

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Donald Keller,
Appellant,

v.

Keith County Board of Equalization,
Appellee.

Case Nos: 13A 042 & 13A 043

Decision and Order Affirming the
Determinations of the Keith County Board
of Equalization

For the Appellant:

Joshua Wendell,
McQuillan Law Office.

For the Appellee:

Randy Fair,
Keith County Attorney.

These appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property consists of two adjacent parcels located in Keith County. The parcel in Case No. 13A 042 consists of 79.71 acres, with 10.23 acres assessed as agricultural land and horticultural land and 69.48 acres assessed as accretion land.¹ The parcel in Case No. 13A 043 consists of 15.73 acres, with 3.85 acres assessed as agricultural land and horticultural land and 11.88 acres assessed as accretion land.² The legal description and property record card of the Subject Property in Case No. 13A 042 are found at Exhibit 3. The legal description and property record card of the Subject Property in Case No. 13A 043 are found at Exhibit 4.

II. PROCEDURAL HISTORY

The Keith County Assessor (County Assessor) determined that the assessed value of the Subject Property in Case No. 13A 042 was \$113,435 for tax year 2013.³ Donald Keller (the Taxpayer) protested this assessment to the Keith County Board of Equalization (the County

¹ See, E3. This parcel is located in Section 18, Township 13, Range 39 of Keith County.

² See, E4. This parcel is located in Section 19, Township 13, Range 39 of Keith County.

³ See, E1.

Board) and requested an assessed valuation of \$19,130.⁴ The County Board determined that the taxable value for tax year 2013 was \$116,805.⁵

The County Assessor determined that the assessed value of the Subject Property in Case No. 13A 043 was \$20,080 for tax year 2013.⁶ The Taxpayer protested this assessment to the County Board and requested an assessed valuation of \$3,893.⁷ The County Board determined that the taxable value for tax year 2013 was \$21,350.⁸

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits as ordered by the Commission. The Commission held a hearing on November 3, 2014.

Subsequent to the hearing, the Commission raised the issue, *sua sponte*, whether it had jurisdiction over the issues presented at the hearing on the merits. A show cause hearing was held on January 21, 2015, to determine over which issues, if any, the Commission had jurisdiction in these appeals. At the hearing, the Commission entered a progression order based upon the parties' agreement to the submission of additional exhibits to establish jurisdiction. On February 6, 2015, the Commission received Exhibit 18. The exhibit indicates that: (1) the Appellant timely filed applications to obtain special valuation for the Subject Property for tax year 2013; (2) the applications were timely denied by the County Assessor; and (3) the Appellant timely appealed the County Assessor's determinations to the County Board. The appeal forms filed with the Commission and contained in the case files, together with the documents contained in Exhibit 18, indicate that the Appellant timely appealed to the Commission the County Board's determinations that the Subject Property should not receive special valuation.

Additionally, the documents contained in Exhibit 18 also indicate that the Appellant timely protested the assessed values of the Subject Property to the County Board. The documents contained in the Commission's case file, together with Exhibit 18, indicate that the Appellant timely appealed the County Board's determinations of the taxable values of the Subject Property to the Commission.

⁴ See, *id.*

⁵ See, *id.*

⁶ See, E2.

⁷ See, *id.*

⁸ See, *id.*

The Commission finds that it has jurisdiction over whether the Subject Property qualifies for and should receive special valuation, and whether the County Board's determinations of the Subject Property's taxable values were arbitrary or unreasonable.

III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.⁹ 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."¹⁰

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.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 arbitrary or unreasonable.¹² Proof that the order, decision, determination, or action was arbitrary or unreasonable must be made by clear and convincing evidence.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.¹⁴ The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.¹⁵

⁹ See, Neb. Rev. Stat. §77-5016(8) (2014 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).

¹⁰ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

¹¹ *Id.*

¹² Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹³ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁴ 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).

¹⁵ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.”¹⁶ 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.”¹⁷ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹⁸

IV. APPLICABLE LAW

A. Special Valuation

Special valuation means, “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.”¹⁹ Nebraska law establishes a system for valuing agricultural land and horticultural land at a special value which ignores the actual value of the agricultural land and horticultural land for its highest and best use when the highest and best use of the agricultural land and horticultural land is for a purpose or use other than an agricultural or horticultural purpose or use.²⁰ After application for special valuation, and a determination that the real property is agricultural land and horticultural land, the assessed value of the real property must be set at the special value of the real property.²¹

B. Equalization

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”²² Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.²³ The purpose of equalization of

¹⁶ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹⁷ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹⁸ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

¹⁹ See, Neb. Rev. Stat. §77-1343(5) (Reissue 2009).

