistance to eligible landowners to address wetland, wildlife habitat, soil, water, and related natural resource concerns on private lands in an environmentally beneficial and cost-effective manner. **The voluntary program provides an opportunity for landowners to receive financial incentives to restore, protect, and enhance wetlands in exchange for retiring marginal land from agriculture (emphasis added)**
> …
> ***How WRP Works***
> The program offers five enrollment options:
>
> *1. Permanent Easement.* This is a conservation easement in perpetuity. Easement payments are usually based on the Nebraska Geographical Area Rate Caps (GARCs), *see Figure 1*. In addition to paying for the easement, USDA pays up to 100 percent of the costs of restoring the wetland.
> *2. 30-Year Easement*. Easement payments through this option are 75 percent of what would be paid for a permanent easement. USDA also pays up to 75 percent of the restoration costs.
> *3. Reserved Grazing-Rights: Permanent or 30-Year Easement.* The easement payment is based off of the standard permanent or 30-year easement value that is then reduced by a predetermined amount for the retained grazing rights. USDA pays up to 100 percent of the restoration cost for permanent easements and up to 75 percent of the restoration cost for 30-year easements.
> *4. 30-Year Tribal Contract*. Contract payments through this option are 75 percent of what would be paid for a permanent easement. USDA also pays up to 75 percent of the restoration costs.
> *5. Restoration Cost-Share Agreement.* This is a 10 year agreement to restore degraded or lost wetland habitat. USDA pays up to 75 percent of the restoration cost, with an annual payment limit of $50,000. No easement is placed on the property….
>
> ***Uses of WRP Land***
> On acres subject to a WRP easement, the landowner controls access to the land and may lease the land for hunting, fishing, and other undeveloped recreational activities. At any time, a landowner may request that additional activities be evaluated by NRCS to determine if they are compatible uses for the site. This request may include such items as permission to cut hay, graze livestock, or harvest wood products. Compatible uses are allowed if they are consistent with the long-term protection and enhancement of the

wetland. In the case of the Reserved Grazing Rights easement, landowners retain the right to graze the land with an approved grazing plan.

C. How Should the Subject Property be Valued?

The Deed in this case falls under enrollment option number 1 above. The Landowners did not enter into an agreement under option number 3 (i.e., "Reserved Grazing-Rights: Permanent or 30-Year Easement), but they instead contracted for a higher payment under the more restrictive approach in perpetuity. Thus, the Commission finds that the land was not being "retained or protected" for future agricultural or horticultural purposes under the conservation easement within the meaning of Neb. Rev. Stat. §77-1359(2)(a). The Commission also finds that the property under the terms of the Deed was "primarily used" for the purposes stated in the Deed and was not "primarily used" for "agricultural or horticultural purposes" within the meaning of Neb. Rev. Stat. §77-1359(1) (Reissue 2009). Therefore, the 448.21 acres under the terms of the Deed are not "agricultural land and horticultural land" as defined in Neb. Rev. Stat. §77-1359 (Reissue 2009).

For the reasons given above, that portion of the subject property cannot be valued as "agricultural land and horticultural land." It follows that the property under the terms of the Deed must be valued at its actual value as required by Neb. Rev. Stat. §77-201(1) (Reissue 2009).

The remaining 31.79 acres of the subject property, as well as the residential improvement, were not included under the terms of the Deed. Some of these acres were valued by the County Assessor as agricultural land and horticultural land,[4] and the improvement and the land associated with the improvement were valued as residential. (Exhibit 5:5-6). The Taxpayer offered no competent evidence that these non-WRP acres or improvement were valued improperly.[5]

V. EQUALIZATION

[4] E5:6. As more fully discussed below, most of these acres were improperly valued by the County Assessor at 70% of market value rather than at 75% of market value, as required by Neb. Rev. Stat. §77-201(2) (Reissue 2009).

[5] The equalized values of these acres and the improvement are discussed below.

"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." *Neb. Const.,* Art. VIII, §1. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal*., 238 Neb. 565, 471 N.W.2d 734 (1991). 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. *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, 635 (1999). Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization,* 8 Neb.App. 582, 597, N.W.2d 623, 635 (1999). 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. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987). 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. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson,* 167 Neb. 666, 94 N.W.2d 47 (1959).

A. Summary of the Evidence

The Taxpayer also asserted that the subject property should have been equalized with other parcels in Garfield County at the same percentage of actual value as applied to those parcels. The County Assessor testified that soil types, land use codes, and land value groupings (LVG)

were used to determine the actual value of the 448.21 acres under the terms of the Deed. (Exhibit 5:3, Exhibit 5:6). For example, 4G1 land was valued at $555 per acre, indicating 100% of market value. She testified that since the property under the terms of the Deed did not qualify as "agricultural land and horticultural land" she did not value it at 75% of its actual value.

