

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

THE COUNTY OF HALL, A Body)
Politc and Corporate,)

Appellant,)

and)

JAN PELLAND, Hall County)
Assessor,)

Appellant,)

vs.)

AREA 4 AGRICULTURAL AND)
HORTICULTURAL LAND VALUATION)
BOARD,)

Appellee.)

CASE NO. 03AH-1

DOCKET ENTRY
AND ORDER
VACATING AND REVERSING THE
DECISION OF THE AREA 4
AGRICULTURAL AND HORTICULTURAL
LAND VALUATION BOARD

The Nebraska Tax Equalization and Review Commission ("the Commission") called the above-captioned case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on the 1s^t day of May, 2003. The Notice of Hearing was issued the 18t^h day of April, 2003. The appeal raises questions of first impression for the Commission.

The appeal was heard by Commissioners Hans, Lore, Wickersham and Reynolds. Chairman Reynolds presided at the hearing. Appellant Hall County Board of Equalization, later the County of Hall, A Body Politic and Corporate, appeared at the hearing through Jerom E. Janulewicz, the Hall County Attorney. Appellant Jan Pelland appeared personally at the hearing in her capacity as the Hall County Assessor ("the Assessor"). The Area 4

Agricultural and Horticultural Land Valuation Board ("the AHLVB") appeared through Mr. B. J. Meyer, Chair of the AHLVB.

Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002) requires that every final decision and order entered by the Commission which is adverse to a party be stated in writing or on the record and be accompanied by findings of fact and conclusions of law. The Commission received certain exhibits, heard and considered the testimony and argument. Thereafter it entered its Findings of Fact, Conclusions of Law, and a Final Order on the merits of the appeal on the record. Those matters, in substance, are set forth below:

I.
FINDINGS OF FACT
AND
PROCEDURAL CONCLUSIONS OF LAW

From the entire record before it, the Commission finds and determines as follows:

A.
THE BOARD AND STANDING

1. The AHLVB is a creature of statute organized pursuant to Neb. Rev. Stat. §77-1380 (Cum. Supp. 2002).
2. The AHLVB has clearly defined geographic boundaries, i.e., the AHLVB **is** organized to include land within Custer,

Valley, Greeley, Sherman, Howard, Dawson, Buffalo, and Hall Counties. Neb. Rev. Stat. §77-1389 (Reissue 1996).

3. The statutes describe the general purpose or benefit to be accomplished by the AHLVB. Neb. Rev. Stat. §77-1381 (Cum. Supp. 2002) provides:

"After April 1 and on or before April 15 of each year,

(a) [Each AHLVB may] increase or decrease by percentage the value of a class or subclass of agricultural and horticultural land, including agricultural and horticultural land granted special valuation under section 77-1344, in any county in its land manual area in order to establish separately the equalization of the value of both the special value and recapture value of agricultural or horticultural land between the various counties in its land manual area effective for that year, (b) make necessary changes in classification of agricultural and horticultural land within its land manual area if the evidence discloses incorrect classification, (c) report to the Tax Equalization and Review Commission the action taken or that no action was taken, (d) order the county assessor to implement the board's action, and (e) within ten days after the action taken by the board, publish, in newspapers of general circulation in the affected counties, the

board's action along with a notice that appeals of the board's action must be filed with the Tax Equalization and Review Commission."

4. The AHLVB, from the record before the Commission, has no contractual relationship with other political subdivisions.
5. The AHLVB has no authority to levy taxes.
6. The AHLVB lacks public elections. Members of the AHLVB are appointed by the county boards of equalization which are within the geographic boundaries of the particular AHLVB. Neb. Rev. Stat. X77-1380(1) (Cum. Supp. 2002). The AHLVB is "a panel of participating county representatives." *Roggasch v. Region IV Office of Developmental Disabilities*, 228 Neb. 636, 641, 423 N.W.2d 771, 775 (1988).
7. The AHLVB only "operates as an arm of the counties and as a facilitator to carry out the public policy of the State of Nebraska." *Roggasch, supra*, at 641, 775.
8. The AHLVB **is**, therefore, a state agency, but not a political subdivision of the State of Nebraska. *Roggasch, supra*, at 641, 775.
9. The right to appeal the decision of a state agency is governed by statute. *See, e.g., Gage County Bd. of Equalization v. Nebraska Tax Equalization and Review Com'n*, 260 Neb. 750, 751 - 752, 619 N.W.2d 451, 453 (2000).