²⁰ See, Neb. Rev. Stat. §77-1344 (Reissue 2009).

²¹ See, *id.*

²² *Neb. Const.*, Art. VIII, §1.

²³ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.²⁴ In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the Subject Property and comparable property is required.²⁵ Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.²⁶ Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.²⁷ The constitutional requirement of uniformity in taxation extends to both rate and valuation.²⁸ If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”²⁹ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”³⁰

The Nebraska Supreme Court has held that agricultural land and horticultural land is a distinct class of land, and that the Nebraska Constitution does not require equalization between agricultural land and horticultural land and other classes of real property.³¹ The Court has held that it is improper to compare the level of assessed value of agricultural land and horticultural land with the level of assessments of other classes of real property.³²

C. “Agricultural or Horticultural Land”

The term “agricultural land and horticultural land” is a term of art defined by Nebraska statutes.

²⁴ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

²⁵ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

²⁶ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²⁷ *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

²⁸ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

²⁹ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁰ *Id.* at 673, 94 N.W.2d at 50.

³¹ See, *Krings v. Garfield Cty. Bd. Of Equal.*, 286 Neb. 352, 835 N.W.2d 750 (2013) (citing Neb. Const. art. VIII, §1). See also Neb. Rev. Stat. §77-1359 (2014 Cum. Supp.).

³² See, *id.*

Agricultural land 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;...³³

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.³⁴

All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.³⁵ In the context of special valuation, “[a]gricultural or horticultural land” means that land as defined in section 77-1359.³⁶

D. Parcel

Parcel means, “a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.”³⁷

E. “Primarily Used”

In *Agena v. Lancaster County Board of Equalization*, the Nebraska Supreme Court held that when determining how a parcel of agricultural land and horticultural land is primarily used, an assessment official must assess the parcel based upon the primary use of the entire parcel and not independently assess the uses of the various portions of the parcel.³⁸ The *Agena* decision was followed by legislation in 2008 and 2012, both amending the definition of “agricultural land and horticultural land” in Section 77-1359.³⁹ The 2008 legislation excluded “any building or enclosed structure and the land associated with such building or enclosed structure located on the parcel” from the “primarily used” analysis.⁴⁰ However, the 2012 legislation revised what is

³³ Neb. Rev. Stat. §77-1359 (1) (2014 Cum. Supp.).

³⁴ Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

³⁵ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

³⁶ Neb. Rev. Stat. §77-1343 (Reissue 2009).

³⁷ Neb. Rev. Stat. §77-132 (Reissue 2009).

³⁸ *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 862-863, 758 N.W.2d 363, 373 (2008).

³⁹ See 2008 Neb. Laws, LB777, § 1, and 2012 Neb. Laws, LB750, §1.

⁴⁰ See 2008 Neb. Laws, LB777, § 1, amending Neb. Rev. Stat. §77-1359(1) (Reissue 2009).

excluded from the “primarily used” analysis so that only the “land associated with a building or enclosed structure located on the parcel” is excluded.⁴¹

F. Accretion Land

“Accretion Land is the increase of land by the gradual deposit of water borne solid materials. Accretion land areas may vary in size as the associated body of water either raises or lowers, or as a stream or river changes its channel. It is the opposite of erosion.”⁴² Accretion land includes, “land that has been formed by alluvial deposits associated with a body or stream of water.... Accretion land can be classified into any agricultural use category.”⁴³

G. Recreational Parcel

The parcel type Recreational means, “all parcels of real property predominately used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. Some of the uses would include fishing, hunting, camping, boating, hiking, picnicking, and the access or view that simply allows relaxation, diversion and entertainment.”⁴⁴

H. Wasteland

Wasteland includes land that cannot be used economically and are [sic] not suitable for agricultural or horticultural purposes. Such land types include but are not limited to, blowouts, riverwash (recent unstabilized alluvial deposits), marshes, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. To qualify for wasteland the land must be lying in or adjacent to and in common ownership or management with land used for agricultural or horticultural purposes. Some of these areas could be developed or reclaimed for some beneficial use by land shaping, revegetation, drainage, or possibly other special practices. Until they are reclaimed, developed, or restored to agricultural production or recreational use, they should be classified as wasteland.⁴⁵

V. SUMMARY OF THE EVIDENCE

Cheryl Schiel, County Assessor, testified that accretion land in Keith County has a higher value for recreational uses than if used for agricultural or horticultural purposes. She indicated

⁴¹ See 2012 Neb. Laws, LB750, § 1, amending Neb. Rev. Stat. §77-1359(1) (2014 Cum. Supp.).

