

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

LELAND D. REISS TRUSTEE, LELAND))	
REISS TRUST,)	
)	CASE NOs. 04A-36, 04A-37
Appellant,)	and 04A-38
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
HARLAN COUNTY BOARD OF))	HARLAN COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of the appeals by Leland D. Reiss Trustee, Leland Reiss Trust, to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 S. 2nd, in the City of Kearney, Buffalo County Nebraska, on July 27, 2005, pursuant to a Notice and Order for Hearing issued May 10, 2005. Commissioners Wickersham, Lore, and Hans were present.

Commissioner Wickersham presided at the hearing.

Leland D. Reiss Trustee, Leland Reiss Trust, ("the Taxpayer") appeared at the hearing without counsel.

The Harlan County Board of Equalization ("the County Board") appeared through counsel, Bryan S. McQuay, Esq., the County Attorney for Harlan County, Nebraska.

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2003, as amended by 2005, Neb. Laws L.B. 15 §10) to state its final decision concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

I. STANDARD OF REVIEW

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. §77-5016(8)(Cum. Supp. 2004, as amended by 2005 Neb. Laws L.B. 15 §9). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

II. FINDINGS

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described in the appeals as , described in the table below. The property as described in the table below constitutes the subject property

2. Eighty percent of the actual or fair market value of the agricultural land and horticultural land for the subject property, placed on the assessment roll as of January 1, 2004, ("the assessment date") by the Harlan County Assessor is set forth in the following table:

Case No. 04A-36

Subject Property Description: NE $\frac{1}{4}$, Section 22, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$158,425.00	\$78,515.00	\$158,425.00
Road	-0-		-0-
Total	\$158,425.00	\$78,515.00	\$158,425.00

Case No. 04A-37

Subject Property Description: W $\frac{1}{2}$ NW $\frac{1}{4}$, Section 23, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$106,380.00	\$81,750.00	\$106,380.00
Road	-0-	-0-	-0-
Total	\$106,380.00	\$81,750.00	\$106,380.00

Case No. 04A-38

Subject Property Description: SW¹/₄, Section 30, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$180,180.00	\$131,955.00	\$180,180.00
Road	-0-	-0-	-0-
Total	\$180,180.00	\$131,955.00	\$180,180.00

3. The Taxpayer timely protested those values to the County Board.
4. The County Board denied the protests. (E1, 2, 3)
5. The Taxpayer timely filed an appeal of those decisions to the Commission.
6. The County Board was served with a Notices in Lieu of Summons, and answered those Notices after a Motions for Leave to File Out of Time were granted by the Commission .
7. A Notice and Order for Hearing issued on May 10, 2005, set a hearing of the Taxpayer's appeals for July 27, 2005, at 1:00 p.m. CDST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.
9. The appeals were consolidated for purposes of hearing by order of the Commission.
10. The Taxpayer's opinion of value for each of the parcels described in the appeals was based on the prior years taxable value.
11. The only evidence of actual or taxable value for each parcel described in the appeals was the Taxpayer's opinion.

12. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
13. Based on the entire record before it, the Commission finds and determines that eighty percent of the actual or fair market value of the agricultural land and horticultural land described in each appeal for the tax year 2004 is:

Case No. 04A-36

Subject Property Description: NE $\frac{1}{4}$, Section 22, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

Agricultural land \$158,425.00

Case No. 04A-37

Subject Property Description: W $\frac{1}{2}$ NW $\frac{1}{4}$, Section 23, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

Agricultural land \$106,380.00

Case No. 04A-38

Subject Property Description: SW $\frac{1}{4}$, Section 30, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

Agricultural land \$180,180.00

14. The taxable value of the real property described in each appeal as of the assessment date as determined by the County Board is not contradicted by the evidence.
15. The decisions of the County Board were correct and neither arbitrary nor unreasonable.
16. The decisions of the County Board should be affirmed.

III. CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998)
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016(3) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9).
4. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
5. Agricultural land and horticultural land shall be valued for purposes of taxation at eighty percent of its actual value. Neb. Rev. Stat. §77-201(2)(Reissue 2003).
6. Agricultural land and horticultural land means land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. Land retained or protected for future agricultural or horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or horticultural land. Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural

land or horticultural land. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stat. §77-1359(1)(Reissue 2003)

7. Agricultural or horticultural products include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops. Neb. Rev. Stat. §77-1359(2)(Reissue 2003).
8. “Actual 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.” Neb. Rev. Stat. §77-112 (Reissue 2003).
9. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
10. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 8241 (2002).
11. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9). The Nebraska Supreme Court, in

considering similar language, has held that “There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, 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.” *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

12. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
13. The term "unreasonable" can be applied to a decision of an administrative agency only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).
14. The Court has also held that “In an appeal to the county board of equalization or to [the Tax Equalization and Review Commission] and from the [Commission] to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will

- or failure of plain duty, and not mere errors of judgment.” *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).
15. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
16. “It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization.” *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58, (1991).
17. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).
18. The prior year’s assessment is not relevant to the subsequent year’s valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201,206 (1988).

IV. ANALYSIS

The Taxpayer challenged the taxable value of three parcels on differing basis.

