

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Donald V. Cain Jr.,
Appellant,

v.

Custer County Board of Equalization,
Appellee.

Case Nos: 12A 112, 12A 113, 12A 114,
12A 115, 12A 116, 12A 117, 12A 118,
12A 119, 12A 120, & 12A 121

Decision and Order Affirming the Actions
of the Custer County Assessor and the
Custer County Board of Equalization

For the Appellant:

Steven P. Vinton,
Bacon & Vinton, LLC.

For the Appellee:

Glenn Clark,
Deputy Custer County Attorney.
Steve Bowers,
Custer County Attorney.

The appeals were heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The Subject Property consists of 10 agricultural parcels totaling 1093.93 acres located in Custer County, Nebraska. The legal descriptions of the Subject Property and the property record cards for the Subject Property are found in Exhibits 11-16.

II. PROCEDURAL HISTORY

For tax year 2012, the Custer County Assessor increased the taxable value of the Subject Property. The Taxpayer asserted that he was not noticed of the increase as required by Nebraska Statutes section 77-1315, and that under Nebraska Statutes section 77-1507.01 he had until December 31, 2012, to petition the Commission for relief because he was prevented from filing an appeal with the County Board as is his right under Nebraska Statutes section 77-1502(1). In an order dated May 24, 2013, the Commission found that it had jurisdiction over the above captioned cases under Nebraska Statutes section 77-1502(1). A hearing on the merits of these cases occurred on November 1, 2013.

The evidence and testimony submitted in the hearing indicates that on December 11, 2012, eleven days prior to the Taxpayer petitioning the Commission, the Custer County Board of Equalization met to determine whether there were clerical errors associated with the parcels identified as case numbers 12A 112,¹ 12A 113,² 12A 114,³ 12A 115,⁴ 12A 116,⁵ and 12A 117.⁶ The evidence indicates that the Taxpayer informed the County Assessor that these parcels had been assessed for wells that were actually located on other parcels.⁷ The evidence shows that in 12A 112, 12A 113, and 12A 114 the Custer County Board of Equalization determined that a clerical error had resulted in the Subject Property in these cases being assessed for wells that were located on other parcels.⁸ Pursuant to Nebraska Statutes section 77-1507, the County Board adjusted the actual value of the Subject Property in 12A 112, 12A 113, and 12A 114 to account for this error.⁹ The County Board did not determine that a clerical error existed for the parcels identified in cases 12A 115, 12A 116, and 12A 117.¹⁰

The Taxpayer petitioned the Commission for relief on the six parcels discussed in the preceding paragraph and four additional parcels that the County Board never reviewed or considered.

The County Assessor's actions determining actual values for cases 12A 115, 12A 116, 12A 117, 12A 118, 12A 119, 12A 120, and 12A 121 constitutes the action appealed from to the Commission. The County Assessor determinations of the actual values for these cases are as follows: \$138,927 for case 12A 115,¹¹ \$198,073 for case 12A 116,¹² \$177,060 for case 12A

¹ See, E11:11.

² See, E11:24.

³ See, E12:10.

⁴ See, E13:12.

⁵ See, E13:24.

⁶ See, E13:36.

⁷ See, E11:11 and 24; E12:10; E13:12, 24, and 36.

⁸ See, E11:11; E11:24; and E12:10.

⁹ *Id.*

¹⁰ See, E13:12; E13:24; and E13:36.

¹¹ See, E13:7.

¹² See, E13:19.

117,¹³ \$147,319 for case 12A 118,¹⁴ \$739,052 for case 12A 119,¹⁵ \$64,374 for case 12A 120,¹⁶ and \$95,970 for case 12A 121.¹⁷

The evidence indicates that the County Assessor agreed with the County Board's determination that clerical errors required corrections to the tax roll for cases 12A 112, 12A 113, and 12A 114.¹⁸ The Taxpayer petitioned the Commission eleven days after these determinations were made, and the Commission finds the assessed values after the corrections for clerical errors constitute the actions appealed from to the Commission. These values are \$80,501 for case 12A 112,¹⁹ \$128,773 for case 12A 113,²⁰ and \$11,794 for case 12A 114.²¹

III. STANDARD OF REVIEW

The Commission's review of orders, actions, determinations, or decision before it is de novo.²² When the Commission considers an appeal of a decision of a County Board of Equalization or action of a County Assessor, a presumption exists that the assessing official has performed his or her duties according to law.²³

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.²⁴

¹³ See, E13:31.