⁴² Title 350, Neb. Admin. Code, ch. 14, §002.02. Rev. 3/15/09.

⁴³ Title 350, Neb. Admin. Code, ch. 14, §004.05. Rev. 3/15/09.

⁴⁴ Title 350, Neb. Admin. Code, ch. 10, §001.05E. Rev. 3/15/09.

⁴⁵ Title 350, Neb. Admin. Code, ch. 14, §002.54. Rev. 3/15/09.

that some accretion acres were granted special valuation for tax year 2013 and that all accretion acres either received special valuation and were assessed at \$255 per acre (75% of the market value of grassland categorized as 4G1), or were not part of agricultural land and horticultural land and were valued as recreational land at \$1,585 per acre, or market value.⁴⁶ A synopsis of the County Assessor's special value model is in evidence at Exhibit 16, page 21.

The County Assessor first began granting accretion acres special valuation in 2007. In 2012, all accretion acres in the county were reviewed to determine whether they qualified for special valuation. The County Assessor sent disqualification letters to owners of accretion acres that the County Assessor determined were not qualified to receive special valuation but had qualified to receive special valuation in prior years. During this process, she reviewed every parcel that included accretion acres in Keith County.

Schiel testified that her determinations were based first on a comparison of the number of deeded acres to the number of accretion acres per parcel.⁴⁷ In instances where the number of deeded acres exceeded or were within 20% of the number of accretion acres on the parcel, the County Board approved special valuation. In instances where the parcel was part of a larger agricultural operation consisting of contiguous parcels, then the ratio of accretion acres to agricultural acres was developed by combining the number of acres of all of the contiguous parcels under common ownership that were part of the same agricultural operation.

If the number of accretion acres exceeded the number of deeded acres, then Schiel examined the actual use of both the accretion acres and the deeded acres on the parcel. Schiel testified that there are some parcels in Keith County where the accretion acres were used for agricultural or horticultural purposes. If a majority of the acres on the parcel were used for agricultural or horticultural purposes, whether the acres were accretion acres or deeded acres, then special valuation was approved for the parcel.

Schiel determined the area of accretion acres located on the real property used for agricultural or horticultural purposes by either physically inspecting the property or by reviewing maps from the United States Department of Agriculture, Farm Service Agency (the FSA), and referring to the Natural Resources District (the NRD) for a determination of the amount of accretion acres. She testified that if the number of deeded acres exceeded the number of

⁴⁶ See, E7:1 (sales used by the County Assessor to determine the market value of accretion acres).

⁴⁷ For purposes of this Order, "deeded acres" refers to the non-accretion acres on a parcel of property to distinguish them from the accretion acres on that same parcel.

accretion acres on a parcel a physical inspection was not completed for the parcel but that she annually reviewed the NRD and FSA office maps for each parcel. She asserted that she only asked owners about recreational uses on the accretion acres if she made a determination that the accretion acres on the parcel were not primarily used for agricultural or horticultural purposes. She stated that the non-agricultural influences were recreational, including hunting, fishing, and general outdoor enjoyment. Schiel undertook an additional review of accretion acres in 2013 to determine if anything had changed on parcels receiving special valuation following the 2012 review. The 2013 review resulted in her determination to disqualify additional parcels from special valuation.⁴⁸

Schiel generally valued special valuation accretion acres at the same assessed value as grassland categorized as 4G acres. She asserted that 4G soils have similar production capabilities as accretion acres in Keith County. If a review of a parcel indicated that the accretion land was used as irrigated cropland or dry cropland then the accretion land was valued respectively as either irrigated or dry. She asserted that accretion acres that were not used for agricultural or horticultural purposes were not valued based on the soil type or capabilities.