The Taxpayer's challenge to taxable value for the NE¼, Section 22, Township 4 North, Range 17 West 6th PM is based on his assertion that the land is 35 to 40 per cent wetlands. (E1). Photographs of that parcel with standing water were received by the Commission. (E5:1-8). The Taxpayer did not quantify the impact on actual or taxable value of the presence of wetlands. The Taxpayer did offer his opinion that the taxable value of the subject property for the tax year 2004 was the same as the taxable value for the year 2003. An opinion of value on that basis cannot be deemed clear and convincing evidence of taxable value. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201,206 (1988). The Taxpayer asserted that land to the south of the parcel had a lower value even though it was not as subject to standing water. (E:1) The Taxpayer did not produce evidence that the land to the south of the parcel was comparable or that its taxable value was 80 per cent of its actual value. The unsupported assertions of the Taxpayer regarding the taxable value of another tract are not clear and convincing evidence of the actual or taxable value of the parcel whose value is being challenged.

The Taxpayer's challenge to valuation of W½NW¼ Section 23, Township 4 North, Range 17 West 6th PM is based on the assertion that its source of water for irrigation is based on a contract. (E2). The Taxpayer's assertion that a sale of the parcel would be affected by the availability of water can be readily accepted. It is not enough however to raise a possible effect on value without proving that the possibility raised does in fact impact value. Here the Taxpayer acknowledges that any sale of the parcel could carry with it the contractual right to use water from an adjoining tract and has not produced any evidence that water would not be available after a sale. The Taxpayer did testify that in his opinion the taxable value of the property for the year

2004 should be the same as the taxable value for the tax year 2003. As noted proof of a prior year's taxable value is an insufficient basis for relief based on valuation. The Taxpayers claim may also raise questions of Equalization based on the classification of the land as irrigated. *See. Otradovsky, v. Board of Equalization of County of Colfax*, 206 Neb. 559, 294 N.W.2d 334 (1980). The claim raised in *Otradovsky*, which on its facts is nearly identical to the claim raised in the Taxpayer's protest, was denied. *Id.* The Commission cannot grant relief on the claim that taxable value of the parcel is affected by its water source.

In the appeals pertaining to both parcels, the Taxpayer raised two additional issues. First that the Leland Reiss Trust did not receive notice of a time to meet with the County Board. It is unclear whether that assertion pertains to the hearing the County board held on the protest or the later meeting of the Board during which it took action on the protest. If the claim relates to the Board's hearing any failure of notice would have been rendered moot by the appearance of the Trustee at the hearing. The Trustee did appear at the hearing. (E2). If the claim relates to the second meeting of the County Board at which a decision was made the Commission is unaware of any requirement that a protestant be given notice of that meeting. The assertions of the Taxpayer regarding the procedures employed by the County Board do not offer a basis for relief.

The Taxpayer's challenge to valuation of SW¹/₄ Section 30, Township 4 North, Range 17 West 6th PM is based on assertions that the parcels taxable value for 2004 increased 27 per cent over the taxable value for the tax year 2003, that the property had been listed for \$165,000.00 two years prior to 2004 without a buyer, and that taxable values in Market Area 1 of Harlan County are unfair. (E2).

The Taxpayer's assertion that because taxable value increased 27 per cent from one tax year to the next is not a basis on which the Commission can grant relief. The prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201,206 (1988). If the base for a calculation is not relevant results of the calculation cannot be relevant. An assertion that taxable value for a subsequent year should be determined as a percentage of the prior year's taxable value is therefore not persuasive.

The definition of actual value which the Commission is bound to follow is found in Nebraska Statues. "Actual 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." Neb. Rev. Stat. §77-112 (Reissue 2003). That definition is based on a transaction between a buyer and a seller. An offer to sell, however motivated, is only one half of a transaction. A listing cannot, standing alone, be evidence of actual value. The only other evidence of actual value as of the assessment date was the opinion of the Taxpayer that taxable value for the tax year 2004 should be the same as for the tax year 2003. For reasons stated above proof of a prior year's taxable value is an insufficient basis for relief nor does that evidence support a determination that the listing price of the parcel represented actual value as of the assessment date.

The Taxpayer asserted that values determined for Market Area 1 were unfair. The Taxpayer testified that values for market area 1 should not be higher than the values for market area 3. The Taxpayer testified that energy costs in market area 1 associated with pumping water from deep wells were higher than those costs for irrigation in market area 1. Sales rosters for both market areas 1 and 3 were received. (E20 and E24). The Taxpayer identified one sale described in Exhibit 20 as influenced by the tax benefits conferred by Section 1031 of the Internal Revenue Code. Without further evidence that the transactions described in Exhibits 20 and 24 should not have been used the Commission cannot determine that the resulting values are unfair.

The Commission is unable to find a basis for relief.

**V.
ORDER**

IT IS THEREFORE ORDERED:

1. That the decisions of the County Board determining eighty percent of the actual or fair market value of the agricultural land and horticultural land for the subject property as of the assessment date, January 1, 2004, as follows:

Case No. 04A-36

Subject Property Description: NE $\frac{1}{4}$, Section 22, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

Land	<u>\$158,425.00</u>
Total	<u><u>\$158,425.00</u></u>

Case No. 04A-37

Subject Property Description: W $\frac{1}{2}$ NW $\frac{1}{4}$, Section 23, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

Land	<u>\$106,380.00</u>
Total	<u>\$106,380.00</u>

Case No. 04A-38

Subject Property Description: SW $\frac{1}{4}$, Section 30, Township 4 North, Range 17 West, 6th PM, Harlan County, