

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

Connie L. Anderson,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee.

Case No: 11A 086

**Amended** Decision and Order Reversing the  
Determination of the Sarpy County Board of  
Equalization  
**(Correction page 5)**

**For the Appellant:**  
Connie L. Anderson,  
Pro Se

**For the Appellee:**  
Michael A. Smith,  
Deputy Sarpy County Attorney

The appeal was heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth. Commission Salmon reversing, and Commissioner Freimuth concurring part and dissenting in part.

**I. THE SUBJECT PROPERTY**

The Subject Property is a 36.4 acre parcel located in Sarpy County, Nebraska. The legal description of the Subject Property is found at Exhibit 5. The property record card for the Subject Property is found at Exhibit 5.

**II. PROCEDURAL HISTORY**

The Sarpy County Assessor determined that the assessed value of the Subject Property was \$252,661 for tax year 2011. Connie L. Anderson (the Taxpayer) protested this assessment to the Sarpy County Board of Equalization (the County Board) and requested an assessed valuation of \$218,761. The Sarpy County Board determined that the assessed value for tax year 2011 was \$252,286.<sup>1</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

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<sup>1</sup> E1.

Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged exhibits. The Commission held a hearing on May 30, 2014.

### III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.<sup>2</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>3</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>4</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>5</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</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>7</sup> The County Board need not

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

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

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

<sup>7</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).

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>8</sup>

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.”<sup>9</sup> 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.”<sup>10</sup>

#### 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

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<sup>8</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

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

<sup>12</sup> *Id.*

<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).

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>

“Parcel 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 Evidence**

The Taxpayer alleged that the model used by Sarpy County to value the farm site and farm home site located on the Subject Property is unreasonable and arbitrary, and that the County Assessor had incorrectly calculated the amount of waste land located on the Subject Property.

### **1. Actual Value of Farm Home Site and Farm Site**

Connie L. Anderson testified that there were no sales of vacant land in the Subject Property’s area that support the County Assessor’s value of \$62,000 for the first acre associated with the Subject Property’s farm home. The Taxpayer offered the property record cards for five alleged

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<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).

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

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

comparable properties ranging in land area from approximately ten acres to approximately eighty acres.<sup>20</sup> She asserted that the sales of these properties indicated that the actual value of the first acre of the farm home site was actually far below \$62,000. The Taxpayer derived an average sale price per acre from her alleged comparable properties and opined that the actual value of her farm home site and farm site was \$9,940 per acre, and a total actual value for her farm site of \$7,554.40.

The Taxpayer asserted these values were supported by her alleged comparable sales. The alleged comparable properties contained in Exhibits 34 and 35 are located directly across the street from the Subject Property. The two parcels were purchased by the same buyer from the same seller in 2008. The alleged comparable property in Exhibit 34 was improved at the time of sale with a residence valued at \$186,288, consisted of 10.03 acres, and sold for \$307,500.<sup>21</sup> The alleged comparable property in E35 was unimproved at the time of sale, consisted of 41.13 acres, and sold for \$475,000.<sup>22</sup> The average sale price acre of the alleged comparable property in Exhibit 34 was \$12,085<sup>23</sup> and the average sale price per acre of the alleged comparable property in Exhibit 35 was \$11,549 per acre.<sup>24</sup> The Taxpayer also asserted that alleged comparable property 3 supported her opinion of value.

Alleged comparable property 3 consisted of 9.71 acres of unimproved land and sold in 2010 for \$120,000. The Taxpayer asserted that this sale at approximately \$12,000 per acre further supported her assertions.

The Taxpayer asserted that there was nothing in law or directives from the Department of Revenue requiring the County Assessor to value the first acre of farm home site at a value greater than the average sale price of agricultural land or horticultural land.

Tim Ederer, an appraiser for the **Sarpy** County Assessor's Office, testified that he used a model to calculate the value of the Subject Property's farm home site and farm site. He testified that he used the sales of 15 properties that he determined were not subject to any improper

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<sup>20</sup> See, E34-39.

<sup>21</sup> See, E34.

<sup>22</sup> See, E35.

<sup>23</sup>  $\$307,500 - \$186,288 \text{ improvement} = \$121,212 / 10.03 \text{ acres} = \$12,085 \text{ (rounded)}$ .

