

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

Donald V. Cain Jr.,  
Appellant,

v.

Custer County Board of Equalization,  
Appellee.

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

On Remand from the Nebraska Supreme  
Court for Reconsideration on the Record

Decision and Order Reversing the  
Assessments by the Custer County Assessor  
in Case Nos. 12A 112, 12A 113, & 12A 114

Decision and Order Affirming the  
Assessments by the Custer County Assessor  
in Case Nos. 12A 115, 12A 116, 12A 117,  
12A 118, 12A 119, 12A 120, & 12A 121

**For the Appellant:**

Steven P. Vinton,  
Bacon & Vinton, LLC.

**For the Appellee:**

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

**I. INTRODUCTION**

These appeals were first heard by Commissioners Nancy J. Salmon and Thomas D. Freimuth. The Decision and Order of the Tax Equalization & Review Commission (the Commission) was dated July 31, 2014.<sup>1</sup> On August 28, 2015, the Nebraska Supreme Court issued its Order to reverse and remand the Commission's Decision and Order.<sup>2</sup> On remand, the Commission was ordered to reconsider these matters on the record. The Commission has reviewed the record in its entirety and reconsidered the appeal.<sup>3</sup>

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<sup>1</sup> The Commission's Decision and Order may be found at <http://www.terc.ne.gov/pdf/Decisions/2014/August/August/Week%20Ending%202008-01-14/12A-112%20through%2012A-121%20Cain%20v.%20Custer.pdf>.

<sup>2</sup> *Cain v. Custer Cty. Bd. Of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

<sup>3</sup> Commissioner Thomas D. Freimuth resigned on September 2, 2015. On remand, the appeal was assigned to Commissioner Salmon and Commissioner Robert W. Hotz.

## II. PROCEDURAL HISTORY

The Subject Property consists of ten parcels of agricultural land and horticultural land, totaling 1,093.93 acres, located in Custer County, near Broken Bow, Nebraska. The legal descriptions of the Subject Properties and the property record cards for each Subject Property are found in Exhibits 11 to 16. For tax year 2012, the Custer County Assessor (the County Assessor) increased the taxable value of each of the ten Subject Properties. Donald V. Cain, Jr. (the Taxpayer) asserted that he received no notice from the County Assessor of the changes in valuation for tax year 2012 for any of the Subject Properties prior to June 1, 2012, as is required by law.<sup>4</sup> The Taxpayer asserted it was not until November 9, 2012, that he realized he did not have any assessment notices for tax year 2012 in his files and that he then obtained from the County Assessor an Assessment Summary for each Subject Property on that same date.

The assessments by the County Assessor were as follows:

Case No.	Assessment by the County Assessor
12A 112	\$101,592 <sup>5</sup>
12A 113	\$156,731 <sup>6</sup>
12A 114	\$ 15,827 <sup>7</sup>
12A 115	\$138,927 <sup>8</sup>
12A 116	\$198,073 <sup>9</sup>
12A 117	\$177,060 <sup>10</sup>
12A 118	\$147,319 <sup>11</sup>
12A 119	\$739,052 <sup>12</sup>
12A 120	\$ 64,374 <sup>13</sup>

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<sup>4</sup> Neb. Rev. Stat. §77-1315(2) requires the County Assessor to notify the owner of record on or before June 1, “of every item of real property which has been assessed at a value different than in the previous year. Such notice shall be given by first-class mail addressed to such owner’s last-known address. It shall identify the item of real property and state the old and new valuation, the date of convening of the county board of equalization,” and the dates for filing a protest.

<sup>5</sup> Exhibit 1.

<sup>6</sup> Exhibit 2.

<sup>7</sup> Exhibit 3.

<sup>8</sup> Exhibit 4.

<sup>9</sup> Exhibit 5.

<sup>10</sup> Exhibit 6.

<sup>11</sup> Exhibit 7.

<sup>12</sup> Exhibit 8.

Case No.	Assessment by the County Assessor
12A 121	\$ 95,970 <sup>14</sup>

The record indicates that on or about November 9, 2012, the Taxpayer informed the County Assessor that the assessments of six of the Subject Properties had included a value for water wells that he asserted were located on other parcels.<sup>15</sup> The record also indicates that the County Assessor agreed that clerical errors<sup>16</sup> required corrections to the assessments for three of the parcels, in Case Nos. 12A 112,<sup>17</sup> 12A 113,<sup>18</sup> and 12A 114.<sup>19</sup>

On December 11, 2012, the Custer County Board of Equalization (the County Board) met to determine whether there were clerical errors associated with the parcels later identified by the Commission as Case Nos. 12A 112,<sup>20</sup> 12A 113,<sup>21</sup> 12A 114,<sup>22</sup> 12A 115,<sup>23</sup> 12A 116,<sup>24</sup> and 12A 117.<sup>25</sup> The record indicates that in Case Nos. 12A 112, 12A 113, and 12A 114, the County Board determined that, due to clerical errors, these three parcels had been incorrectly assessed as including water wells that were located on other parcels.<sup>26</sup> On December 11, 2012, the County Board directed the County Treasurer to accept the tax list corrections made to the parcels in Case Nos. 12A 112, 12A 113, and 12A 114 to account for these errors.<sup>27</sup> The clerical error corrections made by the County Board on December 11, 2012 resulted in Tax List Corrections to the parcels in Case Nos. 12A 112, 12A 113, and 12A 114. Those corrections are shown below:

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<sup>13</sup> Exhibit 9.