¹⁴ See, E15:7.

¹⁵ See, E15:16.

¹⁶ See, E15:25.

¹⁷ See, E16:7.

¹⁸ See, E11:11; E11:24; and E12:10.

¹⁹ See, E11:11.

²⁰ See, E11:24.

²¹ See, E12:10.

²² 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).

²³ See, *State ex rel. Bee Building Co. v. Savage*, 65 Neb. 714 (1902); *Woods v. Lincoln Gas & Electric Co.*, 74 Neb. 526 (1905); *Brown v. Douglas Co.*, 98 Neb. 299 (1915); *Gamboni v. County of Otoe*, 159 Neb. 417 (1954); *Ahern v. Board of Equalization*, 160 Neb. 709 (1955); *Collier v. Logan County*, 169 Neb. 1 (1959); *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415 (1965); *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

²⁴ *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.²⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.²⁶

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.²⁷ The Appellee need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the order, decision, determination, or action appealed from was unreasonable or arbitrary.²⁸

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”²⁹ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”³⁰

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.³¹

“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

²⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

²⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

²⁷ 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).

²⁸ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

²⁹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

³⁰ Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

³¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

77-1371, (2) income approach, and (3) cost approach.”³² The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”³³ 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.³⁴ All real property in Nebraska subject to taxation shall be assessed as of January 1.³⁵ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.³⁶

B. Summary of the Evidence

Donald Cain, Jr., the Taxpayer, testified that the composition of soils located on the Subject Property is more similar to soil compositions in Market Areas 2 or 3, and that soil type and not the location of the Subject Property was the most important characteristic in determining the actual value of the Subject Property.

The Taxpayer asserted that although the Subject Property comprises all of the land between Broken Bow, Nebraska, and the Adam’s Feedyard the location of the Subject Property does not positively influence its actual value because the Subject Property has limited access to Highway 2. He further testified that some of the land he received as a land exchange wherein he received undevelopable land from Broken Bow for some developable land he owned.

The Taxpayer asserted that the actual value of the Subject Property is \$48,007 for case 12A 112,³⁷ \$86,390 for case 12A 113,³⁸ \$5,409 for case 12A 114,³⁹ \$103,223 for case 12A 115,⁴⁰ \$74,351 for case 12A 116,⁴¹ \$55,733 for case 12A 117,⁴² \$57,073 for case 12A 118,⁴³ \$276,955 for case 12A 119,⁴⁴ \$29,816 for case 12A 120,⁴⁵ and \$41,668 for case 12A 121.⁴⁶ The Taxpayer

³² Neb. Rev. Stat. §77-112 (Reissue 2009).

³³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

³⁴ Neb. Rev. Stat. §77-131 (Reissue 2009).

³⁵ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009)

³⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

³⁷ See, E11:5.

³⁸ See, E11:18.

³⁹ See, E12:4.

⁴⁰ See, E13:5.

⁴¹ See, E13:17.

⁴² See, E13:29.

⁴³ See, E15:5.

⁴⁴ See, E15:14.

⁴⁵ See, E15:23.

calculated his opinion of value by taking a prior appraisal performed by C.M. Thoene, and another previous appraisal not received into evidence, and making a positive 10-15% adjustment.

The Taxpayer testified that the Subject Property's actual value is more similar to grassland than other irrigated land because it is only irrigated for a short time each year to increase the growth of natural grass utilized to feed livestock. He asserted that the soil types are incompatible with the growth of row crops making the Subject Property not comparable with other irrigated agricultural land located in the Subject Property's market area. However, he testified that he has not explored using the land for any other irrigated purpose, because he wishes to maintain the Subject Property as a grazing operation and because, in his opinion, its current use is the highest and best use for the Subject Property. The Taxpayer also provided photographs of the Subject Property as contained in Exhibit 17.

C.M. Thoene, an appraiser, conducted an appraisal of portions of the Subject Property in August 2010, retroactive to December 31, 2008.⁴⁷ Thoene also stated that the retroactive appraisal would have been accurate as of August 13, 2010.⁴⁸ He testified that sales prices have dramatically increased from 2012 to 2013 and that he had no evidence that the trend was reversing. He asserted that according to his best quantification of this increase the actual value of all agricultural and horticultural land in Custer County had increased approximately 12.74% from 2012 to 2013.⁴⁹ Thoene did not provide an individual quantification of the percentage increase of actual value for any individual class of real property (i.e. irrigated, dry, and grassland).

