

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

Michael E. Kroeger,  
Appellant,

v.

Colfax County Board of Equalization,  
Appellee.

Case No: 14A 003

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

**For the Appellant:**

Michael E. Kroeger,  
Pro Se

**For the Appellee:**

Edmond E. Talbot III  
Deputy Colfax County Attorney

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

**I. THE SUBJECT PROPERTY**

The Subject Property is a 153 acre parcel located in Colfax County, Nebraska. The legal description of the Subject Property is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 2, pages 30-31.

**II. PROCEDURAL HISTORY**

The Colfax County Assessor determined that the assessed value of the Subject Property was \$131,820 for tax year 2014. Michael E. Kroeger (the Taxpayer) protested this assessment to the Colfax County Board of Equalization (the County Board) and requested an assessed valuation of \$58,200. The County Board determined that the taxable value for tax year 2014 was \$131,820.<sup>1</sup>

The Taxpayer appealed the decision 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 parties also stipulated to the receipt of some of the exchanged exhibits. The Commission held a hearing on June 17, 2016.

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<sup>1</sup> Exhibit 1.

### 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 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

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<sup>2</sup> 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).

<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) (2014 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).

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

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> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>11</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>12</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>13</sup> The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”<sup>14</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>15</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>16</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>17</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

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<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

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

<sup>13</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>14</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>15</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>16</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009)

<sup>17</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

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>18</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>19</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.<sup>20</sup>

“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.”<sup>21</sup>

“Accretion Land: Includes land that has been formed by alluvial deposits associated with a body or stream of water. The State of Nebraska is unique in its recognition of the riparian rights of individuals to own land lying under water. Accretion land can be classified into any agricultural use category.”<sup>22</sup>

“Grassland is the state and condition of the range based on what it is naturally capable of producing. Grassland includes all types of grasses, permanent brome grass, other introduced grasses, and native grasses used for grazing or mowed for hay.”<sup>23</sup>

“Recreational means all parcels predominantly used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. Some of these uses are fishing, hunting,

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<sup>18</sup> Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).

<sup>19</sup> Neb. Rev. Stat. §77-132 (Reissue 2009).

<sup>20</sup> Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

<sup>21</sup> 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. Other land which may be classified as wasteland are the permanent easement acres associated with the Bureau of Reclamation or irrigation districts, which are defined as open canals or ditches, laterals, drains, and service roads for the canal system. Assessors need to verify or be aware of the type of deed or easement that may be filed for these areas before making any determination of classification. Title 350 Neb. Admin. Code, Ch. 14, §002.54

<sup>22</sup> Title 350 Neb. Admin. Code, Ch. 14, §004.05.

<sup>23</sup> In many instances it is not possible to identify permanent brome grass from temporary brome grass that is grown as part of the crop rotation. For this reason, all of the present brome grass should be classified as grassland until the area is returned to cultivation. There may be situations where an alfalfa and grass mixture is grown in rotation with cropland or is harvested for hay. These areas can be classified as cropland but their market value may be more representative of grassland. Areas of wooded grazing land are classified as grassland not timberland or wasteland. When there are significant areas of trees or timber on a parcel, and it can no longer be grazed, consideration needs to be given to placing the affected acres in the forestland and timberland category. Title 350 Neb. Admin. Code, Ch. 14, §002.31.

camping, boating, hiking, picnicking, or having an access or view that simply allows diversion, entertainment, and relaxation.”<sup>24</sup>

The Commission may find a taxable value that is more than the highest value for which notice was given by the County Assessor, the County Board of Equalization, or the Property Tax Administrator.<sup>25</sup> However, notice of a higher taxable value and the intent to offer proof in its support must be served on all parties and the Commission prior to the hearing.<sup>26</sup>

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

Michael Kroeger testified that the Subject Property consisted of 153 acres that were located on an island of the Platte River. The parcel includes accretion land and riparian rights. For tax year 2014, Kroeger stated that there were no agricultural uses of the parcel, but that cattle were grazed on its grasses years ago. He testified that his purposes and uses of the parcel were recreational, including overnight stays in an old log cabin, riding a utility vehicle around the parcel for pleasure, and duck hunting. Kroeger stated that he used more than one duck blind on the parcel on the banks of the river.

Kroeger asserted that the parcel should be valued at less per acre as compared to other agricultural land horticultural land parcels in the County because of limited access to the parcel and because no county services were available to the parcel. He explained that in order to reach the parcel several other properties had to be crossed. The nearest county road access was 1.5 miles from a cable car. Kroeger had obtained an agreement with the landowner to cross the property to the cable car at a cost of \$500 per year. Access to the island required use of the cable car that carried no more than three persons over the channel of the Platte River. Once across the river using the cable car, Kroger testified, he then had to cross three or four additional properties not owned by Kroeger, by foot or by vehicle, before reaching the border of the Subject Property. Kroeger testified that for more than a decade he and his family had gained access across these properties on the island. He did not testify as to any cost that he had incurred to gain such passage.

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<sup>24</sup> Title 350 Neb. Admin. Code, Ch. 10, §002.15J.

<sup>25</sup> Title 442 Neb. Admin. Code, Ch. 5, §016.02A.

<sup>26</sup> Title 442 Neb. Admin. Code, Ch. 5, §016.02A.

Kroeger also testified he believed that some of the 153 acres had suffered erosion to the Platte River. However, he provided no survey, appraisal, or any other quantifiable evidence as to how many acres this may have involved as of the relevant time period for tax year 2014.

Kroeger's testimony proves that the highest and best use of the Subject Property is recreational, not agricultural. His testimony represents competent evidence that rebuts the presumption in favor of the County Board decision. It is also clear and convincing evidence that a classification of the parcel as agricultural land and horticultural land for tax year 2014 would be unreasonable.

There is evidence in this proceeding that land classified as recreational in Colfax County was valued at much more per acre than land valued as wasteland or grassland, as the Subject Property was valued.<sup>27</sup> However, there is no evidence that the Taxpayer was given notice in these proceedings of a higher value than \$131,820 for tax year 2014. The Commission's Rules and Regulations do not allow the Commission to set taxable value of real property at an amount higher than previously noticed to the Taxpayer by the County Assessor, County Board of Equalization, or 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.<sup>28</sup> The Commission notes that no such 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 an amount higher than previously noticed to the Taxpayer by the County Assessor, County Board of Equalization, or Property Tax Administrator in this appeal. The Commission further finds that the taxable value of the Subject Property for tax year 2014 is \$131,820.

## 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

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<sup>27</sup> See Exhibit 2:31.

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

County Board's determination of value is arbitrary or unreasonable since the parcel should be classified and valued as recreational land. The competent evidence of actual value of the property would indicate that the value of the property was higher than any previously noticed value. However, since the Taxpayer received no notice of a value higher than any previously noticed value, the determination by the County Board should be affirmed.

## VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Colfax County Board of Equalization determining the value of the Subject Property for tax year 2014 is affirmed.
2. The taxable value of the Subject Property for tax year 2014 is \$131,820.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Colfax County Treasurer and the Colfax 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 2014.
7. This Decision and Order is effective for purposes of appeal on June 21, 2016.

Signed and Sealed: June 21, 2016

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

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