<sup>14</sup> Exhibit 10.

<sup>15</sup> See, E11:11 and 24; E12:10; E13:12, 24, and 36.

<sup>16</sup> The County Board may meet at any time to correct clerical errors. See, Neb. Rev. Stat. §77-1507(1) (2011 Supp.). The meaning of clerical error includes when an item of real property other than land is identified on the wrong parcel. See, Neb. Rev. Stat. §77-128 (Reissue 2009). See also, Title 350, Chapter 10, Section 002.06.

<sup>17</sup> See, E11:11-12.

<sup>18</sup> See, E11:24-25.

<sup>19</sup> See, E12:10-11.

<sup>20</sup> See, E11:11.

<sup>21</sup> See, E11:24.

<sup>22</sup> See, E12:10.

<sup>23</sup> See, E13:12.

<sup>24</sup> See, E13:24.

<sup>25</sup> See, E13:36.

<sup>26</sup> See, E11:11; E11:24; and E12:10.

<sup>27</sup> *Id.* See, Neb. Rev. Stat. §77-1507 (2011 Supp.).

Case No.	Taxable Value after Tax List Correction Ordered by the County Board
12A 112	\$ 80,501 <sup>28</sup>
12A 113	\$128,773 <sup>29</sup>
12A 114	\$ 11,794 <sup>30</sup>

The Commission gives great weight to these clerical error corrections in its consideration of the actual values of the Subject Properties in Case Nos. 12A 112, 12A 113, and 12A 114.

The County Board did not determine that any clerical errors existed for the parcels identified in Case Nos. 12A 115, 12A 116, or 12A 117.<sup>31</sup> There is nothing in the record to indicate that the Taxpayer received notice of any clerical error or tax list corrections, or whether he filed any protests of the County Board’s tax list correction actions of December 11, 2012.<sup>32</sup>

On December 28, 2012, the Taxpayer filed Petitions for each of the ten parcels with the Commission as permitted under Neb. Rev. Stat. §77-1507.01. The Commission held a show cause hearing on February 7, 2013. In an Order, dated May 24, 2013, the Commission determined it had jurisdiction over the ten petitions filed by the Taxpayer.<sup>33</sup> The Commission found that the Taxpayer was not given notice of the increased assessments on or before June 1, 2012, as required by Neb. Rev. Stat §77-1315(2). The Commission concluded that, under Neb. Rev. Stat §77-1507.01, the Taxpayer had until December 31, 2012 to petition the Commission for relief because a failure by the County Assessor to give notice of the increased assessments<sup>34</sup> prevented the Taxpayer from timely filing any protests of the assessments.<sup>35</sup>

Since no protests were filed, no appeals were filed. The cases came before the Commission as petitions to be heard on the merits. Therefore, as the Court in *Cain* instructed, when exercising jurisdiction over the petitions filed by the Taxpayer, the role of the Commission was “not that of

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<sup>28</sup> Exhibit 11:11-12.

<sup>29</sup> Exhibit 11:24-25.

<sup>30</sup> Exhibit 12:10-11.

<sup>31</sup> See, E13:12; E13:24; and E13:36.

<sup>32</sup> See, Neb. Rev. Stat. §77-1507 (2011 Supp.).

<sup>33</sup> See, Case File.

<sup>34</sup> See Case File.

<sup>35</sup> See, Case File. Prior to December 31, 2012, the Taxpayer filed Petitions with the Commission for the ten Subject Properties, including the six parcels that were the Subject of the County Board’s December 11, 2012 action in regard to clerical errors.

an appellate body.”<sup>36</sup> These were not appeals from determinations by a county board of equalization, where the Commission acts as an “intermediate appellate tribunal.”<sup>37</sup> It follows, therefore, that when the Commission held a hearing on the merits of the ten petitions on November 1, 2013, it was not acting in the role of an appellate body, as it functions when hearing an appeal of a decision of a county board of equalization, but rather in “a position to perform an initial review of [the Taxpayer’s] challenges to the increased assessments.”<sup>38</sup>

After that hearing, the Commission issued a Decision and Order on the merits of the petitions on July 31, 2014. The Taxpayer appealed the Commission’s Decision and Order to the Nebraska Court of Appeals. The Supreme Court of Nebraska moved the case to its docket pursuant to its statutory authority to regulate the dockets of the appellate courts of the state.<sup>39</sup>

### **III. REVERSAL AND REMAND BY THE NEBRASKA SUPREME COURT**

In *Cain v. Custer Cty. Bd. Of Equal.*,<sup>40</sup> the Nebraska Supreme Court found plain error in the Decision and Order of the Commission when the Commission applied a clear and convincing evidence standard rather than a preponderance, or greater weight, of the evidence standard to petitions brought by the Taxpayer under Neb. Rev. Stat. §77-1507.01. The Order of the Court specifically stated, “[w]e remand the cause for reconsideration on the record using the preponderance, or greater weight, of the evidence standard applicable to protests before a county board of equalization.”<sup>41</sup>

### **IV. PLAIN ERROR**

The Nebraska Supreme Court found plain error in the standard of review used by the Commission. The court noted, plain error is “error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.”<sup>42</sup> The Court concluded that the Commission “should have applied the same standards and burdens of proof as the board of equalization would have used in a

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<sup>36</sup> *Cain*, 291 Neb. at 748, 868 N.W.2d at 347.