<sup>24</sup>  $\$475,000 / 41.13 \text{ acres} = \$11,549 \text{ (rounded)}$ .

influence to determine a base value for the first acre of rural residential property.<sup>25</sup> Ederer included rural residential properties, properties located in rural subdivisions, and properties located near more developed areas in the same market area, but gave properties located in rural subdivisions, and properties located near more developed areas a positive adjustment of 10% to 30%.<sup>26</sup> A scatter graph contained in evidence indicates that the smaller the area of a parcel the greater the per acre value the parcel demands in the open market.<sup>27</sup> Ederer testified that it was inappropriate to take the average sale price of properties consisting of multiple acres to derive the actual value of a single acre, because the actual value of an acre of property decreases as the total area of a parcel increases. Ederer asserted that the sale of a single acre of rural residential property would have a higher per acre actual value than a sale of a multiple acre property.

The Commission notes that the sale of alleged comparable property 3 in 2010 for \$120,000 supports the County Assessor's assessed value for the Subject Property in tax year 2010 of \$127,402. The Commission further notes that using the Taxpayer's \$9,940 per acre the expected sale price for the 2010 sale would be \$96,517.40, approximately 20% or \$23,482.60 too low. Additionally, the Commission notes that if the Taxpayer's \$9,940 was used to predict the sale price of the alleged comparable property in E34 the expected sale price of \$99,698.20 is only 82% of the actual sale price or \$21,513.80 too low. Additionally, Taxpayer also testified that the buyer demolished the residence on the alleged comparable property in Exhibit 35 and constructed a residence worth over \$500,000.<sup>28</sup> The buyer would have adjusted down the sale price of the alleged comparable property to account for the costs associated with demolition of the residence.

The Taxpayer asserted that the alleged comparable properties in Exhibits 34 and 35 sold together, and the buyer paid a premium to obtain both lots. Even considering both alleged comparable 1 and alleged comparable 2 as a single sale, the Taxpayer's \$9,940 per acre would have indicated a sale price of \$508,530, only 85% of the actual sale price and approximately \$86,781.60 too low.

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<sup>25</sup> See, E10:5.

<sup>26</sup> See, E10:6.

<sup>27</sup> See, E10:5.

<sup>28</sup> See also, E35.

Further, Ederer's testimony and model indicates that the principle of diminishing returns applies to rural residential properties. The Taxpayer's opinion of value did not account for the effect of this commonly accepted appraisal principle.

"Graphical analysis can help the appraiser discern systematic relationships in land values, which can then be incorporated into valuation schedules and adjustment factors. In general, sale price per unit is the dependent variable and should be depicted on the vertical (y) axis of the graph. Any other variable for which data are available should be selected as the independent variable and represented on the horizontal (x) axis.

"One variable of particular interest is the number of units, that is, the number of square feet, front feet or buildable units. Often there is a systematic negative relationship between the number of units and sale price per unit: The greater the number of units, the lower the price per unit. At least up to a point."<sup>29</sup>

When the sales were graphed by the County Assessor they show that as the size of a sold parcel increased it's per acre sale price declined. The trail of green triangles that represents a line through the data points was developed after several tries to obtain a best fit.

Valuation is not an exact science.<sup>30</sup> There is evidence to support the determinations of the County Assessor that sites contributed value on a sliding scale.

The Commission finds that there is not clear and convincing evidence that the County Assessor's value for the farm home site and farm site associated with the Subject Property was unreasonable or arbitrary.

## **2. Wasteland**

The Taxpayer also asserted that the County Assessor had inappropriately identified Waste Land located on the Subject Property as Timber Land. The Taxpayer provided pictures of the disputed areas which support her testimony that the ground consists of rocky soils, large boulders, and steep grade. She described the area as a ravine and testified that there is no timber

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<sup>29</sup> *Property Appraisal and Assessment Administration*, The International Association of Assessing Officers (1990) p. 185.

<sup>30</sup> *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

that could be harvested from the area. She specifically asserted that the area designated as 8100 and 4113 on Exhibit 7, page 1 should be classified as Waste Land instead of Timber 1 and Timber 2.