Schiel asserted that there has not been an agricultural market for accretion acres since the 1990's, when owners began removing the accretion acres associated with larger parcels of agricultural land and horticultural land, placing the accretion acres in separate parcels, and selling the accretion acres while maintaining ownership of the remaining agricultural land and horticultural land. Schiel indicated that she reviewed the methodology of other counties to support her determination of the special valuation of accretion acres. She asserted that all owners of parcels of agricultural land and horticultural land in Keith County containing accretion acres had applied for and were granted special valuation for any associated accretion acres, and that no accretion acres were assessed at 75% of actual value. Schiel testified that she did not consider any net cash rents for accretion acres when determining their actual value or special valuation.

Schiel also asserted that subsequent to her assessment of the Subject Property she determined that portions of the Subject Property were not owned by the Taxpayer. She asserted that the channel of the Platte River crossed onto the interstate right of way owned by the State of

⁴⁸ See, E11:1.

Nebraska Department of Roads.⁴⁹ She asserted that accretion acres adjacent to the area where the channel crossed onto the interstate right of way were owned by the State of Nebraska Department of Roads and not the Taxpayer.

Donald Keller, owner of the Subject Property, testified that he purchased the Subject Property in 2010 for \$205,000, or \$1,800 per acre, and that a land survey was completed in connection with that sale.⁵⁰ The Subject Property was assessed at \$16,235 for tax year 2010. In 2011, he received a notice of valuation change and a notice of denial of special valuation for the Subject Property. He testified that his application for special valuation every year since 2011 has been consistently denied.

Keller asserted that the County Assessor's method for determining whether real property is agricultural land and horticultural land results in property owners who are not residents of the County paying more taxes than residents. He asserted that his review of the assessed value of accretion acres indicated that people who reside in Keith County are assessed at \$255 per accretion acre, but nonresidents of Keith County are assessed at \$1,585 per accretion acre.

Keller testified that only 24 to 25 acres located on the Subject Property are capable of being used for agricultural or horticultural purposes and that these acres were planted in wheat in tax year 2013. In order to prepare these 24 to 25 acres for agricultural and horticultural purposes, Keller removed a large amount of concrete debris and some fencing that was on the Subject Property at the time of purchase. Keller asserted that an additional .5 acres were enclosed by a cattle pen, but were not used in any livestock operation.

Keller testified that he does not make income from the Subject Property from any lease or payment for recreational uses. He personally visits the Subject Property 10 to 12 times per year, and hunts on the land, but he does not lease the Subject Property for hunting. He asserted that the parcel next to the Subject Property is not currently used for agricultural or horticultural purposes, and that hunting is occurring on the property to the East, but these properties are assessed at \$255 per acre and receive special valuation. Keller asserted that the Subject Property was not equalized with similar properties because owners of neighboring properties were using the accretion acres for recreational uses, but the County Assessor had granted special valuation for those accretion acres.

⁴⁹ See, E16:5.

⁵⁰ See, E16:3.

Keller asserted that he owned and maintained all of the accretion acres associated with the Subject Property, and that the State of Nebraska Department of Roads did not own any of the accretion acres.

VI. ANALYSIS

A. Ownership of the Subject Property

During the hearing, the parties disputed the ownership of a portion of one of the parcels in this appeal. Both parties asked the Commission to determine the ownership of this disputed real property. The Commission's subject matter jurisdiction is controlled by statute.⁵¹ The Commission finds that the issue of the ownership of a portion of one of the parcels of the Subject Property is outside the scope of the Commission's subject matter jurisdiction.⁵² The Commission, therefore, does not make a determination on this issue. Additionally, without a clearly recognizable ownership interest in someone other than the parties to these appeals as determined by a judicial body with subject matter jurisdiction over the issue, the Commission finds that the Appellant and the Appellee are the only necessary parties to these appeals.

B. Equalization and Special Valuation

The Commission finds that the issue of whether the Subject Property is agricultural land and horticultural land is determinative of whether the Subject Property qualifies for special valuation and also whether the Subject Property should be equalized with agricultural land and horticultural land.

The Taxpayer asserts that the County Board's determination was arbitrary or unreasonable because it classified the Subject Property differently from substantially similar parcels and valued the accretion land on the Subject Property at 620% more than accretion land on parcels that have been classified as agricultural land and horticultural land and that receive special valuation.⁵³

⁵¹ See, Neb. Rev. Stat. §77-5007(2014 Cum. Supp.).