<sup>37</sup> *See, Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 284, 753 N.W.2d 802, 812 (2008).

<sup>38</sup> *Cain*, 291 Neb. at 748, 868 N.W.2d at 347.

<sup>39</sup> *See, Cain v.* 291 Neb. 730, 868 N.W.2d 334.

<sup>40</sup> *Cain v. Custer Cty. Bd. Of Equal.*, 291 Neb. 730, 868 N.W.2d 334.

<sup>41</sup> *Cain.*, 291 Neb. 730, 750, 868 N.W.2d 334, 348.

<sup>42</sup> *Cain*, 291 Neb. at 747, 868 N.W.2d at 347, citing *Connolly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012). *See also, Medicine Creek v. Middle Republican NRD*, 296 Neb. 1, 4, \_N.W.2d\_, \_ (2017).

protest.”<sup>43</sup> The Court remanded the petitions back to the Commission for “reconsideration on the record using the preponderance, or greater weight, of the evidence standard applicable to protests before a county board of equalization.”<sup>44</sup> The Court essentially concluded that the Commission should not have applied its appellate review standard, but rather should have applied a lower standard of review which the Court found was applicable to an initial review of an increased assessment.

## V. STANDARD OF REVIEW

When an assessment action is reviewed, a presumption exists that the assessing official has performed his or her duties according to law.<sup>45</sup> “[T]he valuation by the assessor is presumed to be correct,”<sup>46</sup> and the burden of proof rests upon the taxpayer to rebut this presumption and “to prove that an assessment is excessive.”<sup>47</sup>

In its remand order, the Court found that the Commission “should have applied the same standards and burdens of proof as the county board of equalization would have used in a protest” proceeding.<sup>48</sup> In determining that standard, the Court cited to *Wetovick v. County of Nance*,<sup>49</sup> in finding that “[o]ur case law indicates that the standard *generally applicable* to proceedings before county boards, including monetary disputes, is a preponderance, or greater weight, of the evidence.”<sup>50</sup>

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<sup>43</sup> *Cain*, 291 Neb. at 748, 868 N.W.2d at 347.

<sup>44</sup> *Cain*, 291 Neb. at 750, 868 N.W.2d at 348.

<sup>45</sup> See, e.g., *Brown v. Douglas Co.*, 152 N.W. 545, 98 Neb. 299 (1915); *Gamboni v. County of Otoe*, 67 N.W.2d 489, 159 Neb. 417 (1954) (overruled on other grounds); *Ahern v. Board of Equalization*, 160 Neb. 709 (1955); *Le Dioyt v. Keith Cty.*, 74 N.W.2d 455, 161 Neb. 615 (1956); *K-K Appliance Co. v. Bd. of Tax Equal. Of Phelps Cty*, 86 N.W.2d 381, 165 Neb. 547 (1957); *Ainsworth v. Fillmore Cty.*, 90 N.W.2d 360, 166 Neb. 779 (1958), *Omaha Paxton Hotel Co. v. Bd. of Equal. of Douglas Cty.*, 92 N.W.2d 537, 167 Neb. 231 (1958); *Adams v. Bd. of Equal. of Hamilton Cty.*, 95 N.W.2d 627, 168 Neb. 286 (1959); *Collier v. Logan County*, 169 Neb. 1 (1959); *Baum Realty Co. v. Bd. of Equal. of Douglas Cty.*, 100 N.W.2d 730, 169 Neb. 682 (1960); *H/K Co. v. Bd. of Equal. of Lancaster Cty.*, 121 N.W.2d 382, 175 Neb. 268 (1963); *Josten-Wilbert Vault Co. v. Bd. of Equal. for Buffalo Cty.*, 138 N.W.2d 641, 179 Neb. 415 (1965) (overruled on other grounds); *Helvey v. Dawson Cty. Bd. of Equal.* 495 N.W.2d 261, 242 Neb. 379 (1993); *Garvey Elevators, Inc. v. Adams Cty. Bd. of Equal.*, 621 N.W.2d 518, 261 Neb. 130 (2001); *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

<sup>46</sup> *Cain*, 291 Neb. at 748-749, 868 N.W.2d at 348, citing *Helvey v. Dawson Cty. Bd. Of Equal*, 242 Neb. 379, 386, 495 N.W.2d 261, 267 (1993).

<sup>47</sup> *Ainsworth v. County of Fillmore*, 166 Neb. 779, 784, 90 N.W.2d 360, 364 (1958).

<sup>48</sup> *Cain*, 291 Neb. at 748, 868 N.W.2d at 347.

