

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

Bernard J. Morello,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee

Case No: 09A-124

Decision and Order Affirming the Decision  
of the Douglas County Board of  
Equalization

**For the Appellant:**

Bernard J. Morello,  
Appellant, Pro Se

**For the Appellee:**

Thomas Barrett,  
Douglas County Attorney

This appeal was heard by Commissioners Robert W. Hotz and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property is comprised of one parcel totaling approximately 164 acres located in Douglas County, Nebraska, as described on the appeal form filed with the Commission.<sup>1</sup>

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property was \$165,140 for tax year 2009.<sup>2</sup> Bernard J. Morello (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The County Board determined that the assessed value for tax year 2009 was \$165,140.<sup>3</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on August 1, 2011.

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<sup>1</sup> E48:7.

<sup>2</sup> See, Case file.

<sup>3</sup> See, Case file.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>4</sup> 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."<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>8</sup>

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>9</sup> 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.<sup>10</sup>

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<sup>4</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "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).

<sup>5</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>6</sup> *Id.*

<sup>7</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>8</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>9</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value) .

<sup>10</sup> *Bottof v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

## IV. VALUATION

### A. Law

Under Nebraska law,

[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.<sup>11</sup>

"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."<sup>12</sup> The Courts have held that "[a]ctual value, market value, and fair market value mean exactly the same thing."<sup>13</sup> 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.<sup>14</sup> All real property in [Nebraska] subject to taxation shall be assessed as of January 1.<sup>15</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>16</sup>

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.<sup>17</sup>

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<sup>11</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>12</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>13</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>14</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>15</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>16</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup>

## **B. Summary of the Evidence**

Bernard J. Morello asserted through his witnesses that the actual value of the Subject Property should be decreased because the Subject Property had high water tables and frequent flooding.

Dr. Ason Okoruwa, a Certified General Appraiser in Nebraska since 1996, testified concerning the actual value of the Subject Property. Okoruwa testified that he valued the Subject Property using the income approach, and that the value of the Subject Property required adjustments for flooding.

Okoruwa testified that after looking at the market, he determined that the actual rental rate for the Subject Property corresponded to the market rate for properties similar to the Subject Property. He stated that after examining the agricultural property market in Douglas County, he concluded that the only expense attributable to the Subject Property would be a management fee

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<sup>18</sup> See, Neb. Rev. Stat. §77-132(Reissue 2009).

<sup>19</sup> Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

of 5-10%. He testified he determined the vacancy and collection loss to be 2%, all of which was attributed to collection difficulties, but no actual vacancy loss since the Subject Property is currently rented.

Okoruwa testified that he analyzed two sales from the Douglas County market in order to determine the unloaded capitalization rate.<sup>20</sup> He testified that one sale had a 2.35% unloaded capitalization rate and the other had a 4.47% unloaded capitalization rate. He testified that he determined that an adjustment of 1.61% was necessary in order to “load” the capitalization rate with the effective tax rate, bringing the capitalization rates for the comparable properties to 3.96% and 6.07% respectively. Okoruwa testified that he spoke with other agricultural appraisers to ensure that his adjusted capitalization rates and comparable properties were acceptable. Okoruwa testified that after conferring with these individuals he was confident in his opinion of value and the capitalization rate.

Okoruwa testified that after determining the loaded capitalization rates, he added an additional 1% adjustment to the capitalization rates to account for the Subject Property’s location within a flood way and flood plain. He testified that he used the highest capitalization rate because the comparable properties were superior to the Subject Property. Okoruwa testified that he accomplished this adjustment by increasing the appraised property’s capitalization rate by 1%. When questioned regarding his 1% adjustment to the capitalization rate, Okoruwa testified that there was no market data available with which to quantify the impact of the flood way or flood plain characteristic, and that he had determined the adjustment of 1% based on his personal opinion of the impact the additional risk created on the owner of the property and his analysis of comparable but superior property. Okoruwa testified that as a result of this analysis his opinion of value for the Subject Property was \$158,348.