10. The Hall County Board of Equalization is also a creature of statute organized pursuant to Neb. Rev. Stat. §77-1501 (Cum. Supp. 2002).
11. The Hall Board of Equalization has clearly defined geographic boundaries, i.e., the boundaries of Hall County, Nebraska, which are set forth in Neb. Rev. Stat. §22-140 (Reissue 1997).
12. The statutes describe the general purpose or benefit to be accomplished by the Hall County Board of Equalization. Neb. Rev. Stat. §77-1501 (Cum. Supp. 2002) provides:

"The county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately."
13. The Hall County Board of Equalization, from the record before the Commission, has no contractual relationships with other political subdivisions.
14. The Hall County Board of Equalization has no authority to levy taxes.
15. The Hall County Board of Equalization consists of the members of the Hall County Board.
16. Although the Hall County Board members are elected during public elections pursuant to Neb. Rev. Stat. §23-103 (Reissue 1997), the Hall County Board and the Hall County

Board of Equalization are two separate and distinct entities in the eyes of the law. *Speer v. Kratzenstein*, 143 Neb. 300, 303, 12 N.W.2d 306, 309 (1943).

17. The Board merely "operates as an arm of the counties and as a facilitator to carry out the public policy of the State of Nebraska." *Roggasch, supra*, at 641, 775.
18. The Board is, under *Roggasch*, a state agency, but not a political subdivision of the State of Nebraska.
19. The ability of one state agency to appeal the decision of another state agency is governed by statute. *See, e.g., Gage County Bd. of Equalization v. Nebraska Tax Equalization and Review Com'n*, 260 Neb. 750, 751 - 752, 619 N.W.2d 451, 453 (2000).
20. Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002) governs appeals of decisions of the AHLVB. The statute provides:
"Any affected person may appeal an action of [an agricultural or horticultural land valuation] board increasing or decreasing values or reclassifying land within the county to the Tax Equalization and Review Commission. The commission shall hold a hearing and shall enter its order on or before May 15. All appeals shall be filed within fifteen days after the action by the [agricultural or horticultural land valuation] board by mailing notice to the commission and the

[agricultural or horticultural land valuation] board setting forth the order from which the appeal is being taken, the date of the order, and a summary of the reason for the appeal. The burden of proof shall be on the party appealing the order to establish that the order of the board, is unlawful, arbitrary, or capricious." (Emphasis added.)

21. Neither the phrase "any affected person" nor the word "person" is defined in Chapter 77. Neb. Rev. Stat. §49-801(16) (Reissue 1998) however, provides:
"Person shall include bodies politic and corporate, societies, communities, the public generally, individuals, partnerships, limited liability companies, joint stock companies, and associations."
22. The issue concerning the standing of the Hall County Board of Equalization to prosecute this appeal was raised on the Commission's own motion on the record. The Hall County Attorney in response asked without objection leave to amend the pleadings to reflect that the County of Hall, a body politic and corporate, is substituted as the real party in interest in this appeal. The requested leave was granted, and the County of Hall, a body politic and corporate of the State of Nebraska ("the County") was substituted as one of the real parties in interest.

23. The AHLVB may, pursuant to Neb. Rev. Stat. §77-1381(3)(d) (Cum. Supp. 2002), order the Assessor to implement the AHLVB's action. The Board has ordered the Assessor to implement the action. (E19:8). This Order requires the Assessor to revise the assessed values of each parcel of agricultural and horticultural land within Market Area 1 and Market Area 3 of Hall County for tax year 2003. The Assessor is also required to recertify the Abstract of Assessment for Hall County for 2003. Neb. Rev. Stat. §77-1381.01 (Cum. Supp. 2002).

B.

CONCLUSIONS OF LAW: STANDING

1. Whether a question is raised by the parties concerning jurisdiction, it is not only within the power but the duty of an appellate body to determine whether such appellate body has jurisdiction over the subject matter. *Washington County Bd. of Equalization v. Rushmore Borglum Ministries, Inc.*, 11 Neb.App. 377, 650 N.W.2d 504, 506 (2002).
2. Standing is an element of jurisdiction. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Chambers v. Lautenbaugh*, 263 Neb. 920, 926, 644 N.W.2d 540, 546 (2002).