Jarel Vinduska, an individual familiar with the Subject Property, possessing a degree in natural resources from UNL, with experience in logging, excavating, and agriculture and horticulture, testified that the areas of the Subject Property designated as 8100 and 4113 had no economic value for agricultural or horticultural production. He asserted that in the past the areas had contained natural grass that were used to pasture livestock, but over grazing resulted in erosion and loss of the natural grasses. Vinduska described the cedar trees that cover the area as a weed with no economic use. He testified that the fire prevention restricted the development of useable hardwood trees.

Vinduska asserted that these portions of the Subject Property contained steep slopes exceeding 20%.<sup>31</sup> He opined that it would not support hunting because of the difficulty in navigating the terrain, and could not be used in conjunction with recreational use of a nearby river because the Subject Property lacked access.

Dan Pittman, the County Assessor, testified that he inspected the disputed portion of the Subject Property and that the current assignment of Wasteland and Timberland constituted his opinion. He asserted that the assignment was made consistent with Department of Revenue Rules and Regulations. He indicated that soil type defined as 8100 (e) indicates a limited soil depth and potential for cultivation because of erosion and soil type 4113 (s) indicates shallow soil.<sup>32</sup> Pittman asserted that Timberland is more valuable than Wasteland.

Wasteland is a subclass of agricultural property.<sup>33</sup> “Wasteland includes land that cannot be used economically and are not suitable for agricultural and horticultural purposes.”<sup>34</sup> Streambeds, banks, and deep gullies are types of wasteland.<sup>35</sup> Land may be Waste even though improvements to the land, including land shaping, revegetation, or drainage, may lead to the

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<sup>31</sup> See, E41 (topographical map).

<sup>32</sup> See, E54.

<sup>33</sup> See, 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>34</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>35</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).



economic use of the property.<sup>36</sup> If a property is restored to a recreational use it is no longer wasteland.<sup>37</sup>

“Timberland and Forestland is land which is wooded by nature or humans and consisting of a dense growth of trees and underbrush such that it is not suitable for grazing.”<sup>38</sup> Timbered land, where grazing occurs, is considered timbered grass land.<sup>39</sup> Stands of trees, whether natural or planted, where grazing is not practiced or possible is considered Forestland and Shelterbelt Areas.<sup>40</sup>

Vinduska asserted that the land was comprised of streambeds, banks, and deep gullies and that there was no other economical use for the land. The evidence indicates that the disputed areas lie near agricultural land and horticultural land. The Taxpayer provided aerial soil maps of the parcel,<sup>41</sup> and topographical maps of the parcel.<sup>42</sup> The Taxpayer additionally provided photographs of the asserted Wasteland.<sup>43</sup>

Nebraska law requires that the real property can only fit in one class or subclass. Nebraska statutes require that the properties within a subclass have similar characteristics that are not typically found outside of that subclass.<sup>44</sup> It is therefore imperative to identify the common characteristics identified as “typical” of the subclass and place the real property in the class most suited for the characteristics.

“Wasteland includes land that cannot be used economically and are not suitable for agricultural and horticultural purposes.”<sup>45</sup> Streambeds, banks, and deep gullies are types of Wasteland.<sup>46</sup> The uncontroverted testimony at the hearing indicates that the disputed areas of the Subject Property have no economic use for agricultural or horticultural purposes.

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<sup>36</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>37</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>38</sup> 350 Neb. Admin. Code, ch. 14 §002.29 (03/09).

<sup>39</sup> 350 Neb. Admin. Code, ch. 14 §004.04G (03/09).

<sup>40</sup> 350 Neb. Admin. Code, ch. 14 §004.04G (03/09).

<sup>41</sup> See, E6 and E7.

<sup>42</sup> See, E41.

<sup>43</sup> See, E55.

<sup>44</sup> Neb. Rev. Stat. §77-103.01 (Reissue 2009).

<sup>45</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>46</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

The Commission finds that the disputed areas of the Subject Property are not timberland because timberland is defined as land that cannot be grazed because of overgrowth of trees and brush.<sup>47</sup> In this case it is not the overgrowth of trees, but the topography of the Subject Property including steep ravines and rocky ground that makes the property unsuitable for cultivation and grazing.<sup>48</sup> The common typical characteristic that defines these areas of the Subject Property is not the trees that are growing on the banks, on the sides of the steep slopes, in the ravine, or through the rocks, but the steep slopes, ravine, and rocks themselves.