Thoene testified that he calculated his 2010 Appraisal values using comparable sales from his private roster that he maintains for private use when appraising real property located in Custer County and surrounding counties. Thoene last inspected the Subject Property for his 2010 Appraisal, but he reviewed current photos of the Subject Property and asserted that the Subject Property had not changed since his appraisal. He asserted that the Subject Property is located to the South of Broken Bow, Nebraska, just north of a feedlot. Thoene asserted that the proximity of the Subject Property to Broken Bow, Nebraska could affect its actual value.

⁴⁶ See, E16:7.

⁴⁷ E18.

⁴⁸ See, E18:2.

⁴⁹ See, E25:11.

Tohene described the Subject Property as rolling sandhills grassland with development for irrigation to grow grassland.⁵⁰ He asserted that the soil type was very fragile and used almost predominately for grazing and grassland. He asserted that the irrigation was unconventional, because it is often not economically feasible to install and operate irrigation for these purposes.

Tohene prepared supplemental material to help describe the Subject Property's relationship to other parcels in Custer County.⁵¹ He asserted that by including the Subject Property in Market Area 1, the assessed value of the Subject Property was affected by sales of parcels with better soils that could be used to cultivate row crops. He asserted that the highest and best use of the Subject Property was grassland, and without the irrigation it would look the same as grassland in Market Area 2 and 3.

Tohene asserted that he could find no comparable sales in Custer County, but that he found sales of parcels that were irrigated originally for grass production in the 1970's but have since been converted to row crop production in Counties located north of Custer County. He asserted that in 2010 he developed a ratio of average to good quality irrigation soil type to soil types similar to the Subject Property and concluded that the Subject Property would have a value of 1/3 to 1/4 the value of the irrigated parcels with superior soil types.

Tohene asserted the County Assessor's process for determining actual value was not unreasonable, but that his opinion of the value of the Subject Property was different than the County Assessor. He asserted that there should be a greater difference between the actual value of irrigated crop land and irrigated grassland.

Connie Braithwaite, Custer County Assessor, testified that beginning in tax year 2006 the Subject Property had been classified as irrigated grassland and valued using an old formula found in a 1990's ag land manual which was dependent upon a ratio of the value of dry land and irrigated land.⁵² In 2012, she discontinued the special classification of irrigated land, because she observed that irrigated grassland was often plowed and planted as row crops, and because the actual value of irrigated grassland was becoming similar to the actual value of all other irrigated

⁵⁰ See, E25:8-9 (pictures of portions of the Subject Property).

⁵¹ See, E25.

⁵² See, E27.

land. She asserted that the assessed values of all irrigated land in Custer County were equalized. She asserted that she based her valuations on sales obtained from the market.

Braithwaite testified that she was unaware of any laws in Nebraska that would allow her to treat irrigated grassland different from any other type of irrigated land, based in part on Department of Revenue Directive 14.02.21B. She testified that it is her understanding that surrounding counties are following a similar model.

Braithwaite disagreed with Thoene's assertions that the soil types located on the Subject Property were the same as soil types located in Market Area 2. She asserted that there are different classifications of valentine sand, and that the production capability of valentine sand with loam is superior to other classifications of valentine sands found in Market Area 2. She asserted that while the Subject Property does have soil types that include valentine sand, that the soil also contains loam making it superior to the soil types in Market Area 2.

Braithwaite testified that her market areas were derived by examining sales. She asserted that there is topography difference between Market Area 1 and Market Area 2, because Market Area 1 has a uniform sandy soil type, and the sales indicated that the real property in Market Area 1 would command a different value than property in Market Area 2. Near the conclusion of the County Assessor's testimony she was asked:

Question: Do you agree with Mr. Thoene's position that it is somewhere between market area 2 and market area 3, somewhere between 450 and 870? If you were to say from a fairness standpoint, or a similarity standpoint, would you agree with Mr. Thoene that it is somewhere between 450 and 870? Market area 2? Market area 3?

Answer: It could possibly be, and I would more soon use a formula because there is going to be more irrigated grass. It is just not one person that this would envelop.

This Commissioner interprets the County Assessor's answer as a statement that if she agreed with Mr. Thoene, than his range of values, "could possibly be" correct. However, this Commissioner notes that the County Assessor consistently maintained throughout the hearing that her methodology and determined values were statutorily permissive and consistent with mass appraisal principles and Department of Revenue directives. Additionally, the County

Assessor consistently differentiated the types of soils found in Market Area 2 and those that are found on the Subject Property. She consistently asserted that these differences allowed for irrigation of the Subject Property, where only 2 or 3 parcels in all of Market Area 2 even approach this capability.