3. The right to appeal the decision of a state agency is purely statutory. "The right of appeal in this state is clearly statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist." *Gage County Bd. of Equalization v. Nebraska Tax Equalization and Review Com'n*, 260 Neb. 750, 751 - 752, 619 N.W.2d 451, 453 (2000) (Citations omitted).
4. Only "an affected person" has the statutory right to appeal a decision of an agricultural and horticultural land valuation board. Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002).
5. The Hall County Board of Equalization is not "an affected person" within the meaning of Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002). The Hall County Board of Equalization therefore lacks standing to prosecute this appeal.
6. The County of Hall, a body politic and corporate, however, is a "person" as that term is defined in Neb. Rev. Stat. §49-801(16) (Reissue 1998).
7. The Assessor is a "person" as that term is defined in Neb. Rev. Stat. §49-801(16) (Reissue 1998). Furthermore, given the duties imposed upon her as a result of the AHLVB action, the Assessor is "an affected person" as that term is defined in Neb. Rev. Stat. §49-801(16). The Assessor therefore possesses the standing requisite to prosecute the appeal.

C.
CONCLUSIONS OF LAW CONCERNING
AHLVB APPEALS, NOTICE, AND BURDENS

1. Neb. Rev. Stat. §§77-5007 (Cum. Supp. 2002), 77-5013 (Cum. Supp. 2002), and 77-5016 (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9), govern appeals to the Nebraska Tax Equalization and Review Commission.
2. Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002) governs appeals from an agricultural and horticultural land valuation board. This statute differs substantially from the provisions of Neb. Rev. Stat. X77-5007, et seq.
3. Rules of statutory construction provided that "In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result... Statutory language is to be given its plain and ordinary meaning. .

Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist., 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996). These rules of construction also provide that statutes of specific application are controlling over statutes of general application. The courts have reached this conclusion since the special statute is a specific expression of legislative will concerning a particular subject. See, e.g., *Kratochvil v. Motor Club Ins. Ass'n*, 255 Neb. 977, 986, 588 N.W.2d 565, 573 (Neb. 1999)

4. The appeal provisions of Neb. Rev. Stat. §77-1384, to the extent they conflict with the provisions of Neb. Rev. Stat. §§77-5007, *et seq.*, are controlling over the provisions of Neb. Rev. Stat. §77-5007, *et seq.*
5. The burden of going forward with evidence is on the appellant pursuant to Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002).
6. The appellant must adduce evidence establishing that the decision of the AHLVB was unlawful, arbitrary or capricious
7. The appellant's burden of persuasion in matters heard and decided by the Commission is by clear and convincing evidence. *See, e.g., Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 171, 645 N.W.2d 821, 821 (2002).
8. Nothing in the cited statute requires the Commission to provide notice of the day and time of the hearing on the merits of an appeal of a decision of an agricultural and horticultural land valuation board. However, the federal Constitution provides:

. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment XIV. The Due Process Clause requires notice, and a reasonable opportunity to present evidence and argument. The Nebraska Supreme Court has determined that these "due process" provisions apply to administrative proceedings. *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997).

9. The Commission accordingly issued a Notice of Hearing on April 18, 2003. The Notice of Hearing provided:
"A hearing in the above-captioned case has been set . to consider the following: hearing to show cause as to why the relief requested by the Appellant should not be granted." (*Notice of Hearing* at page 1).
10. This Order to Show Cause, under the facts and circumstances of this appeal, shifts the burden of going forward with evidence from the Appellants to the Appellee. This is contrary to law, and is therefore erroneous.
11. The issue was raised on the Commission's own motion at the hearing on the merits of the appeal. The Appellants were afforded the opportunity to contest the improper notice and to request a continuance. The Appellants waived any

objection and further waived their right to a continuance of the proceedings.

12. These waivers cure any defects in the erroneous notice.

D.
PROCEDURAL HISTORY

1. The AHLVB is required to meet during the first ten days of February each year to elect officers. Neb. Rev. Stat. §77-1380(3).
2. The Chair of the AHLVB is required to issue a written order to all county assessors within the land manual area to report data on the assessed valuations of agricultural and horticultural land, level of value, and any other information deemed appropriate for the board to perform its duties. Neb. Rev. Stat. §77-1380(3) (Cum. Supp. 2002). The AHLVB Chair issued the required order on February 10, 2003. (E19:1).
3. The AHLVB is authorized by Neb. Rev. Stat. §77-1381(3) (a) (Cum. Supp. 2002) to take action between April 1 and April 15 of each year.
4. Notice of the April 7, 2003, meeting was provided to each member of the AHLVB and to the Department of Property Assessment and Taxation. (E19:2).