⁵² See, *id.*

⁵³ See, E3:1 (indicating that the value of accretion acres for recreational purposes is \$1,585); See also, E7 (Keith County Accretion sales supporting the valuation of \$1,585 for recreational purposes); See also, E16:45 (indicating that the special value of an accretion acre is \$255). $\$1,585/\$255 = 6.22$.

The Taxpayer's main concern is the County Assessor's practice of combining small parcels consisting of mainly accretion acres, of which a small portion is used for agricultural or horticultural purposes, with large parcels used almost entirely for agricultural or horticultural purposes, and determining that both parcels considered together constitute agricultural land and horticultural land. The result is that small parcels consisting mostly of accretion acres that are not used for agricultural or horticultural purposes and would not qualify as agricultural land and horticultural land if considered individually are classified as agricultural land and horticultural land when combined with other parcels used mostly for agricultural or horticultural purposes.

Nebraska law provides constitutional and statutory advantages for agricultural land and horticultural land in the assessment of the property. Specifically, agricultural land and horticultural land is assessed at 75% of actual value instead of 100% of actual value.⁵⁴ Additionally, if agricultural land and horticultural land has a higher value for a use other than agricultural or horticultural purposes, the Taxpayer can apply for special valuation of the agricultural land and horticultural land and, upon approval, the value of the land for purposes other than agricultural or horticultural purposes is ignored when calculating the actual value of the agricultural land and horticultural land.⁵⁵ Agricultural land and horticultural land may, therefore, not only receive the advantage of being assessed at 75% of actual value, but the derived assessed value may also be significantly less than the agricultural land and horticultural land would bring on the open market because of special valuation.

The Taxpayer asserts that the Subject Property should receive special valuation, similar to neighboring parcels. A parcel is defined by Nebraska Statute as, "a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section."⁵⁶ The County Board and County Assessor considered multiple areas of real property lying within the same section and taxing district, owned by the same person, but assigned separate real property identification numbers (i.e. parcel numbers) as a single parcel for purposes of determining whether the areas of land constituted agricultural land and horticultural land. The Commission finds that this practice is consistent with Nebraska law.

While the County Assessor's and County Board's decisions to combine parcels when determining whether real property constituted agricultural land and horticultural land is

⁵⁴ See, Neb. Rev. Stat. §77-1359 (2014 Cum. Supp.).

⁵⁵ See, Neb. Rev. Stat. §77-1344 (Reissue 2009).

⁵⁶ Neb. Rev. Stat. §77-132 (Reissued 2009).

statutorily permissible, their tests for determining whether real property constitutes agricultural land and horticultural land based upon a comparison of the number of acres used for agricultural uses and for non-agricultural uses should be examined further. The Nebraska Supreme Court has reviewed previous tests that focused on the ratio of acres used for agricultural or horticultural purposes to acres used for other purposes.⁵⁷

In *Agena v. Lancaster County Board of Equalization*, the Nebraska Supreme Court concluded that the addition of the word “parcel” to the statutory definition of “agricultural land and horticultural land” narrowed the class and required a County Board of Equalization to consider the entire tract of land, including buildings and land associated with buildings, to determine how the parcel was primarily used.⁵⁸ Portions of the *Agena* decision have been superseded by legislative changes.⁵⁹ After *Agena*, the Nebraska Legislature amended the definition of “agricultural land and horticultural land” on two separate occasions.⁶⁰ The amendments retained the word parcel in the definition of “agricultural land and horticultural land,” but excluded certain portions of a parcel from the “primarily used” analysis.⁶¹ The current definition of agricultural land and horticultural land requires the assessing official to ignore any “land associated with a building or enclosed structure located on the parcel[,]” when determining the primary use of a parcel, but to consider all other portions of the parcel.⁶² It is important to note that the Legislature retained the word “parcel” in the definition of agricultural land and horticultural land.