C. Analysis

In his brief, the Appellant asserted that the increase in the taxable value of the Subject Property was void, because the County Assessor failed to provide appropriate notice of the change. Nebraska Statutes sections 77-1501 to 77-1510 establish avenues of review of increased property tax assessments from the county assessor and decisions of the county board of equalization concerning valuation protests. Nebraska Statutes section 77-1507.01 states:

Any person otherwise having a right to appeal may petition the Tax Equalization and Review Commission in accordance with section 77-5013, on or before December 31 of each year, to determine the actual value or special value of real property for that year if a failure to give notice prevented timely filing of a protest or appeal provided for in sections 77-1501 to 77-1510.

Nebraska Statutes section 77-1507.01 was originally passed by the legislature in 2005.⁵³ Neither the Nebraska Court of Appeals, nor the Nebraska Supreme Court has heard any cases concerning this section of statute. The courts have, however, heard cases concerning the legal consequences of a failure to provide appropriate notice to a taxpayer of an increased property tax assessment, and failure of a county board of equalization to provide statutorily required notice of its decision concerning a property tax assessment petition prior to the adoption of this section of statute.

In *Rosenberry v. Douglas County*, the Nebraska Supreme held that a county assessor did not have authority to increase the assessed value of a property unless the taxpayer received appropriate notice.⁵⁴ The Court reasoned that it was mandatory under the applicable Nebraska Statute that a county assessor or county board of equalization provides notice of an increased

⁵³ Nebraska Laws 2005, LB15, §5.

⁵⁴ 123 Neb. 803, 807, 244 N.W. 398, 400 (1932).

assessment of property taxes to the taxpayer.⁵⁵ Similarly, in *Gamboni v. County of Otoe*, the Nebraska Supreme Court held that where a county assessor provides notice of a valuation increase, but does not include all of the requisite information, then the increased valuation is void.⁵⁶ In *Falotico v. Grant County Board of Equalization*, the Grant County Board of Equalization failed to send notice of its determination within 7 days as required by statute.⁵⁷ The taxpayer filed his appeal to the Commission late and the Nebraska Supreme Court determined that the Commission did not have jurisdiction.⁵⁸ The increased assessment was held void because the taxpayer did not have an effective path for appealing the merits of the determination.⁵⁹

In *Darnall Ranch, Inc., v. Banner County Board of Equalization*, the Nebraska Supreme Court held that the Banner County Board of Equalization had violated the Open Meeting Acts concerning the taxpayer's petition to the county board of equalization.⁶⁰ The Nebraska Supreme Court further concluded that the Commission, therefore, did not have jurisdiction to hear the appeal.⁶¹ The Court reasoned that because the taxpayer no longer had an avenue of appeal available the increased assessment was void.⁶²

The Nebraska Supreme Court and Court of Appeals have held in multiple cases the failure followed a mandatory provision of statute, including a failure to provide appropriate notice of a county board determination or an increase in taxation by a county assessor voids the assessment.⁶³ In cases concerning failures to provide sufficient notice, the courts concluded that because the taxpayer had lost its access to review, the increased assessment was

⁵⁵ *Id.*

⁵⁶ 159 Neb. 417, 67 N.W.2d 489 (1954) (overruled in part on other grounds by *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972)).

⁵⁷ 262 Neb. 292, 293-294, 631 N.W.2d 492, 495 (2001).

⁵⁸ *Id.*

⁵⁹ *Id.* at 296, 631 N.W.2d at 498.

⁶⁰ 280 Neb. 655, 789 N.W.2d 26 (2010).

⁶¹ *Id.*

⁶² *Id.*

⁶³ See generally, *Falotico v. Grant County Board of Equalization*, 262 Neb. 292, 293-294, 631 N.W.2d 492, 495 (2001); *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954) (overruled in part on other grounds by *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972)); *Rosenberry v. Douglas County*, 123 Neb. 803, 807, 244 N.W. 398, 400 (1932); *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, 119 Neb. 138, 227 N.W. 452 (1929); *Crane Co. v. Douglas County*, 112 Neb. 365, 199 N.W. 791 (1926); *Farmers Co-operative Creamery & Supply Co. V. McDonald*, 100 Neb. 33, 158 N.W. 369 (1916) (overruled in part on other grounds by *Fromkin v. State*, 158 Neb. 377, 63 N.W.2d 332 (1954)); *Brown v. Douglas County* 98 Neb. 299, 152 N.W. 545 (1915); *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469, 131 N.W. 1034 (1911); *Grant v. Bartholomew*, 57 Neb. 673, 78 N.W. 314 (1899); *Spiech v. Tierney*, 56 Neb. 514, 76 N.W. 1090 (1898); *Dixon County v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888); *South Platte Land Co. v. Buffalo County*, 7 Neb. 253 (1878); *Sioux City & P.R. Co. v. Washington County*, 3 Neb. 30 (1873).

void.⁶⁴ However, all of these cases were prior to the adoption of Nebraska Statutes section 77-1507.01.

Under Nebraska Statutes section 77-1507.01 taxpayers now have an avenue for appeal by December 31 of each tax year if notice was not timely provided. The Commission, therefore, has jurisdiction over petitions which it did not otherwise have prior to the passage of the statute. Because the Commission now has jurisdiction and the taxpayer has an avenue for review, the previous Nebraska Supreme Court and Court of Appeals decisions are no longer applicable; it appears that Nebraska Statutes section 77-1507.01 now supersedes these decisions in instances where a taxpayer petitions the Commission prior to December 31 of a tax year where a failure of notice from the County Assessor or County Board prevents timely filing under other statutes.

The Commission finds that the actions by the County Assessor and County Board are not void.

The Taxpayer asserted that the Subject Property had a similar soil composition to properties found within another market area in the county. He asserted that because his soil type was rare for the assigned market area, that the actual value of the Subject Property should be derived similarly to the properties in the other market areas.

In his brief, the Appellant's attorney cites to *Bartlett v. Dawes County Board of Equalization*, 259 Neb. 954, 613 N.W.2d 810 (2000) to support the contention that only soil types can be considered when valuing agricultural and horticultural land. This case has been superseded by *Vandeheiden v. Cedar County Board of Equalization*, 16 Neb.App. 578, 746 N.W.2d 717 (2008) and Nebraska Statutes section 77-103.01.⁶⁵ Prior to the passage of Nebraska Statutes section 77-103.01 the County Assessor could only configure market areas for agricultural property based upon the soil classifications of the properties.⁶⁶ Properties with similar soil classifications were grouped into market areas throughout the county.⁶⁷ Some counties attempted to take into

⁶⁴ See generally, *Falotico v. Grant County Board of Equalization*, 262 Neb. 292, 293-294, 631 N.W.2d 492, 495 (2001); *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954) (overruled in part on other grounds by *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972)); *Rosenberry v. Douglas County*, 123 Neb. 803, 807, 244 N.W. 398, 400 (1932).

⁶⁵ See, L.B. 170, Revenue Committee, 97th Leg., 1st Sess. (Jan. 25, 2001).

⁶⁶ See, *Vandeheiden v. Cedar County Board of Equalization*, 16 Neb.App. 578, 584-586, 746 N.W.2d 717, 722-723 (2008).

⁶⁷ *Id.*

consideration geographic location and other factors in determining the appropriate market areas but were rebuffed by the courts until the passage of Nebraska Statutes section 77-103.01.⁶⁸

The Nebraska Court of Appeals in *Vandeheiden v. Cedar County Board of Equalization*, reasoned that the change in statute now allowed for agricultural markets areas to be constructed on the basis of factors other than soil type.⁶⁹ In that case, the Cedar County Assessor had constructed market areas based in part upon “soil types, productivity, availability of water, relation to market distribution points, land use, geography, and sales history.”⁷⁰ The Nebraska Court of Appeals found that these actions did not violate the statute and were permissible.⁷¹ The construction of market areas based on these factors is also supported by appraisal literature.⁷²

In the present case the evidence indicates that the County Assessor utilized several factors when constructing the market areas. Nebraska Statutes section 77-103.01 allows the County Assessor to consider more factors than only the soil type when constructing the market areas. While the Subject Property consists of the same soil type as a majority of properties in another market area, additional factors also contribute to the value the Subject Property will bring on the open market. The actual value of the Subject Property is at issue in this case.

While the Taxpayer generally asserted that the Subject Property’s location in Market Area 1 between Broken Bow, Nebraska and Adam’s Feedlot did not result in an increase in actual value as compared to real property located in Market Area 2, the Commission notes that County Assessor’s review of sales determined otherwise.

