

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Donald Keller,
Appellant,

v.

Keith County Board of Equalization,
Appellee.

Case Nos: 12A 022 & 12A 023

Decision and Order Reversing
The Determinations of the Keith County
Board of Equalization

1. The real property under consideration in the above-noted appeals (herein referred to in part or the aggregate as the “Subject Property”) consists of two agricultural parcels located in Keith County, Nebraska, with the following legal descriptions: Case No. 12A 022: 18-13-39 LOTS 6, 7, 8 LYING N OF I-80 EX TR 69.48ACCR 18-13-39 10.23A. 1A-2-B-B----16; and Case No.12A 023: 19-13-39 TR LYING N OF I-80 11.88 ACCR 19-13-393.85A.1A-2-B-B----16 in.
2. The Keith County Assessor assessed the Subject Property at \$113,435 in Case No. 12A 022, and \$20,080 in Case No. 12A 023 for tax year 2012.
3. Donald Keller (herein referred to as the “Taxpayer”) protested these values to the Keith County Board of Equalization (herein referred to as the “County Board”) and requested an assessed value of \$19,130 in Case No. 12A 022, and \$3,893 in Case No. 12A 023 for tax year 2012.
4. The County Board determined that the assessed value of the Subject Property was \$113,435 in Case No. 12A 022 and \$20,080 in Case No. 12A 023 for tax year 2012.
5. The Taxpayer appealed the determinations of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held on June 10, 2013, at the Hampton Inn, 200 Platte Oasis Parkway, North Platte, Nebraska, before Commissioner Thomas D. Freimuth.
7. Donald Keller, the Taxpayer, was present at the hearing. Joshua J. Wendell, the Taxpayer’s attorney, was also present at the hearing.
8. Randy Fair, Keith County Attorney, and Cheryl Schiel, Keith County Assessor, were present for the County Board.

I. Standard of Review

9. The Commission’s review of the determination of the County Board of Equalization is de novo.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.”²

¹ 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).

² *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

10. When considering an appeal 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.”³ 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.”⁴
11. 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.⁵
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶
13. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁷

II. Taxpayer Assertions

14. The Taxpayer asserted that: (1) the Subject Property should receive special valuation; (2) the Subject Property should be classified as agricultural land or horticultural land rather than recreational land; (3) the County Assessor violated principles of equalization by valuing similar properties as agricultural land rather than recreational land; (4) the County Assessor overvalued market value accretion land; (5) the County Assessor inappropriately reviewed the use of sale properties and the qualification thereof for special valuation; and (6) real property owners domiciled in Keith County are treated differently as compared to owners who live outside of the County with respect to the determining whether real property qualifies for special value designation.
15. The Taxpayer asserted that his arguments were applicable to both tax years 2011 and 2012. The Taxpayer requested that the Commission determine the taxable value of the Subject Property for both tax years 2011 and 2012.

III. Taxable Value of the Subject Property for Tax Year 2011

16. The Taxpayer did not appeal the County Assessor’s valuations or the disqualification of the Subject Property from special valuation for tax year 2011. The Case File for each appeal herein discloses that the Taxpayer filed Subject Property protests with the County Board only for tax year 2012.
17. The Commission obtains jurisdiction to hear an appeal of the valuation of real property only after all provisions of Nebraska Statutes section 77-5016 are met by the appropriate deadline. The Taxpayer has not met any of the requirements for the Commission to obtain jurisdiction over the 2011 taxable value of the Subject Property.

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

18. The Commission finds that it does not have jurisdiction to determine the taxable value of the Subject Property for tax year 2011.

IV. Nebraska Ad Valorem Taxation - General Definitions & Statutory Frameworks

19. The Commission finds it necessary to establish the legal definition of certain terms used by the parties in the appeals herein, as well as pertinent ad valorem property tax procedures created by Nebraska Law.

20. Agricultural and horticultural land is a distinct class of real property which may be taxed on a different proportion of actual value as compared to all other classes of real property without violating principles of equalization under the Nebraska Constitution.⁸ Acting under this constitutional authority, the legislature has determined that agricultural and horticultural land should be taxed on only 75% of actual value.⁹ All other classes of real property (commercial and residential property) are taxed on 100% of actual value.¹⁰

21. Nebraska Statutes define actual value as:

[T]he 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.¹¹

22. The legislature has determined that the actual value of agricultural land in some areas of Nebraska is influenced by the potential use of the real property for purposes other than agricultural or horticultural uses.¹² The legislation allows real property affected by these influences to receive special valuation treatment.¹³

23. The documents submitted to the Commission at the hearing indicate that the Keith County Assessor assigned a value of \$255 per accretion acre for special value purposes, and \$1,585 per accretion acre for property that did not qualify for special valuation.¹⁴ The property record cards for the Subject Property indicate that its accretion acres did not receive special valuation for tax year 2012 and were valued at \$1,585 per acre.