The Commission finds that areas of the Subject Property that area designated as soil types 8100 and 4113 should be classified as wasteland because they have no economical or actual agricultural or horticultural use, and are in conjunction with areas of the Subject Property used for agricultural and horticultural purposes.

The property record card for the Subject Property indicates that 5.75 acres of soil types 8100 and 4113 located on the Subject Property were assessed as something other than wasteland.<sup>49</sup> The Commission finds that these 5.75 acres should also be assessed as wasteland at \$80 per acre for a total actual value of the 5.75 acres of \$460.

The Commission finds that total assessed value for the Subject Property's land component is \$91,965.<sup>50</sup> The County Board determined improvement value of the Subject Property in this case was undisputed at \$158,864. The Commission finds that the total assessed value of the Subject Property should be \$250,829.<sup>51</sup>

## 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 clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

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<sup>47</sup> 350 Neb. Admin. Code, ch. 14 §002.29 (03/09).

<sup>48</sup> See, E55.

<sup>49</sup> E5:4.

<sup>50</sup> See, E5:4-5. All soil types 8100 and 4113 valued at \$80 per acre.

<sup>51</sup> \$91,965 (land) + \$158,864 (improvements) = \$250,829 actual value.

For all of the reasons set forth above, the determination of the County board is Vacated and Reversed.

## VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Sarpy County Board of Equalization determining the value of the Subject Property for tax year 2011 is vacated and reversed.<sup>52</sup>
2. The assessed value of the Subject Property for tax year 2011 is:

Land	\$91,965
<u>Improvements</u>	<u>\$158,864</u>
Total	\$250,829

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy 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 2011.
7. This Decision and Order is effective for purposes of appeal on **October 3, 2014**.

Signed and Sealed: **October 3, 2014**

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Nancy J. Salmon, Commissioner

SEAL

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

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<sup>52</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 of Equalization at the protest proceeding.

**PRESIDING HEARING OFFICER THOMAS D. FREIMUTH CONCURRING IN PART AND DISSENTING IN PART:**

I concur with Commissioner Salmon’s decision to reverse the Sarpy County Board’s determination based on the assessment of 5.75 acres as wasteland rather than timberland, and that the actual value of the Subject Property’s agricultural land component for tax year 2011 is \$22,365 rather than \$23,822.

I would further find that the County’s model for determining the valuation of the Subject Property’s 1<sup>st</sup> acre farm home site and the .76 acre farm site is arbitrary and unreasonable, and that the best evidence of the value of these site acres is the \$35,700 determination rendered by the County Board’s private-sector Referee for tax year 2011.<sup>53</sup> Therefore, I would find that the actual value of the Subject Property for tax year 2011 is \$216,929.<sup>54</sup>

**I. OVERVIEW**

Following is a chart that sets forth the background of this 2011 appeal by the Taxpayer:<sup>55</sup>

	Assessor Notice Value	Taxpayer Protest Value	Referee Value	Board Value
Ag Land	\$24,197	\$16,506	\$24,197	\$23,822
1st Acre Home Site	\$62,000	\$9,940	\$30,000	\$62,000
.76 Acre Farm Site	\$7,600	\$7,554	\$5,700	\$7,600
Residence	\$158,864	\$155,000	\$158,864	\$158,864
Total	\$252,661	\$189,000	\$218,761	\$252,286

The Taxpayer does not dispute the contribution to value made by the residence. The contention of the Taxpayer is that the contribution to value by the one acre farm home site and the .76 acre farm site is excessive, and that some of the acres classified as timber should be classified as waste land.

<sup>53</sup> E4:1.

<sup>54</sup> \$22,365 (Ag Land) + \$30,000 (1<sup>st</sup> Acre Home Site) + \$5,700 (.76 Acre Farm Site) + \$158,864 (Residence) = \$216,929.

<sup>55</sup> See, E1.