Applicable Rules and Regulations define the term “primarily used” as “the use of the land is mainly agricultural or horticultural.”⁶³ The term “mainly” is not defined in Nebraska law. However, “mainly” is defined elsewhere in relevant part as, “in the principal respect: for the most part: chiefly.”⁶⁴ Regarding the “primarily used” analysis for a parcel, Nebraska law does not make any one factor determinative. Therefore, the determination of whether a parcel is primarily used for agricultural or horticultural purposes must be based on the totality of the

⁵⁷ *Agena v. Lancaster County Board of Equalization*, 276 Neb. 851, 862-863, 758 N.W.2d 363, 373 (2008) (superseded in part by Nebraska Laws 2008, LB777, §1 and Nebraska Laws 2012, LB750, §1).

⁵⁸ See, 276 Neb. 851, 862-863, 758 N.W.2d 363, 373 (2008).

⁵⁹ See, Nebraska Laws 2008, LB777, §1; See also, Nebraska Laws 2012, LB750, §1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See, Neb. Rev. Stat. §77-1359 (2014 Cum. Supp.).

⁶³ Title 350 Neb. Admin. Code, ch 14 §002.56 (03/15/2009).

⁶⁴ *Webster's Third New International Dictionary*, Merriam-Webster, Inc. (2002), p. 1362.

evidence, including any relevant factors. While the ratio of the number of acres of the parcel used for agricultural or horticultural purposes to the number of acres of the parcel used for other purposes is a factor worth consideration, it is not dispositive under this test.

Additionally, the analysis must ignore the highest and best use of the parcel.⁶⁵ Generally, when determining the actual value of real property, the assessor must determine the highest and best use of real property, meaning a use which is legally permissible, physically possible, financially feasible, and maximally productive.⁶⁶ However, to determine if real property is to be classified as “agricultural land and horticultural land” the focus is on the current use and not the highest and best use of the real property.⁶⁷

The Commission finds that to the extent the County Board and County Assessor focused exclusively on the ratio of the number of acres of the parcel used for agricultural or horticultural purposes to the number of acres of the parcel used for other purposes or the ratio of the number of deeded acres to the number of accretion acres, the County Board and County Assessor applied a too-narrow test to determine how the parcel was “primarily used.” The Commission determines de novo if there is clear and convincing evidence that the County Board’s determinations that the Subject Property did not constitute “agricultural land and horticultural land” are arbitrary or unreasonable. There are no buildings or enclosed structures located on the Subject Property.⁶⁸ Therefore, the Commission must consider the entire parcel in its “primarily used” analysis.

In the present appeal, each parcel of the Subject Property lies in a different section. Therefore, each parcel must be evaluated independently for purposes of the “primarily used” analysis.⁶⁹ The parcel in Case No. 13A 042 consists of 79.71 acres, with no more than 10.23 acres being used for agricultural or horticultural purposes and approximately 69.48 acres of accretion land incapable of being used for agricultural or horticultural purposes and being used primarily for recreational purposes.⁷⁰ The parcel in Case No. 13A 043 consists of 15.73 acres,

⁶⁵ Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

⁶⁶ Appraisal Institute, *The Appraisal of Real Estate*, at 335-36 (14th ed. 2013).

⁶⁷ See, Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

⁶⁸ See, E3 and E4.

⁶⁹ Neb. Rev. Stat. §77-1359 (1) (2014 Cum. Supp.).

⁷⁰ See, E3.

with no more than 3.85 acres used for agricultural or horticultural purposes and approximately 11.88 acres of accretion land incapable of being used for agricultural or horticultural purposes and being used primarily for recreational purposes.⁷¹

The Taxpayer asserted that the accretion acres were being used for an agricultural or horticultural purpose as wasteland and that this use should be considered in a determination of whether the Subject Property constitutes agricultural land and horticultural land. In order to qualify as wasteland, the land must: (1) “[lie] in or adjacent to land in common ownership or management with land used for agricultural or horticultural purposes[;]” (2) lack the capability for economic use in its current state; and (3) be unsuitable for agricultural or horticultural purposes.⁷²

It is undisputed that the accretion acres on the Subject Property are adjacent to acres being used for agricultural or horticultural purposes at all relevant times, and that the accretion acres are unsuitable for agricultural or horticultural purposes. However, accretion acres in Keith County have a significant value for use as recreational land. In fact, the evidence, including the purchase of the Subject Property in 2010, supports the position that accretion acres are worth up to 620% more on the open market for recreational uses than deeded acres on similar neighboring parcels.⁷³ The accretion acres can be used economically and cannot be classified as wasteland.