<sup>49</sup> *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

<sup>50</sup> *Cain*, 291 Neb. at 749, 868 N.W.2d at 348 (emphasis added) citing *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010) (Where a county attorney brought a declaratory judgment action against the county and its county board in a county budget dispute involving the salary and insurance of an employee of the county attorney, the court applied a preponderance, or greater weight, standard of review to a review by the county board of the employment determination made by the elected county attorney). We note that the *Wetovick* case had nothing to do with a determination by a county assessor or the review of an

Respectfully, for the sake of completeness, and because an appellate court’s finding of plain error is made to prevent a “result in damage to the integrity, reputation, or fairness of the judicial process,”<sup>51</sup> the Commission notes that the “generally applicable” standard of review applied by the court in *Cain* arose from a case involving the review by a county board of an employment determination made by a county attorney, not the initial review by a county board of equalization of an assessment by a county assessor. *Wetovick* said nothing about what standard of review should be applied in an initial review by any governmental body of an assessment by a county assessor.<sup>52</sup>

Moreover, prior to *Cain*, the Nebraska Supreme Court consistently stated that the burden of persuasion on the complaining taxpayer in “an appeal to the county board of equalization” was clear and convincing evidence.<sup>53</sup> These cases were not overruled by *Cain*, nor were they cited or discussed in the court’s decision, with the exception of *Helvey*,<sup>54</sup> which was cited for a different proposition.<sup>55</sup>

Since the Order in *Cain* appears to be contrary to this long held precedent without overruling such precedent, we are forced to conclude that the Court’s direction is meant to sit side by side with its previous body of law. Therefore we conclude that the holding in *Cain* is limited specifically to the fact pattern presented in *Cain* and the standard of review is only to be used by the Commission for petitions filed under Neb. Rev. Stat. §77-1507.01. In order to comply with the Court’s order, the Commission will therefore apply the preponderance, or greater weight, standard of review to resolve these petitions on remand.

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assessment. Further, the decision said nothing, generally or otherwise, about what standard of review should be applied in an initial review of an assessment by a county assessor.

<sup>51</sup> *Cain*, 291 Neb. at 747, 868 N.W.2d at 347. See also, *Medicine Creek v. Middle Republican NRD*, 296 Neb. 1, 4, \_N.W.2d\_, \_ (2017).

<sup>52</sup> We believe it is important to note that under Nebraska law a county board never reviews the assessment actions of a county assessor. Only the county board, acting in its specific authority as a county board of equalization, performs any initial review of assessment actions. See, Neb. Rev. Stat. §77-1501 et seq.

<sup>53</sup> See, *Helvey v. Dawson Cty. Bd. Of Equal*, 242 Neb. 379, 386, 495 N.W.2d 261, 267 (1993); *Spencer Holiday House v. County Bd. Of Equal.*, 215 Neb. 194, 200, 337 N.W.2d 759, 763 (1983); *Farmers Co-op Ass’n v. Boone County Bd. of Equalization*, 213 Neb. 763, 775, 332 N.W.2d 32, 39 (1983); *LaGord Associates v. Cass County*, 209 Neb. 99, 101-02, 306 N.W.2d 578, 580 (1981); *Bumgarner v. Valley County*, 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981); *Nash Finch Co. v. County Bd. of Equalization, Hall County*, 191 Neb. 645, 648, 217 N.W.2d 170, 173 (1974); *Hastings Bldg. Co. v. Board of Equalization of Adams County*, 190 Neb. 63, 72, 206 N.W.2d 338, 344 (1973); *Lexington Building. Co. v. Board of Equalization In and For Dawson County*, 186 Neb. 821, 822, 187 N.W.2d 94, 96 (1971). See also, *J.C. Penney Co., Inc. v. Lancaster Cty. Bd. of Equal.*, 6 Neb.App. 838, 850-851, 578 N.W.2d 465, 473 (Neb.App. 1998).

<sup>54</sup> *Helvey v. Dawson Cty. Bd. Of Equal*, 242 Neb. 379, 495 N.W.2d 261 (1993).

<sup>55</sup> But the reference to *Helvey* did not also include *Helvey*’s citation to the clear and convincing evidence standard, as it has also been cited in the numerous cases above, to be applied in “an appeal to the county board of equalization.” *Helvey*, 242 Neb. at 386-387, 495 N.W.2d at 267 (1993).

## VI. APPLYING THE STANDARD OF REVIEW

As noted above, the Commission has reviewed the entirety of the record in these proceedings, including the Decision and Order issued by the Commission, dated July 31, 2014, and the remand order issued by the Nebraska Supreme Court, dated August 28, 2015.

### A. Applicable 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>56</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>57</sup> The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”<sup>58</sup> Taxable value is the percentage of actual value subject to taxation as directed by Neb. Rev. Stat. §77-201 and has the same meaning as assessed value.<sup>59</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>60</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>61</sup>

When using comparable sales to determine the actual value of a Subject Property, a County Assessor is required to follow statutory guidelines to determine what constitutes a comparable sale, including, “whether [sales] of property are in a similar Market Area and have similar characteristics to the property being assessed...”<sup>62</sup> A Market Area is “an area with defined characteristics within which similar properties are effectively competitive in the minds of buyers

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<sup>56</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>57</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>58</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>59</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>60</sup> See, Neb. Rev. Stat. §77-1301(1) (2012 Cum. Supp.).

<sup>61</sup> Neb. Rev. Stat. §77-201(1) (2012 Cum. Supp.).