The County Board presented two opposing sets of capitalization rates. The first set was determined by the Property Tax Administrator as part of the annual process for measuring whether the county’s values are within statutorily permissible ranges.<sup>21</sup> These capitalization rates reflecting the differences in the subclasses of agricultural land were: Irrigated 8.25%:

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<sup>20</sup> An unloaded capitalization rate does not include the effective tax rate.

<sup>21</sup> E47:4

Dryland 5.65%: and Grass 4.75%.<sup>22</sup> Additionally, the County referred to the capitalization rates set for the Eastern District of Nebraska in *Nebraska Farm Real Estate Market Highlights 2009-2010*.<sup>23</sup> These “capitalization rates” are an estimate of the annual net return for agricultural land by type of land. It is unclear whether these rates are “loaded” or “unloaded”: Irrigated Land 2009 = 3.9%, 2010 = 3.5%; Dryland 2009 = 3.5%, 2010 = 3.2%; and Grazing 2009 = 2.5%, 2010 = 2.3%.<sup>24</sup>

Mr. Michael Lunkwitz, an employee of the county assessor, testified that if he were to value the land using the income approach he would use the capitalization rates provided in *Nebraska Farm Real Estate Market Highlights 2009-2010*. He gave an opinion of value using the income approach for the Subject Property of \$421,936 for tax year 2009. The Commission gives less weight to Lunkwitz’s income approach value given that it was presented without expense data, and without explanation of whether the capitalization rate was “loaded” or “unloaded.” Further, Lunkwitz testified that he only had knowledge of the assessment report for the Subject Property and a knowledge of general appraisal practices but could not answer specific questions concerning the County Board’s determination of the value of the Subject Property.

Barry Couch, a Douglas County Appraiser, testified that he set the value for the Subject Property for tax years 2009 and 2010. Couch testified that he considered but did not make any adjustments to the assessed value of the Subject Property based upon the Subject Property’s location in either a flood plain or flood way, or based on the frequency of flooding or level of water table. Couch testified that all sales within Douglas County were “influenced sales,” affected by the proximity to urban development, and that sales from other counties not subject to these same influences were used for purposes of determining the coefficients or multipliers for the mass appraisal of Property located in Douglas County. Couch testified he used sales qualified by the Property Tax Administrator from Burt, Johnson, Nemaha, Pawnee, and Richardson Counties to set the assessed values of agricultural land in Douglas County.<sup>25</sup>

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<sup>22</sup> E47:4.

<sup>23</sup> As authorized by Neb. Rev. Stat. §77-5016(3) and pursuant to 442 Neb. Admin. Chapter 5, Section 031.02 (06/11), the Commission considered and utilized *Nebraska Farm Real Estate Market Highlights 2009-2010* produced by the Department of Agricultural Economics, Bruce B. Johnson, Ryan Lukassen, and Tyler Rosener.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> E50:2-5.

Couch testified that Exhibit 50, page 5 is the multiple regression analysis of the sales by soil types. Couch testified that he determined that the multiple regression analysis of the comparable sales from uninfluenced counties supported a position that the flood way and flood plain characteristics had no impact on the actual value of agricultural land in Douglas County. Finally, Couch testified that while the multiple regression analysis did show fluctuation in value between soil types, he determined that the correlation was unreliable because the variations were contrary to his general assumptions regarding the difference in value of higher and lower soil types on the open market.

Couch testified that he decided to value the agricultural property in Douglas County based on the use of the property instead of the soil type. Couch reached this conclusion because the correlation did not meet his preconceived notions of the affect soil types would have on the value of property in Douglas County. Couch testified that he ran a multiple regression analysis based on land use to arrive at his coefficients using properties from uninfluenced counties with varying drainage capabilities.

Couch's rejection of the coefficients produced from the multiple regression analysis of the valuation by soil type is significant for two reasons; (1) "[w]hen using the sales comparison approach and valuing rural Property, adjustments should be made for drainage;" and (2) the drainage of property is often characterized by the soil type created as a consequence of the characteristic.<sup>26</sup>

After analysis of the indicators of significance for the multiple regression analysis of the uninfluenced sales provided in Exhibit 50, page 5, the Commission finds that Couch's decision to reject the coefficients by soil type for the mass appraisal of agricultural property in Douglas County without the inclusion of additional features or terms was reasonable. However, the Commission also finds that the method Couch chose to replace the regression analysis was arbitrary or unreasonable.