No persuasive evidence was received in these appeals to prove that either of the two parcels were “primarily used” for agricultural or horticultural purposes. Given that for each parcel of the Subject Property the market value of the acres used for recreational purposes far exceeded the market value of the acres used for agricultural or horticultural purposes, and having considered all other relevant factors, the Commission finds that the Subject Property was not primarily used for agricultural or horticultural purposes. The Commission therefore finds that the Subject Property should be classified and assessed as recreational land.

The Commission finds that based on the totality of the evidence in this case, the County Board’s determinations that the Subject Property did not constitute agricultural land and horticultural land was not arbitrary or unreasonable. The County Board’s determinations that the

⁷¹ See, E4.

⁷² Title 350 Neb. Admin. Code, ch. 14 §002.54 (03/15/2009).

⁷³ See, E3:1 (indicating that the value of accretion acres for recreational purposes is \$1,585); See also, E7 (Keith County Accretion sales supporting the valuation of \$1,585 for recreational purposes); See also, E16:45 (indicating that the special value of an accretion acre is \$255). $\$1,585/\$255 = 6.22$.

accretion acres on the Subject Property did not qualify for special valuation because the Subject Property did not constitute agricultural land or horticultural land are also not arbitrary or unreasonable. Further, it was reasonable for the County Board to determine that since the parcel was recreational land, it should not be equalized with agricultural land and horticultural land in Keith County.

C. Actual Value

The County Assessor and County Board valued portions of the Subject Property used for agricultural or horticultural purposes at 75% of actual value even though the parcel was categorized as recreational land.⁷⁴ All real property that is not exempt from taxation, other than agricultural land and horticultural land, is required to be valued at 100% of actual of value.⁷⁵ The Commission has found no Nebraska law, whether in Statute, Rule and Regulation, or case law permitting the assessment of a parcel that does not qualify as agricultural land and horticultural land to include a portion of the parcel that is assessed at less than 100% of actual value even when that portion of the parcel is used for agricultural or horticultural purposes.

The Commission finds that there is clear and convincing evidence that the County Board's determination of the taxable value of the Subject Property was arbitrary or unreasonable when the taxable value of the Subject Property was not determined to be 100% of its actual value for the entire parcel. However, the Commission may not order an increase in taxable value from the highest taxable value for which notice was given to the Taxpayer in these appeals.⁷⁶ In the present case, there is no evidence that the Taxpayer was given notice of any taxable value higher than \$116,805 in Case No. 13A 042 and \$21,350 in Case No. 13A 043.⁷⁷ The Commission's Rules and Regulations do not allow the Commission to set taxable value of real property at any amount higher than previously noticed to the Taxpayer by the County Assessor, the County Board, or the Property Tax Administrator without specific notice from the opposing party prior to the hearing that the opposing party intends to offer evidence and assert that the taxable value for the Subject Property is higher than any previously noticed value.⁷⁸ The Commission notes

⁷⁴ See, E3 and E4.

⁷⁵ See, Neb. Rev. Stat. §77-201 (Reissue 2009).

⁷⁶ Title 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

⁷⁷ See, E1:1 and E2:1.

⁷⁸ Title 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

that the County Board did not assert during the hearing that the taxable value should be increased above that value previously noticed, and that no notice as would be required by the Commission's Rules and Regulations was ever perfected. Therefore, the Commission finds that it cannot set the taxable value of the Subject Property at any amount higher than previously noticed to the Taxpayer by the County Assessor, County Board, or Property Tax Administrator. Based upon the foregoing, the Commission finds that the County Board's determinations should not be reversed because of the valuation error.

VII. 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. However, for the reasons set forth above, the determinations of the County Board should be affirmed.

VIII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Keith County Board of Equalization determining the taxable value of the Subject Property for tax year 2013 are affirmed.⁷⁹
2. The taxable value of the Subject Property for tax year 2013 is \$116,805 for Case No. 13A 042 and \$21,350 for Case No. 13A 043.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Keith County Treasurer and the Keith County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 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 2013.

⁷⁹ Taxable 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.

7. This Decision and Order is effective for purposes of appeal on April 8, 2015.⁸⁰

Signed and Sealed: April 8, 2015

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

⁸⁰ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.), and other provisions of Nebraska Statutes and Court Rules.