<sup>62</sup> Neb. Rev. Stat. §77-1371(13) (2012 Cum. Supp.).



and sellers with other comparable property in the area.”<sup>63</sup> The Commission has no authority to create a Market Area.<sup>64</sup>

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value.<sup>65</sup> 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>66</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>67</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>68</sup>

Class or subclass of real property means,

a group of properties that share one or more characteristics typically common to all the properties in the class or subclass, but are not typically found in the properties outside the class or subclass. Class or subclass includes, but is not limited to, the classifications of agricultural land or horticultural land listed in section 77-1363, parcel use, parcel type, location, geographic characteristics, zoning, city size, parcel size, and market characteristics appropriate for the valuation of such land. A class or subclass based on market characteristics shall be based on characteristics that affect the actual value in a different manner than it affects the actual value of properties not within the market characteristic class or subclass.<sup>69</sup>

Agricultural land and horticultural land,

shall be divided into classes and subclasses of real property under section 77-103.01, including, but not limited to, irrigated cropland, dryland cropland, grassland, wasteland, nurseries, feedlots, and orchards, so that the categories reflect uses appropriate for the valuation of such land according to law. Classes shall be inventoried by subclasses of real property based on soil classification standards developed by the Natural Resources Conservation Service of the United States Department of Agriculture as converted into land capability groups by the Property Tax Administrator. County assessors shall utilize

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<sup>63</sup> Title 350, Chapter 14, Section 002.47 (Rev. 3/15/09).

<sup>64</sup> *Dodge County Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 10 Neb. App. 927, 639 N.W.2d 683 (2002).

<sup>65</sup> Neb. Rev. Stat. §77-201 (2) (Reissue 2009).

<sup>66</sup> Neb. Rev. Stat. §77-1359 (1) (2012 Cum. Supp.).

<sup>67</sup> Neb. Rev. Stat. §77-132 (Reissue 2009).

<sup>68</sup> Neb. Rev. Stat. §77-1359 (2) (2012 Cum. Supp.).

<sup>69</sup> Neb. Rev. Stat. §77-103.01 (Reissue 2009).

soil surveys from the Natural Resources Conservation Service of the United States Department of Agriculture as directed by the Property Tax Administrator. Nothing in this section shall be construed to limit the classes and subclasses of real property that may be used by county assessors or the Tax Equalization and Review Commission to achieve more uniform and proportionate valuations.<sup>70</sup>

“Irrigated Cropland includes all land where irrigation is used, whether for cultivated row crops, small grains, seeded hay, forage crops, or grasses.”<sup>71</sup>

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

The County Assessor identified five Market Areas of agricultural land and horticultural land in Custer County for tax year 2012.<sup>72</sup> The Subject Property was located in Market Area 1.<sup>73</sup>

Donald Cain, Jr., the Taxpayer, testified that the composition of soils located on the Subject Property was more similar to soil compositions in Market Areas 2 or 3, and that soil type and not the location of the Subject Property was the most important characteristic in determining the actual value of the Subject Property. The Taxpayer asserted that although the Subject Property comprised all of the land between Broken Bow, Nebraska, and the Adam’s Feed Yard, the location of the Subject Property did not positively influence its actual value because the Subject Property had limited access to Highway 2. He further testified that some of the land was received as a land exchange, wherein he received undevelopable land from the City of Broken Bow for some developable land that he owned.

The Taxpayer asserted that the actual value of the Subject Property was \$48,007 for case 12A 112,<sup>74</sup> \$86,390 for case 12A 113,<sup>75</sup> \$5,409 for case 12A 114,<sup>76</sup> \$103,223 for case 12A 115,<sup>77</sup> \$74,351 for case 12A 116,<sup>78</sup> \$55,733 for case 12A 117,<sup>79</sup> \$57,073 for case 12A 118,<sup>80</sup> \$276,955 for case 12A 119,<sup>81</sup> \$29,816 for case 12A 120,<sup>82</sup> and \$41,668 for case 12A 121.<sup>83</sup> The Taxpayer

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<sup>70</sup> Neb. Rev. Stat. §77-1363 (2012 Cum. Supp.). See also, Title 350, Chapter 10, Section 002.05A.

<sup>71</sup> Title 350, Chapter 14, Section 002.21B (Rev. 3/15/09).

<sup>72</sup> Exhibit 25:3. See also, 2012 Reports & Opinions of the Property Tax Administrator, Custer County, page 34, [https://terc.nebraska.gov/sites/terc.nebraska.gov/files/doc/2012\\_exhibit\\_list/21Custer.pdf](https://terc.nebraska.gov/sites/terc.nebraska.gov/files/doc/2012_exhibit_list/21Custer.pdf)

<sup>73</sup> Exhibit 25:3.

<sup>74</sup> See, E11:5.

<sup>75</sup> See, E11:18.

<sup>76</sup> See, E12:4.

<sup>77</sup> See, E13:5.

<sup>78</sup> See, E13:17.

<sup>79</sup> See, E13:29.

<sup>80</sup> See, E15:5.

<sup>81</sup> See, E15:14.