There is a single residence, shed, and hay shed spread over a total of 1.76 farm home site and farm site acres. For purposes of analyzing the assessment and taxation of “site” acres in the special valuation and agriculture context for the 2011 tax year at issue, Nebraska Statutes section 77-1359 (1) provides that “agricultural land and horticultural land means a parcel of land, **excluding any building or enclosed structure and the land associated with such building or enclosed structure located on the parcel.**”<sup>56</sup> Accordingly, because the 1.76 “site” acres are not agricultural and horticultural land, they are assessed at 100% of actual value (as opposed to 75% of actual value in the case of agricultural or horticultural land).<sup>57</sup>

In addition to Nebraska Statutes section 1359(1) referenced above, section 1359(3) and 1359(4) also govern the treatment of farm home site and farm site property. These subparts of section 1359 provide as follows:

- (3) Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road; and
- (4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site.<sup>58</sup>

In applying Section 1359 for 2011 assessment purposes, the County Assessor and the County Board relied upon the County Assessor’s Rural Land Model found at Exhibit 10 to value the Taxpayer’s one acre farm home site and the .76 acre farm site.<sup>59</sup> As indicated in the chart above, the County determined that the value of the one acre site amounted to \$62,000 and the value of the .76 acre site amounted to \$7,600, thereby rejecting the referee’s recommendation.<sup>60</sup>

The County’s Rural Land Model set forth at Exhibit 10 includes seven pages of charts and graphs. The application of the Model is explained by the County Assessor’s Office in Exhibit 12, which is entitled “Standard Operating Procedures...Rural Site Valuation Non-Ag Other Use” (referred to herein as “Rural Site SOP”). The County’s Rural Site SOP at page 2 of Exhibit 12 provides as follows with respect to tax year 2011: (1) the Primary Acre first acre farm home site

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<sup>56</sup> Neb. Rev. Stat. §77-1359 (1) (Reissue 2009) (emphasis added).

<sup>57</sup> See, Neb. Rev. Stat. §77-201 (Reissue 2009).

<sup>58</sup> Neb. Rev. Stat. §77-1359 (Reissue 2009).

<sup>59</sup> See, E1:1; E2; E10.

<sup>60</sup> E5:4.

is valued at \$62,000; (2) Secondary “site” acres two through four are valued at \$10,000 per acre; and (3) Residual site acres beyond the fourth acre are valued at \$6,200 per acre.

## II. FIRST ACRE FARM HOME SITE AND FARM SITE LEGISLATIVE HISTORY

In order to understand the assessment of the first acre farm home site and farm site throughout Nebraska for property tax purposes, I believe it is useful to review recent legislative history regarding Nebraska Statutes section 1359.

### A. **L.B. 808: Effective date January 1, 2007**

1. **Language:** Inserted word "parcel" in Nebraska section 1359 (1), in an effort to apply “primarily used” portion of this subsection to the entire parcel. Also added “commercial production” language in new subsection 1359(2).
2. **Purpose:** According to the Revenue Committee’s statement dated February 2, 2006, the purpose of L.B. 808 was to limit the use of special valuation (a/k/a “Greenbelt”) status, in order to prevent grant of preferential agricultural tax treatment to taxpayers not engaged in commercial farming. As a part of this limitation effort, it appears the Legislature intended to combat perceived abuse in the case of trophy homes built on acreages that received the agricultural and horticultural discount for portions of the acreage that did not include the farm home site. Additionally, although not directly relevant to the Taxpayer’s appeal, L.B. 808 eliminated the burdensome recapture requirement that required assessors to keep two books on special value property, thereby possibly enhancing grant of valid special use applications.
3. **Outcome:** Hundreds of revocations of special valuation status by the Lancaster County Assessor, which led to a review of 501 revocation protests by the Lancaster County Board of Equalization (“BOE”).<sup>61</sup> The Lancaster County BOE overrode the Lancaster County Assessor on scores of these revocations in the case where the taxpayer maintained a Farm Services Agency (FSA) number and filed a Schedule F (i.e., farm business) for income tax purposes.<sup>62</sup> Subsequently, relying on the modification of section 1359 by L.B. 808 and the legislative history

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<sup>61</sup> See, Revenue Committee Hearing Transcript, L.B. 777, February 20, 2008, pages 23 – 27.

<sup>62</sup> *Id.*

relating thereto, the Nebraska Supreme Court upheld the Tax Equalization and Review Commission's reversal of the Lancaster County BOE's decisions with respect to several of these cases.<sup>63</sup>

4. **Note:** The debate on this legislation began in 2005 pursuant to the introduction of L.B. 407, at a time when residential valuations were increasing significantly pre-Great Recession (low rates, anyone qualifies) and just prior to record-setting growth in the valuation of agricultural land.