5. The AHLVB took action on April 7, 2003. (E1). This action occurred during the statutory time frame allotted for AHLVB action.
6. The AHLVB action increased the level of assessment of agricultural and horticultural land in Market Area 1 of Hall County by three percent (3%). The AHLVB action also increased the level of assessment of agricultural and horticultural land in Market Area 3 of Hall County by five percent (5%). (E1).
7. The Board and the Assessor filed their consolidated appeal on April 16, 2003. This appeal was filed within the fifteen days of AHLVB action as required by Neb. Rev. Stat. §77-1384. The appeal was, therefore, timely filed.
8. The Commission therefore possesses subject matter jurisdiction over the action of the AHLVB.
9. The Commission also possesses personal jurisdiction over the Area 4 Agricultural and Horticultural Land Valuation Board; the County of Hall; and the Hall County Assessor as Parties to this proceeding.
10. The issues before the Commission, as described by the Assessor, are the allegations that:
 - a. The AHLVB order is not supported by a record containing sufficient competent evidence.

- b. The AHLVB failed to make specific findings of fact and conclusions of law for its decision.
 - c. The AHLVB Order was unlawful or contrary to law in that it ordered a valuation increase for agricultural and horticultural land assessed within the statutorily acceptable range of seventy-four percent (74%) to eighty percent (80%) as set forth in Neb. Rev. Stat. §77-5023(3).
 - d. The AHLVB Order is arbitrary and capricious.
 - e. The AHLVB Order is unlawful.
11. The burden of proof imposed on the County or on the Assessor is to establish that the order of the AHLVB is "unlawful, arbitrary, or capricious." Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002).
12. The County's burden of persuasion and the Assessor's burden of persuasion is to prove the required elements by clear and convincing evidence.

II.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

- 1. The Assessor testified without objection that the school district levy comprises the highest percentage of a county tax levy.
- 2. The level of assessment for agricultural and horticultural land within Market Area 1 of Hall County, prior to AHLVB

action, was 74.00%. The COD was 17.73. The PRD was 96.30.
(E2:71).

3. There is no evidence in the form of statistical profiles which is limited to Market Area 1. The level of assessment by school district within Market Area 1 cannot be determined.
4. Howard County forms the north border of Market Area 1 of Hall County for tax year 2003. (E2:97). School District 47-0100 extends into Hall County from Howard County.
(E2:97).
5. Buffalo County forms the west border of Market Area 1. School District 10-0019 extends from Buffalo County into Market Area 1 of Hall County.
6. Merrick County forms the east border of Market Area 1.
(E19:98). School District 40-0028 extends from Merrick County into Hall County.
7. In the absence of evidence of the level of assessment by school district, the Commission cannot conclude that there is a lack of equalization of assessments between counties based on inequalities by school district.
8. The level of assessment of agricultural and horticultural land within Market Area 3 of Hall County was 72.33%. The COD was 3.66. The PRD was 100.70. (E2:71).

9. No counties border Market Area 3 of Hall County for tax year 2003. (E2:98). No school districts extend into Market 3 of Hall County for tax year 2003 from any other county. (E2:97). There is no evidence of any other governmental subdivisions with tax levying authority which extend from other counties into Market Area 3 of Hall County. The Commission therefore cannot conclude that there was a lack of equalization between surrounding counties and Market Area 3 of Hall County prior to AHLVB action.
10. The Assessor and the County have alleged that the AHLVB failed to make specific findings of fact and conclusions of law for its decision. There is no requirement in the applicable statutes which requires the AHLVB to make findings of fact and conclusions of law as part of an order increasing or decreasing assessments. This argument has no merit.
11. The Assessor and the County have alleged that the AHLVB improperly adjusted property values when the assessed values fell within statutorily accepted ranges. Unlike the provisions governing Commission action (see Neb. Rev. Stat. §77-05023 (Cum. Supp. 2002)), there is no statutory provision limiting AHLVB action to those classes or subclasses of agricultural or horticultural land which fall

outside of the acceptable range. This allegation has no merit.