The Commission further finds that by relying upon use instead of soil type, Couch removed from the equation those factors which would take into account the potential impact of the drainage differences of the agricultural property. While Couch may have been borrowing the

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<sup>26</sup> The Appraisal of Rural Property, Second Ed., The Appraisal Institute, (2000) at 240.

conclusions of the impact of drainage from the multiple regression analysis of soil type, as previously discussed and as concluded by Couch, that analysis could not be reasonably relied upon. The Commission finds that concluding that drainage did not affect sales price based upon an unreliable multiple regression analysis, or failing to meaningfully examine the impact of drainage on the actual value of agricultural property is arbitrary and unreasonable.

The Commission finds that the Taxpayer has provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that the Taxpayer has provided clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

The only remaining question is to determine the best evidence of value for the Subject Property. The Commission finds that the best evidence of value is the opinion of value offered by Okoruwa, with one adjustment.

Okoruwa valued the Subject Property using the income approach. Okoruwa testified that the actual rental rate was equal to the market rental rate for the Subject Property. The actual rental rate would then reflect what the market was willing to pay for the Subject Property and there would be no need for an additional adjustment to the capitalization rate for the flood plain or flood way. Okoruwa testified that he added an additional 1% to the capitalization rate due to the risks associated with these characteristics, however for the foregoing reasons, the risk associated with the potential flooding of the property is already encompassed in any reduction to the current rental rate attributable to the characteristic, if any. For these reasons, Okoruwa's capitalization rate should not have been adjusted by 1% for flooding.

The Commission finds that the best evidence of value of the Subject Property for tax year 2009 is Okoruwa's appraisal, without the additional 1% added to the capitalization rate. Okoruwa testified his income value for the Subject Property was \$158,348 using a 7.0% capitalization rate. In the income approach, income divided by rate equals the value ( $I/R=V$ ).<sup>27</sup> Okoruwa testified that the net operating income (NOI) was \$11,084. An indicated value of \$182,603 is evidenced by then dividing the income by the adjusted capitalization rate of 6.07% ( $\$11,084/.0607=\$182,603$ ). This value exceeds the value as determined by the County Board.

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<sup>27</sup> See, *Property Assessment Valuation, 3rd Ed.*, International Association of Assessing Officers, 2010, at 342-46 (discussing the relationship between rate, value and income in the income approach).



The Commission's rules and regulations state:

The Commission may consider and find a taxable value in excess of the highest taxable value for which notice was given by the County Assessor, the County Board of Equalization, or the Property Tax Administrator if notice of a higher taxable value and the intent to offer proof in its support is given by a party. Notice of a higher taxable value and the intent to prove that taxable value must be served on all other parties and the Commission no later than the date for an initial exchange of evidence as set forth in a Commission Order for Hearing and Notice of Hearing on the merits.<sup>28</sup>

The Commission finds that such notice was not given in these appeals, and that pursuant to the Commission's rules and regulations, the Commission cannot find a taxable value in excess of \$165,140. In light of the foregoing, the Commission finds that the assessed value for the Subject Property for tax year 2009 is \$165,140.

## V. CONCLUSION

The Commission finds that the Taxpayer has provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that the Taxpayer has provided clear and convincing evidence that the County Board's determination of value was arbitrary or unreasonable. However, since the actual value is in excess of the highest taxable value for which notice was given, the determination by the County Board should be affirmed.

## VI. ORDER

IT IS ORDERED THAT:

1. The Decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2009 is Affirmed.<sup>29</sup>
2. The taxable value of the Subject Property for tax year 2009 is \$165,140.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)

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<sup>28</sup> 442 Neb. Admin. Chapter 5, §016.02 (06/11).

<sup>29</sup> Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board at the protest proceeding.

4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2009.
7. This Decision and Order is effective for purposes of appeal on January 28, 2013.

Signed and Sealed: January 28, 2013

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statute and Court Rules.