**B. 2008 L.B. 777: Effective date January 1, 2009**

1. **Language:** Inserted following highlighted language in Nebraska Statutes section 1359(1), in order to address the situation triggered by the passage of L.B. 808 referenced above that involved the disqualification of scores of whole parcels from special valuation status:

Agricultural land and horticultural land means a parcel of land, **excluding any building or enclosed structure and the land associated with such 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.

2. **Outcome:** Sarpy County "first acre" dispute whereby the County Assessor's Rural Land Model used \$64,000 as first acre farm home site valuation in 2009 and \$62,000 in 2010. According to page 32 of the 2010 Reports & Opinions of the Property Tax Administrator for Sarpy County, there were 837 rural improved parcels in the County in tax year 2010, all of which were apparently subject to the Rural Land Model.

### III. VALUATION

The Taxpayer contends that the County Assessor's Rural Land Model found at Exhibit 10 is arbitrary or unreasonable because it contains alleged comparables that are dissimilar to the Subject Property. More specifically, the Taxpayer's appeal form submitted to the Commission states that the County's Rural Land Model uses comparables "which are not 'Agricultural' and

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<sup>63</sup> *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 758 N.W.2d 363 (2008).

therefore misrepresentative of true market value.”<sup>64</sup> The Taxpayer also indicated that two sales from Lienemann’s subdivision used by the County to develop its Rural Land Model were of particular concern for comparability purposes. This Commissioner agrees with the Taxpayer for the reasons discussed below.

### **A. Extrapolation**

The County’s Appraiser and assessment material indicated that there are no sales in Sarpy County that represent the typical rural residential parcel, so the County Assessor’s office developed the 2011 Rural Land Model to estimate the contribution of value of acres of land used or to be used as a farm home site or farm site.<sup>65</sup> The two sales referenced by the Taxpayer from Lienemann’s subdivision used by the County to develop its Rural Land Model include a 1.79 unimproved acre parcel and a 1.92 acre unimproved parcel.<sup>66</sup>

The 1.79 acre unimproved parcel sold for \$110,000 on September 5, 2008, which amounts to \$61,453 per acre ( $\$110,000/1.79$  acre).<sup>67</sup> The County’s Rural Land Model makes several references to this \$61,453 per acre value in charts, tables and graphs.<sup>68</sup> Of course, it is noted that this \$61,453 acre amount is close to the Rural Land Model’s \$62,000 first acre valuation applied under Nebraska Statutes section 1359(3) throughout all of Sarpy County.<sup>69</sup>

The 1.92 acre Lienemann’s subdivision unimproved parcel, on the other hand, sold for \$97,000 on June 29, 2009, or \$50,653 per acre ( $\$97,000/1.92$  acre).<sup>70</sup> Similar to the use of the 1.79 acre parcel referenced in the previous paragraph, the County’s Rural Land Model makes several references to \$50,653 per acre in charts, tables and graphs.<sup>71</sup>

It is further noted that generally accepted mass appraisal techniques require assessors to “[l]ook for differences between the comparable sale properties and the subject property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the

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<sup>64</sup> See, Case File.

<sup>65</sup> E3:5.

<sup>66</sup> E10:3; E10:6.

<sup>67</sup> E10:3.

<sup>68</sup> E10:3; E10:4; E10:5; E10:7.

<sup>69</sup> E10:4; E10:5; E12.

<sup>70</sup> E10:3.

<sup>71</sup> E10:3; E10:4; E10:5; E10:7.



subject property or eliminate that property as a comparable.”<sup>72</sup> Page 6 of County Exhibit 10 references the two Lienemann’s subdivision sales as they relate to the Rural Land Model in terms of adjustments. As indicated by the “1.3” in the column labeled “MKT ADJ” of Exhibit 10, page 7, these sales were adjusted up by 30% based on the Rural Land Model.

This Commissioner understands that the County Assessor’s Appraiser indicated that the County’s Rural Land Model did not use the two sales from Lienemann’s subdivision or other sales located in Sanitary Improvement Districts or close to cities to set its “base” values. Nonetheless, the County Assessor’s Appraiser indicated that the County’s Rural Land Model used the two sales from Lienemann’s subdivision for “calibration” purposes in supporting its “base” \$62,000 first acre site value.