The County Assessor testified that soil types, land use codes, and LVG were also used when valuing all "agricultural land and horticultural land" in the County. She further testified that all "agricultural land and horticultural land" in Garfield County was valued at a percentage of market value. For example, 4G1 land was valued at $390 per acre rather than $555 per acre. However, the County Assessor explained that she valued all "agricultural land and horticultural land" at 70% of actual value (rather than at 75% of actual value) according to her belief that such a valuation would comply with statutory requirements. She also explained that it was standard procedure when working with such factors to round up to the nearest $5. Therefore, she rounded the product of the two factors to $390 ($555 x .7 = $388.50). She further testified that for all valuations of "agricultural land and horticultural land" for tax year 2010 she applied the 70% factor rather than 75% for all LVG.

B. Was the Subject Property Assessed at a Higher Percentage of Actual Value than other Taxable Properties?

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 2009). Taxable value of "agricultural land and horticultural land" shall be at 75% of its actual value. Neb. Rev. Stat. §77-201(2) (Reissue 2009). When the County Assessor valued all "agricultural land and horticultural land" at 70% of actual value rather than at 75% of actual value, this was not "a mere error in judgment," but rather was tantamount to "a deliberate and intentional discrimination systematically applied throughout the county." *Kearney Convention Center, Inc. v. Buffalo County Bd. Of Equal.* 216 Neb. 292, 300, 344 N.W.2d 620, 624 (1984). As in *Constructor's Inc. v. Cass County Board of Equalization*, 258 Neb. 866, 606 N.W.2d 786 (2000), the tax statute itself is not at issue; rather it is the decision of the County Assessor which is being scrutinized: "[d]iscrimination in valuation, where it exists, does not necessarily result from the terms of the tax statute, but may be caused by the acts of the taxing officer or officers." 258 Neb. at 874, 606 N.W.2d at 792.

Therefore, by intentionally valuing all "agricultural land and horticultural land" in the County at 70% of actual value rather than at 75% of actual value, the result was that taxable value was 93.33% of the required amount (.7 / .75 = .9333). "[T]he right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed…" *Kearney Convention Center, Inc. v. Buffalo County Bd. Of Equal.* 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984). The Assessor's actions effectively amounted to "an intentional violation of the essential principle of practical uniformity." *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959). Since the subject property was assessed at 100% of actual value, while the "agricultural land and horticultural land" in the County was assessed at 93.33% of the required amount, an equalized value must be ordered.

The Commission therefore finds that the following components of the subject property are entitled to an equalized taxable value: 448.21 acres under the terms of the Deed (Exhibit 5:3, Exhibit 5:6); the residential improvement and land classified as Rural Homesite (Exhibit 5:5); and 1.5 acres not under the terms of the Deed, but valued as agricultural land and horticultural land at 75% of actual value (Exhibit 5:6).[6]

C. Equalized Value

The subject property must be assessed uniformly and proportionately to other real property, even if the result is that it is assessed at less than actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). Therefore, the appropriate analysis for equalization purposes is to determine the relationship of taxable value to actual value of the "agricultural land and horticultural land" in the County, and then apply that percentage to the actual value of the subject property.

In Case No. 10A-087, the assessed value was $39,895, and the equalized value is $37,234 ($39,895 x .9333 = $37,234).

In Case No. 10A88, the assessed value was $258,845, and the equalized value is $242,175:

[6] These 1.5 acres are identified on the property record card as Tryon Fine Sandy Loam, Grass, 4G1M, $415 per acre. E5:6.

448.21 acres of WRP land	$189,946[7]
Improvement	$ 39,497[8]
Rural Homesite	$ 3,267[9]
Agricultural land and horticultural land (assessed at 75%)	$ 585[10]
Agricultural land and horticultural land (assessed at 70%)	$ 8,880[11]
Total	$242,175

VI. CONCLUSION

There is competent evidence to rebut the presumption in favor of the County Board's determination. There is also clear and convincing evidence that the determination by the County Board was arbitrary or unreasonable.

VII. ORDER

IT IS ORDERED THAT:

1. The Decision of the Garfield County Board of Equalization determining the value of the subject property for tax year 2010 is vacated and reversed.
2. That the Equalized value of the Subject property for tax year 2010 is:
    a. In Case No. 10A-087: $37,234
    b. In Case No. 10A-088: $242,175
3. This decision and order, if no appeal is timely filed, shall be certified to the Garfield County Treasurer and the Garfield County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2011 Supp.)
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 2010.

[7] See E5:6 ($45,400 + $24,200 + $103,900 + $18,460 + $11,450 + $110) x .9333 = $189,946
[8] See E5:5: ($42,140 + $180) x .9333 = $39,497
[9] See E5:6: Rural Home site, $3,500 x .9333 = $3,267
[10] See E5:6: Tryon Fine Sandy Loam, Grass, 4G1M, $625 x .9333 = $585
[11] See E5:6: $195 + $3,660 + $1,050 + $3,975 = $8,880

7. This order is effective for purposes of appeal on June 11, 2012.

Signed and Sealed: June 11, 2012.

_____
Robert W. Hotz, Commissioner

SEAL

_____
Thomas D. Freimuth, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2011 Supp.), other provisions of Nebraska Statute and Court Rules.