V. Special Valuation

24. Special valuation is applied to agricultural and horticultural property in Nebraska when the actual value of the property as defined in Nebraska Statutes section 77-112 is influenced by sales for uses other than agricultural and horticultural purposes.¹⁵ Nebraska Statutes define special valuation as "the value that the land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses."¹⁶ A parcel qualifies for special valuation after

⁸ See, *Krings v. Garfield County Board of Equalization*, 835 N.W.2d 750, 286 Neb. 352 (2013).

⁹ See, Neb. Rev. Stat. §77-201 (2) (Reissue 2009).

¹⁰ See, Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹² See, Neb. Rev. Stat. 77-1344 (Reissue 2009).

¹³ See, Neb. Rev. Stat. 77-1344 (Reissue 2009).

¹⁴ See, "2012 Keith County Land Values."

¹⁵ See, Neb. Rev. Stat. §77-1344(1) (Reissue 2009).

¹⁶ Neb. Rev. Stat. §77-1343(5) (Reissue 2009).

application.¹⁷ The application must be filed “on or before June 30 of the first year in which such valuation is requested.”¹⁸ Additionally, the application must be made upon forms prescribed by the Tax Commissioner.¹⁹ Finally, the application must be made to the county assessor.²⁰

25. The evidence before the Commission is that the Taxpayer has never filed an application for special valuation since he received notice in 2011 that the Subject Property was being disqualified for purposes of special valuation. The Commission notes that the Taxpayer did assert in his letter attached to his Property Valuation Protest (Form 422) that the Subject Property should receive special valuation, but the Commission finds that the Form 422 with attached assertions is not sufficient to meet the mandatory requirements of the law. No documents or statements at the hearing indicate that the County Assessor received an application for special valuation as required by statute.
26. The Nebraska Tax Commissioner’s regulations provide that Special Valuation Application, Form 456, is the requisite form for filing an application for special valuation.²¹ Additionally, the Taxpayer’s Form 422 for each appeal herein was filed with the County Clerk rather than the County Assessor.²²
27. The Keith County Board of Equalization only obtains the authority to determine whether a subject property meets the qualifications for special valuation after appeal from a county assessor’s denial of an application for special valuation.²³ The Commission only obtains jurisdiction over the issue of the qualification of subject property for special valuation upon appeal from a decision of the county board of equalization.²⁴ If the lower body did not have jurisdiction to determine an issue, the Commission, likewise, does not have jurisdiction over the issue.²⁵
28. The Commission finds that because the Taxpayer did not file applications for special valuation, there were also no special valuation application denials relating to the Subject Property by the County Assessor. The Commission also finds that the Keith County Board of Equalization did not have jurisdiction to determine whether the Subject Property qualified for special valuation because mandatory application was not made by the Taxpayer.
29. The Commission further finds that any determinations concerning the qualification of the Subject Property for special valuation for tax year 2012 are void. The Commission additionally determines that it does not have jurisdiction to determine whether the Subject Property qualifies for special valuation, or whether the qualification of real property for special valuation is subject to alleged bias of county officials. Because the Commission does not have jurisdiction over the qualification of the Subject Property for special valuation, the Commission cannot value the Subject Property at special valuation levels.

¹⁷ See, Neb. Rev. Stat. §77-1345 (Reissue 2009).

¹⁸ See, Neb. Rev. Stat. §77-1345(1) (Reissue 2009).

¹⁹ See, Neb. Rev. Stat. §77-1345(2)(a) (Reissue 2009).

²⁰ See, Neb. Rev. Stat. §77-1345(1) (Reissue 2009).

²¹ 350 Neb. Admin. Code, ch. 11, §004.02 (03/09).

²² See, Property Valuation Protests, Forms 422.

²³ See, Neb. Rev. Stat. §77-1345.01 (Reissue 2009).

²⁴ See, Neb. Rev. Stat. 77-1345.01(9) (Reissue 2009).

²⁵ *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 1013, 815 N.W.2d 168, 175 (2012).

VI. Actual Value of Influenced Accretion Acres

30. The Taxpayer asserted that the County Assessor incorrectly determined the actual value of accretion acres by considering the influence of non-agricultural uses. The County Assessor provided the Commission with her accretion property sales files, and she described her method for determining the actual value of accretion acres. The Commission finds that the County Assessor's method is acceptable under Nebraska Statutes.²⁶