Because there are no sales in Sarpy County that represent the typical one acre rural residential parcel, the County’s Rural Land Model uses the process of extrapolation to determine its base \$62,000 first acre site value. *The Dictionary of Real Estate Appraisal* defines the word “extrapolation” as follows: “Calculating or estimating a quantity beyond the range of the data on which the calculation for estimate is based; projections that presume a continuation of observed trends, patterns, or relationships.”<sup>73</sup>

The County Appraiser’s testimony illustrates the use of extrapolation in connection with the development of the Rural Land Model’s base \$62,000 first acre site value. For instance, referencing graphs contained in the Rural Land Model set forth at Exhibit 10, pages 4 and 5, Commissioner Salmon’s opinion states that when the sales were graphed by the County Assessor that “[t]he trail of green triangles that represents a line through the data points was developed after several tries to obtain a best fit.”

The Rural Land Model’s use of extrapolation to determine its base \$62,000 first acre agricultural land valuation throughout Sarpy County is arbitrary and unreasonable because the base value is supported by the \$61,453 per acre value associated with the 1.79 Lienemann’s subdivision sale on September 5, 2008.<sup>74</sup>

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<sup>72</sup> *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at 302.

<sup>73</sup> *The Dictionary of Real Estate Appraisal*, 4<sup>th</sup> Edition, The Appraisal Institute, 2002, at 107.

<sup>74</sup> It is noted that this sale occurred just prior to onset of the Great Recession when property values were increasing at historically high rates.

## **B. Dissimilar Comparable Sales – Location**

The Taxpayer asserted that it is unreasonable and arbitrary to use the Lienemann's subdivision sales as comparables to establish Rural Land Model values because they are located in an area of Sarpy County that is significantly different than the Subject Property area. In this regard, the testimony indicated that the Lienemann's subdivision is in close proximity to the Shadow Lake Towne Center, which is a new mall development located on the southwest corner of Highway 370 & 72<sup>nd</sup> Street in the Papillion city limits. In contrast, the Subject Property is located several miles from the Shadow Lake Towne Center in the southwestern corner of Sarpy County, which the evidence indicated differs significantly as compared to the Lienemann's subdivision comparables in terms of its rural nature and in terms of proximity to commercial development.

Under Nebraska Statutes section 77-1371, “[c]omparable sales are recent sales of properties that are similar to the property being assessed in significant physical, functional, and **location characteristics** and in their contribution to value.”<sup>75</sup> In addition, guidance issued by the International Association of Assessing Officers (“IAAO”) requires adjustments for location under the sales comparison approach.<sup>76</sup>

As discussed above, page 6 of County Exhibit 10 references the two Lienemann's subdivision sales as they relate to the Rural Land Model. As indicated by the “1.3” in the column labeled “MKT ADJ” of Exhibit 10, page 6, these sales were adjusted up by 30%. Under the authority cited in the previous paragraph, this Commissioner finds that it is arbitrary and unreasonable to use these sales that are so close to vibrant commercial and residential development in Papillion for Rural Land Model calibration purposes to support the assessment of site acres several miles away in rural southwestern Sarpy County.

## **C. Dissimilar Comparable Sales – Size**

Physical characteristics in terms of size must be considered under the sales comparison approach.<sup>77</sup> Moreover, *The Appraisal of Real Estate* provides as follows:

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<sup>75</sup> Neb. Rev. Stat. § 77-1371 (2012 Cum. Supp.) (emphasis added).

<sup>76</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at 179.

<sup>77</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at 169-79, 205.

Size differences can affect value and are considered in site analysis. Reducing sale prices to consistent units of comparison facilitates the analysis of comparable sites and can identify trends in market behavior. Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase. The functional utility or desirability of a site often varies depending on the types of uses to be placed on the parcel. Different prospective uses have ideal size and depth characteristics that influence value and the highest and best use.<sup>78</sup>

The evidence shows that the 1.92 acre and 1.79 acre Lienemann subdivision sales used to calibrate the County's Rural Land Model are closest in size to one acre for purposes of Nebraska Statutes section 1359(3). In other words, because sales of one acre farm home sites do not exist in Sarpy County, the Rural Land Model effectively uses the larger Lienemann's sales without adjustment (see discussion above) to support its base \$62,000 first acre valuation through the process of extrapolation.