12. The Assessor and the County have alleged that the AHLVB action as to Market Area 3 was arbitrary, capricious and unlawful. The AHLVB is charged with the duty of equalizing assessments between counties. There is no evidence of a lack of intercounty equalization between other counties and Market Area 3 of Hall County prior to AHLVB action for tax year 2003.
 13. The County and the Assessor have adduced sufficient clear and convincing evidence to demonstrate that the decision of the AHLVB was unlawful, arbitrary, and capricious.
 14. The decision of the Area 4 AHLVB to increase assessments for agricultural and horticultural land by 5% for agricultural and horticultural land within Market 3 of Hall County, for tax year 2003, must therefore be vacated and reversed.
 15. The Assessor and the County have alleged that the AHLVB action as to Market Area 1 was arbitrary, capricious and unlawful. The AHLVB is charged with the duty of equalizing assessments between counties.
 16. The only documentary evidence regarding the basis of the Area 4 AHLVB action as to Market Area 1 is found in the Minutes of the AHLVB proceeding. This evidence is supplemented by the testimony of the Area 4 AHLVB Chair.
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The Chair testified that the AHLVB analyzed the levels of assessment by county. However, no evidence was available to the AHLVB regarding the level of assessment by market area and within market area by school district.

17. The record therefore lacks sufficient evidence to demonstrate that there was a lack of equalization between Buffalo, Howard, Merrick or Hall Counties prior to AHLVB action for tax year 2003.
18. The County and the Assessor have adduced sufficient clear and convincing evidence to demonstrate that the decision of the AHLVB to increase assessments for agricultural and horticultural land within Market 1 of Hall County, by 3% for tax year 2003, was unlawful, arbitrary, and capricious.
19. The decision of the AHLVB to increase assessments for agricultural and horticultural land within Market 3 of Hall County, by 5% for tax year 2003, must therefore be vacated and reversed.

**III.
CONCLUSIONS OF LAW**

1. That the Commission has jurisdiction over the parties and the subject matter of this appeal.
2. The Appellant is required to establish that the order of the AHLVB was unlawful, arbitrary or capricious. Neb. Rev. Stat. §77-1384 (Cum. Supp. 2002).

3. A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law. A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change. *In re: Proposed Amendment to Title 291, Chapter 3, of Motor Carrier Rules and Regulations*, 264 Neb. 298, 310 - 311, 646 N.W.2d 650, 660 (Neb. 2002). Under this test, the decisions of the AHLVB were unlawful, arbitrary and capricious.
4. Statutory language is to be given its plain and ordinary meaning. *In re: J.K.*, 265 Neb. 253, 258, 656 N.W.2d 253, 259 (2003).
5. Neb. Rev. Stat. §77-5023 sets the acceptable range for agricultural and horticultural land at between 74% and 80% of actual or fair market value. If the Commission finds that a class or subclass of property falls outside the acceptable range, then the Commission is required to adjust the level of assessment to the midpoint of the acceptable

range. Neb. Rev. Stat. §77-5023(2) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).

6. Nothing in this language purports to restrict AHLVB action.
7. The Assessor and the County have adduced sufficient clear and convincing evidence to demonstrate that the decisions of the AHLVB to increase assessments for agricultural and horticultural land within Market Area 1 of Hall County by 3%, and the decision to increase assessments for agricultural and horticultural land within Market Area 3 of Hall County by 5%, were unlawful, arbitrary, and capricious.
8. Those Orders must accordingly be vacated and reversed.

**IV.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the Area 4 Agricultural and Horticultural Land Valuation Board increasing the level of agricultural and horticultural assessments within Market Area 1 of Hall County, Nebraska, by 3% for tax year 2003 is vacated and reversed.
2. That the order of the Area 4 Agricultural and Horticultural Land Valuation Board increasing the level of agricultural and horticultural assessments within Market Area 3 of Hall County, Nebraska, by 5% for tax year 2003 is vacated and reversed.

3. That any request for relief by any party not specifically granted by this order is denied.
4. That this decision shall be certified forthwith to: the Area 4 Agricultural and Horticultural Land Valuation Board; the County of Hall; and to the Hall County Assessor.
5. That the Hall County Assessor shall reverse the increase in assessments precipitated by the Area 4 AHLVB Order for tax year 2003, and recertify her Abstract of Assessment to the Property Tax Administrator as required by law.
6. That this decision shall only be applicable to tax year 2003.
7. That each party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that the above and foregoing Findings and Orders were issued on the 1st day of May, 2003. The same were approved and confirmed by Commissioners Hans, Lore and Reynolds. Vice-Chair Wickersham dissented as to that portion of the decision pertaining to Market Area 1. A quorum of the Commission having approved and confirmed the Order, this Order is deemed to be the

Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5)
(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).

Signed and sealed this 2n^d day of May, 2003.



SEAL

A handwritten signature in black ink, appearing to read 'Mark P. Reynolds', written over a horizontal line.

Mark P. Reynolds, Chairman