The Commission finds that the County Assessor’s determination that the location of agricultural and horticultural property in Custer County impacts its actual value is supported by her assessed values based on actual sales.

The Commission also finds that the soil types located on the Subject Property are more suitable to irrigation and production than the soils located in Market Area 2 and Market Area 3.

⁶⁸ See, *Bartlett v. Dawes County Board of Equalization*, 259 Neb. 954, 613 N.W.2d 810 (2000); See also, *Schmidt v. Thayer Cty. Bd. Of Equal.*, 10 Neb.App. 10, 624 N.W.2d 63 (2001).

⁶⁹ 16 Neb.App. 578, 587-588, 746 N.W.2d 717, 723-724 (2008).

⁷⁰ *Id.* at 588, 746 N.W.2d at 724.

⁷¹ *Id.*

⁷² See, International Association of Assessing Officers, *Mass Appraisal of Real Property*, at 118-120 (1999); International Association of Assessing Officers, *Property Assessment Valuation*, at 75-77 (3rd ed. 2010); and Appraisal Institute, *The Appraisal of Real Estate*, at 54-56 (13th ed. 2008).

The Commission finds that this also supports the County Assessor assertion that the Subject Property is more valuable than irrigated grassland in Market Area 2 and Market Area 3.

The Commission notes that Market Area 4 also contains soil types which the Taxpayer and Thoene asserted are similar to soil types found in Market Area 2.⁷³ The Commission notes that even though the soil types located in Market Area 4 indicate a similar allocation and diversity as the location of the Subject Property in Market Area 1 neither Thoene nor the Taxpayer asserted that the actual value of the Subject Property was the same as the assessed values in Market Area 4.⁷⁴ The Commission also notes that the assessed values for agricultural and horticultural land located in Market Area 4 are significantly higher than the assessed values for agricultural and horticultural land located in Market Areas 2 and 3. The Commission finds that these facts indicate that market areas created by the County Assessor are based on more factors than soil type alone.

V. CONCLUSION

The Commission finds that there is 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 there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the petitions of the Taxpayer are denied.

VI. ORDER

IT IS ORDERED THAT:

1. The actions determining the actual values of the Subject Property for tax year 2012 are affirmed.⁷⁵
2. The taxable values of the Subject Property for tax year 2012 are \$80,501 for case 12A 112, \$128,773 for case 12A 113, and \$11,794 for case 12A 114, \$138,927 for case 12A 115, \$198,073 for case 12A 116, \$177,060 for case 12A 117, \$147,319 for case

⁷³ See, E25:2-3.

⁷⁴ *Id.*

⁷⁵ 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 of Equalization at the protest proceeding.

12A 118, \$739,052 for case 12A 119, \$64,374 for case 12A 120, and \$95,970 for case 12A 121.

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Custer County Treasurer and the Custer County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
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 2012.
7. This Decision and Order is effective for purposes of appeal on July 31, 2014.

Signed and Sealed: July 31, 2014

Nancy J. Salmon, Commissioner

SEAL

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2010 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.

Commissioner Freimuth, dissenting,

I. OVERVIEW

I would find that the Taxpayer provided sufficient evidence to show that the County's determinations for tax year 2012, which reflect a substantial increase in comparison to tax year 2011, were arbitrary and unreasonable. Thus, I would find that the Taxpayer's opinion of value with respect to each parcel under appeal is the best evidence of the Subject Property's actual value for tax year 2012.

The following chart is the recent assessment history regarding the Subject Property, together with the Taxpayer’s opinion of value for tax year 2012:⁷⁶

Case #	Parcel ID	Acres	2011 Valuation	2012 Valuation	Taxpayer's 2012 Opinion
12A-112	485700	79.69	\$44,853	\$80,501	\$48,007
12A-113	485600	150.29	\$80,366	\$128,773	\$86,390
12A-114	486012	7.98	\$5,016	\$11,794	\$5,409
12A-115	506710	70.25	\$90,952	\$138,927	\$103,223
12A-116	506700	79.54	\$94,769	\$198,073	\$74,351
12A-117	506400	80	\$38,280	\$177,060	\$55,733
12A-118	480900	89.72	\$50,778	\$147,319	\$57,073
12A-119	481080	420.21	\$259,720	\$739,052	\$276,955
12A-120	481050	49.15	\$31,711	\$64,374	\$29,816
12A-121	487600	67.1	\$38,523	\$95,970	\$41,668
TOTAL		1093.93	\$734,968	\$1,781,843	\$778,625

The County increased the assessed value of the Subject Property from an average of \$672 per acre in tax year 2011 ($\$734,968/1093.93 \text{ acres} = \672 per acre) to \$1,628 per acre in tax year 2012 ($\$1,781,843/1093.93 \text{ acres} = \$1,628 \text{ per acre}$).