This Commissioner finds that such extrapolation is unreasonable and arbitrary, especially when using sales of larger parcels such as those from the Lienemann's subdivision in a commercially vibrant area to effectively value site acres several miles away in rural southwestern Sarpy County.

#### **D. Dissimilar Alleged Comparable Sales – Zoning Differences**

*The Appraisal of Real Estate* provides as follows for purposes of the sales comparison approach:

In the valuation of vacant land, zoning is one of the primary determinants of the highest and best use of the property because it serves as the test of legal permissibility. Thus, zoning or the reasonable probability of a zoning change is typically a primary criterion in the selection of market data. When comparable properties with the same zoning as the subject are lacking or scarce, parcels with slightly different zoning but a highest and best use similar to that of the subject may be used as comparable sales. These sales may have to be adjusted for differences in utility if the market indicates that this is appropriate. On the other hand, a difference in the uses permitted under two zoning classifications does not necessarily require an adjustment if the parcels have the same use.<sup>79</sup>

Based on the evidence, it is unclear whether the County sufficiently considered zoning in connection with the development and use of its Rural Land Model. I find, however, that the

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<sup>78</sup> *The Appraisal of Real Estate*, 13<sup>th</sup> Ed., Appraisal Institute, 2008, at 212.

<sup>79</sup> *The Appraisal of Real Estate*, 13<sup>th</sup> Ed., Appraisal Institute, 2008, at 341 – 342.

Taxpayer did not provide sufficient evidence to quantify the impact of zoning for valuation or equalization purposes.

#### **E. Consideration of Site Valuation Alternatives**

The International Association of Assessment Officers' "Standard on Mass Appraisal of Real Property" provides as follows:

The sales comparison approach is the primary approach to land valuation and is always preferred when sufficient sales are available. **In the absence of adequate sales, other techniques used in mass appraisal include allocation, abstraction, anticipated use, capitalization of ground rents, and land residual capitalization.**<sup>80</sup>

This IAAO Mass Appraisal Standard applies to the instant case because the County's Appraiser testified that there are no sales in Sarpy County that represent the typical farm home site. Consequently, the IAAO Mass Appraisal Standard directs the County to consider alternative techniques such as those listed above.

For example, the IAAO defines the allocation method as follows: "A method used to value land, in the absence of vacant land sales, by using a typical ratio of land to improvement value."<sup>81</sup> There is no evidence that the County utilized the allocation method or other alternatives referenced above for purposes of corroborating its Rural Land Model.

#### **IV. CONCLUSION**

This Commissioner would concur with Commissioner Salmon's decision to reverse the Sarpy County Board's determination based on the assessment of 5.75 acres as wasteland rather than timberland and that the actual value of the Subject Property's agricultural land component for tax year 2011 is \$22,365.

This Commissioner is mindful that County Assessors throughout Nebraska confront attempts by landowners to acquire unjustified discounted property tax treatment under the statutes governing agricultural/horticultural and special valuation property. Respectfully, however, this Commissioner finds that it is arbitrary and unreasonable to apply a model throughout Sarpy

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<sup>80</sup> "Standard on Mass Appraisal of Real Property," International Association of Assessment Officers (Approved 2002 and re-approved in 2011 and 2012) (Emphasis added.).

<sup>81</sup> *Id.*

County that is derived through the use of extrapolation and supported by sales of parcels near vibrant commercial activity without sufficient adjustments.

In the case where it is determined that the County Board's determination is unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.<sup>82</sup> I would find that the best evidence of the value of the Subject Property's 1<sup>st</sup> acre farm home site and .76 acre farm site is the \$35,700 determination rendered by the County Board's private-sector Referee for tax year 2011 in addition to the assessment of 5.75 acres as wasteland rather than timberland.<sup>83</sup> Therefore, I would find that the actual value of the Subject Property for tax year 2011 is \$216,929.<sup>84</sup>

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Thomas D. Freimuth, Commissioner

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<sup>82</sup> See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

<sup>83</sup> E4:1.

<sup>84</sup> \$22,365 (Ag Land) + \$30,000 (1<sup>st</sup> Acre Home Site) + \$5,700 (.76 Acre Farm Site) + \$158,864 (Residence) = \$216,929.