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

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

C.M. Thoene, a licensed appraiser, conducted an appraisal of portions of the Subject Property in August 2010, retroactive to December 31, 2008.<sup>84</sup> Mr. Thoene stated that the retroactive appraisal would have been accurate as of August 13, 2010.<sup>85</sup> He testified that sales prices dramatically increased from 2012 to 2013 and that he had no evidence that the trend was reversing. He asserted that according to his best quantification of this increase the actual value of all agricultural land and horticultural land in Custer County had increased approximately 12.47% from 2012 to 2013.<sup>86</sup> Mr. Thoene did not provide an individual quantification of the percentage increase of actual value for any individual class of real property (i.e. irrigated, dry, or grassland).

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

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<sup>82</sup> See, E15:23.

<sup>83</sup> See, E16:7.

<sup>84</sup> E18.

<sup>85</sup> See, E18:2.

<sup>86</sup> See, E25:11.

of the Subject Property to Broken Bow, Nebraska could affect its actual value, but he did not quantify that effect.

Mr. Thoene described the Subject Property as rolling sandhills grassland with development for irrigation to grow grassland.<sup>87</sup> He testified that the soil type was very fragile and used almost predominately for grazing and grassland. He asserted that the irrigation was unconventional, because it was often not economically feasible to install and operate irrigation for these purposes.

Mr. Thoene prepared supplemental material to help describe the Subject Property's relationship to other parcels in Custer County.<sup>88</sup> He asserted that by including the Subject Property in Market Area 1, the assessed value of the Subject Property was affected by sales of parcels with better soils that could be used to cultivate row crops. He asserted that the highest and best use of the Subject Property was grassland, and without the irrigation it would look the same as the grassland in Market Areas 2 and 3.

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

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

Connie Braithwaite, the Custer County Assessor, testified that beginning in tax year 2006 the Subject Property had been classified as irrigated grassland and valued using an old formula found in a 1990's agricultural land manual, which was dependent upon a ratio of the value of dry land and irrigated land.<sup>89</sup> In 2012, she discontinued the special classification of irrigated land,

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<sup>87</sup> See, E25:8-9 (pictures of portions of the Subject Property).

<sup>88</sup> See, E25.

<sup>89</sup> See, E27.

because she observed that irrigated grassland was often plowed and planted as row crops, and because the actual value of irrigated grassland was becoming similar to the actual value of all other irrigated land. Ms. Braithwaite asserted that the assessed values of all irrigated land in Custer County were equalized. She testified that she based her valuations on sales obtained from the market.

Ms. Braithwaite testified that she was unaware of any laws in Nebraska that would allow her to treat irrigated grassland differently from any other type of irrigated land. She testified that she relied upon the Rules & Regulations promulgated by the Nebraska Department of Revenue, which stated that “Irrigated Cropland includes all land where irrigation is used, whether for cultivated row crops, small grains, seeded hay, forage crops, or grasses.”<sup>90</sup> She testified that it was her understanding that surrounding counties were treating all irrigated land in the same way.

Ms. Braithwaite disagreed with Mr. Thoene’s assertions that the soil types located on the Subject Property in Market Area 1 were the same as the soil types located in Market Area 2. She testified, for example, that there were different classifications of valentine sand, and that the production capability of valentine sand mixed with loam was superior to other classifications of valentine sands found in Market Area 2. She asserted that while the Subject Property had soil types that included valentine sand, those soil types also contained loam, making it superior to the soil types in Market Area 2.

Ms. Braithwaite testified that her Market Areas<sup>91</sup> were derived by examining sales.<sup>92</sup> She asserted that there were topography differences between Market Area 1 and Market Area 2, because Market Area 1 had a uniform sandy soil type, and the sales indicated that the real property in Market Area 1 would command a different value from property in Market Area 2.

When asked whether she agreed with Mr. Thoene’s position that the irrigated grass on the Subject Property should be valued comparable to the grassland values of Market Area 2 and Market Area 3 between \$450 per acre and \$870 per acre, Ms. Braithwaite only speculated that “it

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<sup>90</sup> Title 350, Chapter 14, Section 002.21B (Rev. 3/15/09).

<sup>91</sup> A Market Area is, “an area with defined characteristics within which similar properties are effectively competitive in the minds of buyers and sellers with other comparable property in the area.” Title 350, Chapter 14, Section 002.47 (Rev. 3/15/09).

<sup>92</sup> When using comparable sales to determine the actual value of a Subject Property, a County Assessor is required to follow statutory guidelines to determine what constitutes a comparable sale, including, “whether [sales] of property are in a similar Market Area and have similar characteristics to the property being assessed...” Neb. Rev. Stat. §77-1371(13) (2012 Cum. Supp.).

could possibly be.”<sup>93</sup> But the balance of her testimony supported valuing the irrigated grass on the Subject Property as Market Area 1 irrigated cropland. Further, she consistently maintained throughout her testimony that her methodology and assessed values were consistent with mass appraisal principles and in conformity with applicable Statutes and Rules & Regulations. Moreover, the County Assessor consistently differentiated between the types of soils found in Market Area 2 and those that were found on the Subject Property. She also consistently asserted that these differences allowed for irrigation of the Subject Property, where only 2 or 3 parcels in all of Market Area 2 even approached this capability.