II. VALUATION ANALYSIS

- A. A major source of the above-noted substantial increase in the assessed valuation of the Subject Property from tax year 2011 to 2012 stemmed from the County’s 21% increase in the value of all irrigated land in Market Area 1,⁷⁷ together with the County Assessor’s discontinuation of the use of a special irrigated grassland valuation formula noted in the majority opinion. As a result of these actions, the County assessed the irrigated grassland component of the Subject Property from a range of \$2,100 (“4A”) to \$2,900 (“1A”) per acre in tax year 2012.⁷⁸
- B. The Reports and Opinions of the Property Tax Administrator for Custer County for 2012 (herein referred to as the “2012 R&Os”), which can be accessed at the Commission’s website, state as follows with respect to the description of the unique characteristics of Market Area 1 where the Subject Property is located and Market Areas 2 and 3 in the

⁷⁶ See, E11 – E16.

⁷⁷ 2012 Reports and Opinions of the Property Tax Administrator for Custer County, p. 33.

⁷⁸ See, E:25:13; 2012 Reports and Opinions of the Property Tax Administrator for Custer County, p. 39.

northern part of the County that the Taxpayer asserts are more similar to the Subject Property as opposed to Market Area 1:

[Market Area 1] contains the best farm ground in the county. The soils are harder soils than are found in other areas, and irrigation potential is generally better here.

[Market Area 2] is the Sandhills area of the county; the majority of the area contains Valentine Soil. There is very little farming in this area, as the land is best suited to grazing.

[Market Area 3] is a transition area between areas 1 and 2. Portions of the area contain Valentine Soil; however, as you move through the area, the land will start to contain more loam than the soil in area 2, making some farming possible. The presences of the loamier soils also makes for better pasture land as there are fewer areas of blow sand and better grass cover. To ensure equalization in the sandy areas, the assessor values the valentine sand in this area the same as valentine sand in area 2.⁷⁹

- C. I note that the 2012 R&Os provide that while all irrigated land in Market Area 1 increased 27% in tax year 2012, grassland was increased only 5%.⁸⁰ I also note that the 2012 R&Os state as follows with respect to actions by the County Assessor in Market Area 2: “[This] is the only area where values were not changed; this was the trend in this Central Sandhills region where the market is driven by the value of grassland.”⁸¹
- D. The Taxpayer’s appraiser, Mr. Thoene, resides in Ansley near the Subject Property and has decades of experience appraising agricultural land in the Custer County area. Mr. Thoene testified that value of the irrigated grassland component of the Subject Property ranged from \$450 to \$870 per acre, which is the range of “4A” irrigated land in Market Areas 2 and 3, respectively, in the northern portion of Custer County.⁸² Additionally, the appraisal authored by Mr. Thoene, which covered 740 acres included in the Subject Property’s 1093.93 total acres, valued the irrigated grassland component of the Subject Property at \$698 per acre.⁸³
- E. The Taxpayer and Mr. Thoene testified that Market Areas 2 and 3 in the northern portion of Custer County form a part of the southern border of Nebraska’s vast Sandhills region, where irrigation of grassland is common for grazing purposes. Page 1 of Exhibit 25 indicates that

⁷⁹ See, 2012 Reports and Opinions of the Property Tax Administrator for Custer County, p. 34.

⁸⁰ 2012 Reports and Opinions of the Property Tax Administrator for Custer County, p. 33.

⁸¹ See, 2012 Reports and Opinions of the Property Tax Administrator for Custer County, p. 41.

⁸² See, 2012 Reports and Opinions of the Property Tax Administrator for Custer County, p. 39.

⁸³ E18:4.

this southern border of the Sandhills region is only a few miles to the north of the Subject Property.