VII. Classification of the Subject Property

31. The Subject Property in appeal 12A-022 consists of 79.71 total acres located along the North Platte River.²⁷ The Subject Property's soil in this appeal is comprised of soil types 8401, 8492 and 8400 Accretion. Soil types 8401 and 8492 are assigned to 10.23 acres, and the remaining 69.48 acres are classified as 8400 Accretion.²⁸
32. The Subject Property in appeal 12A-023 consists of 15.73 total acres located along the North Platte River.²⁹ The Subject Property's soil in this appeal is comprised of soil types 8401 and 8400 Accretion. Soil type 8401 is assigned to 3.85 acres, and the remaining 11.88 acres are classified as 8400 Accretion.³⁰
33. Agricultural and horticultural land is defined by Nebraska Statute as follows:

Agricultural and horticultural land means a parcel of land, excluding land associated with a building or enclosed structure located on the parcel, 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.³¹

34. Nebraska Statute defines an agricultural or horticultural purpose as follows:

Agricultural or horticultural purpose 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.³²

35. Nebraska Statute further specifies that land retained in a conservation easement and land enrolled in conservation programs qualify as agricultural and horticultural land.³³
36. The Tax Commissioner's rules and regulations define the term "primary use" for purposes of determining whether real property qualifies as agricultural or horticultural land: "Primary used [sic] shall mean that the use of the land is mainly agricultural or horticultural[.]"³⁴

²⁶ See, Neb. Rev. Stat. §77-112 (Reissue 2009).

²⁷ See, Subject Property's Property Record Card.

²⁸ See, Subject Property's Property Record Card.

²⁹ See, Subject Property's Property Record Card.

³⁰ See, Subject Property's Property Record Card.

³¹ Neb. Rev. Stat. §77-1359 (Reissue 2009).

³² Neb. Rev. Stat. 77-1359(1) (Reissue 2009).

³³ Neb. Rev. Stat. §77-1359(2) (Reissue 2009).

³⁴ 350 Neb. Admin. Code, ch. 14, §002.56 (03/09).

37. The Taxpayer testified that he does not lease the Subject Property for hunting. There was no direct evidence of the uses present on the Subject Property other than farming. The Commission is mindful that the evidence indicates that accretion acres may be valuable recreational areas.³⁵ The County Assessor additionally indicated that the highest and best use for the accretion acres was as recreational land. Highest and best use analysis is used to determine the most economically advantageous use for real property based upon what is: (1) physically possible; (2) legally permissible; (3) financially feasible; and (4) maximally productive.³⁶
38. Highest and best use is not the statutorily prescribed method for determining whether real property must be classified as agricultural and horticultural land.
39. Rather, Nebraska Statute requires that a value in use approach be used to determine whether real property is agricultural or horticultural land. The approach assumes that if the current use meets the statutory definition of an agricultural or horticultural use, then the use of the subject property is assumed to be its highest and best use, and no highest and best use analysis is required.³⁷
40. The issue in the current case under the framework described above involves the current primary use of the Subject Property. The only evidence at the hearing indicates that the Subject Property is only used for growing and harvesting planted crops.
41. The Commission finds that growing and harvesting planted crops is an agricultural use. The Commission also finds that the primary use of the Subject Property is for agricultural or horticultural use. The Commission finds that it was unreasonable or arbitrary for the County Board to determine that the Subject Property was not agricultural or horticultural land. The Commission finds that the Subject Property should be valued for tax year 2012 at 75% of actual value.

VIII. Taxable Value of the Subject Property

42. The property record card for the Subject Property in appeal 12A-022 indicates an actual value of \$113,435. The Commission finds that the Subject Property is agricultural land and should be valued at 75% of actual value ($\$113,435 \times .75 = \$85,076$).
43. The property record card for the Subject Property in appeal 12A-023 indicates an actual value of \$20,080. The Commission finds that the Subject Property is agricultural land and should be valued at 75% of actual value ($\$20,080 \times .75 = \$15,060$).
44. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
45. The Taxpayer has adduced sufficient, clear and convincing evidence that the determinations of the County Board are unreasonable or arbitrary and the decisions of the County Board should be vacated.

³⁵ See, “2012 Keith County Land Values” (indicating that uses other than agricultural or horticultural uses influence the actual value of an acre of accretion land by \$1,330).

³⁶ International Association of Assessing Officers, *Property Assessment Valuation*, at 29-30 (3rd ed. 2010).

³⁷ See generally, Neb. Rev. Stat. §77-1359 (Reissue 2009).

IX. Order

IT IS ORDERED THAT:

1. The decisions of the Keith County Board of Equalization determining the value of the Subject Property for tax year 2012 are Vacated and Reversed.
2. That the taxable value of the Subject Property in appeal 12A-022 for tax year 2012 is \$85,076.
3. That the taxable value of the Subject Property in appeal 12A-023 for tax year 2012 is \$15,060.
4. This Decision and Order, if no further action is taken, shall be certified to the Keith County Treasurer and the Keith County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.)
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each Party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax year 2012.
8. This Decision and Order is effective on March 27, 2014.

Signed and Sealed: March 27, 2014.

Thomas D. Freimuth, Commissioner