## **C. Analysis**

### **1. Assessments Not Void**

On remand, we need not address the issue of whether the assessments for tax year 2012 were void based upon an evidentiary finding that the Taxpayer did not receive notice. That issue was addressed and resolved in Part 1(b) of the Court’s remand order,<sup>94</sup> holding that “[t]he language of §77-1507.01 confirms that a lack of notice no longer renders an increased assessment void.”<sup>95</sup>

### **2. Assessment Factors Were Appropriately Considered**

The Taxpayer asserted that the Subject Property consisted of soil types that were rare for Market Area 1 and more similar to the soil types of properties found within another Market Area in Custer County. He asserted that the actual value of the Subject Property should be comparable to the properties in the other Market Areas with what he alleged were more similar soil types.

The Taxpayer relies upon *Bartlett v. Dawes County Board of Equalization*<sup>96</sup> to support the contention that only soil types can be considered when valuing agricultural land and horticultural land. However, *Bartlett* was decided prior to the enactment of Neb. Rev. Stat. §77-103.01.<sup>97</sup> Before the enactment of §77-103.01, a county assessor was required to rely only upon soil classifications when creating subclasses of agricultural land or horticultural land, not upon where

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<sup>93</sup> Bill of Exceptions, page 203.

<sup>94</sup> *Cain*, 291 Neb. at 740-745, 868 N.W.2d at 343-346.

<sup>95</sup> *Cain*, 291 Neb. at 744, 868 N.W.2d at 345.

<sup>96</sup> *Bartlett v. Dawes County Board of Equalization*, 259 Neb. 954, 613 N.W.2d 810 (2000).

<sup>97</sup> See, 2001 Neb. Laws LB170, §3.

the land was located.<sup>98</sup> However, with the enactment of §77-103.01, the classification and subclassification of agricultural land and horticultural land is not based upon soil types alone.<sup>99</sup> The assessor must also consider “parcel use, parcel type, location, geographic characteristics, zoning, parcel size, and market characteristics”<sup>100</sup> when classifying agricultural land and horticultural land. Further, as applicable to the Subject Property, the assessor is required to classify the agricultural land and horticultural land into categories including, but not limited to “irrigated cropland, dryland cropland, grassland, wasteland, nurseries, feedlots, and orchards, so that the categories reflect uses appropriate for the valuation of such land according to law.”<sup>101</sup> Irrigated Cropland includes “all land where irrigation is used, whether for cultivated row crops, small grains, seeded hay, forage crops, or grasses.”<sup>102</sup>

In the present case, the evidence indicates that the County Assessor utilized several factors when constructing the Market Areas. While the Subject Property consisted of similar soil types as a majority of properties in another Market Area, she appropriately determined that additional factors also contributed to the actual value of the Subject Property on the open market.

While the Taxpayer generally asserted that the Subject Property’s location in Market Area 1 between Broken Bow, Nebraska and Adam’s Feedlot did not result in an increase in actual value as compared to real property located in Market Area 2, the Commission notes that the County Assessor’s review of sales contradicted this assertion. The Commission finds that the County Assessor’s determination that the location of agricultural land and horticultural land in Custer County impacted its actual value is supported by her assessed values based on actual sales.

The Commission also finds that the soil types located on the Subject Property were more suitable to irrigation and production than the soils located in Market Area 2 and Market Area 3. The Commission finds that this also supports the County Assessor’s assertion that the Subject Property was more valuable than irrigated grass in Market Area 2 and Market Area 3.

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<sup>98</sup> See, *Bartlett*, 259 Neb. at 962-963, 613 N.W.2d at 817.

<sup>99</sup> See, *Vanderheiden v. Cedar County Board of Equalization*, 16 Neb.App. 578, 584-586, 746 N.W.2d 717, 722-723 (2008). See also, *Schmidt v. Thayer Cty. Bd. Of Equal.*, 10 Neb.App. 10, 624 N.W.2d 63 (2001).

<sup>100</sup> Neb. Rev. Stat. §77-103.01 (Reissue 2009). See also, Neb. Rev. Stat. §77-1363 (2012 Cum. Supp.).

<sup>101</sup> Neb. Rev. Stat. §77-1363 (2012 Cum. Supp.).

<sup>102</sup> Title 350, Chapter 14, Section 002.21B (Rev. 3/15/09).

The Commission notes that Market Area 4 also contained soil types which the Taxpayer asserted were similar to soil types found in Market Area 2.<sup>103</sup> The Commission notes that even though the soil types located in Market Area 4 indicate a similar allocation and diversity of soil types as compared to the Subject Property in Market Area 1, the Taxpayer did not provide persuasive evidence that the actual value of the Subject Property was the same as the assessed values in Market Area 4.<sup>104</sup> The Commission also notes that the assessed values for agricultural land and horticultural land located in Market Area 4 were significantly higher than the assessed values for agricultural land and horticultural land located in Market Areas 2 and 3. The Commission finds that the facts recited above indicate that the County Assessor appropriately considered more factors than soil types alone when creating Market Areas and when classifying the different components of the Subject Property.