- F.** The Taxpayer and Mr. Thoene also testified that, similar to the Subject Property, growth of crops in the Sandhills region is not viable, and that irrigation of grassland is therefore limited to grazing purposes.
- G.** Mr. Thoene submitted a map found at page 2 of Exhibit 25 that demonstrates that the Subject Property includes similar characteristics in comparison to Market Areas 2 and 3 in the northern portion of Custer County. It is also important to note that the 2012 R&Os contain two soil maps that, when viewed together with Mr. Thoene's map found at page 2 of Exhibit 25, illustrate the similarity of the Subject Property in comparison to the vast majority of land in Market Area 2 and a substantial portion of land in Market Area 3.⁸⁴ These maps also indicate that the Subject Property is not comparable to the vast majority of land in Market Area 1.
- H.** The two soil maps contained in the 2012 R&Os state as follows regarding the type of soil depicted thereon where the Subject Property is located – as indicated above, this same soil type covers most if not all of Market Area 2 and a significant portion of Market Area 3: “Excessively drained sandy soils formed in the eolian sands on uplands in sandhills.”⁸⁵
- I.** The Taxpayer and Mr. Thoene testified that the Subject Property is substantially similar to the irrigated grassland in Market Areas 2 and 3 in terms of characteristics and use. Additionally, the Taxpayer and Mr. Thoene submitted ample documentary evidence, including photographs, that demonstrates that the Subject Property is substantially similar to the irrigated grassland in Market Areas 2 and 3 in terms of characteristics and use.
- J.** The Taxpayer testified that he acquired the Subject Property from the community of Broken Bow in exchange for land that has been developed for educational and commercial purposes. The Taxpayer also testified that the community of Broken Bow did not develop the Subject Property throughout approximately 25 years of ownership.
- K.** The County Assessor indicated in response to questioning that the value of the majority of the irrigated grassland component of the Subject Property could possibly range from the

⁸⁴ 2012 Reports and Opinions of the Property Tax Administrator for Custer County, Soil Maps 1 and 2. [As indicated from a review of Mr. Thoene's map found at page 2 of Exhibit 25, the Subject Property is located on the far southeastern portion of the land in Market Area 1 highlighted in light-yellow near the community of Broken Bow. This same area can be viewed on the 2012 R&Os Maps in the upper right portion of quadrant 2599 and the upper left portion of quadrant 2601.]

⁸⁵ 2012 Reports and Opinions of the Property Tax Administrator for Custer County, Soil Maps 1 and 2.

\$450 per acre Market Area 2 4A value to the Market Area 3 \$870 per acre 4A value, rather than the \$2,100 - \$2,900 per acre values assigned thereto for tax year 2012.

- L.** The Nebraska Administrative Code contains guidance entitled “Agricultural Land and Horticultural Land Assessment Regulations” promulgated by the Nebraska Department of Revenue’s Property Assessment Division (herein referred to as the “Agricultural Land Regulations”).⁸⁶ The Agricultural Land Regulations state as follows with respect to the definition of “Market Area:” “[A]n area with defined characteristics within which similar properties are effectively competitive in the minds of buyers and sellers with other comparable property in the area.”⁸⁷ In applying this Regulation based on the evidence outlined above, I would find that the Subject Property is not similar to the vast majority of property in Market Area 1, and that it is substantially similar to all of the land in Market Area 2 and a significant portion of the land in Market Area 3.
- M.** I acknowledge that the County Assessor acquired more power in terms of the development of market areas in light of the 2007 statutory change and interpretation thereof in the *Vandeheiden* case referenced in the majority opinion. Based on the County Assessor’s testimony, it is also my impression that she used reasonable factors for purposes of developing Market Areas in Custer County for tax year 2012. Nonetheless, I would find that the Taxpayer provided sufficient evidence to show that the County’s valuation determinations for tax year 2012 were arbitrary or unreasonable as applied to the Subject Property in part because the Subject Property is unique as compared to other Market Area 1 property and is substantially similar to the northern portion of Custer County (i.e., Market Areas 2 and 3) that forms a part of the southern border of the Sandhills region.

III. CONCLUSION

Based on the above analysis, I would find that the Taxpayer has rebutted the presumption that the County faithfully performed its duties with sufficient and competent evidence on which to base its decisions for tax year 2012, and that the Taxpayer has shown by clear and convincing evidence that the decisions of the County were arbitrary or unreasonable. I would further find that the Taxpayer’s opinion of value constitutes the best evidence of value for the Subject

⁸⁶ Title 350 Neb. Admin. Code, ch. 14 (2009).

⁸⁷ Title 350 Neb. Admin. Code, ch. 14, § 002.47 (2009).

Property for tax year 2012. Therefore, I would find that the actual value of each parcel of the Subject Property for tax year 2012 is equal to the Taxpayer's above-charted opinion of value.

Thomas D. Freimuth, Commissioner