The Taxpayer wants all of his Market Area 1 land to be assessed as grassland, even when it is irrigated with center pivot irrigation. Essentially, the Taxpayer has made management decisions to apply irrigation to land that would otherwise be assessed as grassland, and to grow grass rather than row crops under those irrigation pivots. Nebraska law has only one category for agricultural land and horticultural land that is irrigated: “Irrigated Cropland includes all land where irrigation is used, whether for cultivated row crops, small grains, seeded hay, forage crops, or grasses.”<sup>105</sup>

Based upon the entirety of the record, the Commission may only conclude that the agricultural land and horticultural land of the Subject Property which has irrigation applied is irrigated cropland. Whether, as a matter of public policy, irrigated row crops and irrigated grasses should be classified separately, is beyond the scope of the Commission’s authority.

#### **D. Application of the Standard**

Therefore, using the preponderance, or greater weight, of the evidence standard as directed by the Nebraska Supreme Court on remand, the Commission concludes that the Taxpayer has failed to meet the burden of proof in Case Nos. 12A 115, 12A 116, 12A 117, 12A 118, 12A 119, 12A 120, and 12A 121. The Commission also notes that even if it were to apply the more

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<sup>103</sup> See, E25:2-3.

<sup>104</sup> *Id.*

<sup>105</sup> Title 350, Chapter 14, Section 002.21B (Rev. 3/15/09).



rigorous clear and convincing evidence standard, as it has been applied in previous cases,<sup>106</sup> the Taxpayer still has not met the burden of proof in Case Nos. 12A 115, 12A 116, 12A 117, 12A 118, 12A 119, 12A 120, and 12A 121.

As noted in Part II above, the Commission gives great weight to the evidence regarding the clerical error corrections made by the County Board. Using the preponderance, or greater weight of the evidence standard as directed by the Nebraska Supreme Court on remand, the Commission concludes that the burden was met by a preponderance of the evidence in Case Nos. 12A 112, 12A 113, and 12A 114. The Commission also notes that even if it were to apply the more rigorous clear and convincing evidence standard, as it has been applied in previous cases,<sup>107</sup> the burden was still met in Case Nos. 12A 112, 12A 113, and 12A 114.

## VII. CONCLUSION

The Commission finds that the presumptions in favor of the initial valuations by the County Assessor have not been rebutted by a preponderance of the evidence in Case Nos. 12A 115, 12A 116, 12A 117, 12A 118, 12A 119, 12A 120, and 12A 121. The Commission also finds that the presumptions in favor of the initial valuations by the County Assessor have been rebutted by a preponderance of the evidence in Case Nos. 12A 112, 12A 113, and 12A 114.

For all of the reasons set forth above, the initial valuations by the County Assessor in Case Nos. 12A 115, 12A 116, 12A 117, 12A 118, 12A 119, 12A 120, and 12A 121 should be affirmed and the initial valuations by the County Assessor in Case Nos. 12A 112, 12A 113, and 12A 114 should be reversed.

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<sup>106</sup> See, *Helvey v. Dawson Cty. Bd. Of Equal.*, 242 Neb. 379, 386, 495 N.W.2d 261, 267 (1993); *Spencer Holiday House v. County Bd. Of Equal.*, 215 Neb. 194, 200, 337 N.W.2d 759, 763 (1983); *Farmers Co-op Ass'n v. Boone County Bd. of Equalization*, 213 Neb. 763, 775, 332 N.W.2d 32, 39 (1983); *LaGord Associates v. Cass County*, 209 Neb. 99, 101-02, 306 N.W.2d 578, 580 (1981); *Bumgarner v. Valley County*, 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981); *Nash Finch Co. v. County Bd. of Equalization, Hall County*, 191 Neb. 645, 648, 217 N.W.2d 170, 173 (1974); *Hastings Bldg. Co. v. Board of Equalization of Adams County*, 190 Neb. 63, 72, 206 N.W.2d 338, 344 (1973); *Lexington Building. Co. v. Board of Equalization In and For Dawson County*, 186 Neb. 821, 822, 187 N.W.2d 94, 96 (1971). See also, *J.C. Penney Co., Inc. v. Lancaster Cty. Bd. of Equal.*, 6 Neb.App. 838, 850-851, 578 N.W.2d 465, 473 (Neb.App. 1998).

<sup>107</sup> *Id.*

### VIII. ORDER

IT IS ORDERED THAT:

1. The initial valuations by the County Assessor in determining the actual values of the Subject Property for tax year 2012 in Case Nos. 12A 112, 12A 113, and 12A 114 are reversed.
2. The initial valuations by the County Assessor in determining the actual values of the Subject Property for tax year 2012 in Case Nos. 12A 115, 12A 116, 12A 117, 12A 118, 12A 119, 12A 120, and 12A 121 are affirmed.
3. The taxable values of the Subject Property for tax year 2012 are as follows:

12A 112	\$ 80,501
12A 113	\$128,773
12A 114	\$ 11,794
12A 115	\$138,927
12A 116	\$198,073
12A 117	\$177,060
12A 118	\$147,319
12A 119	\$739,052
12A 120	\$ 64,374
12A 121	\$ 95,970

4. This Decision and Order, if no appeal is timely filed, shall be certified to the Custer County Treasurer and the Custer County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2016 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax year 2012.

8. This Decision and Order is effective for purposes of appeal on March 17, 2017<sup>108</sup>

Signed and Sealed: March 17, 2017

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

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<sup>108</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.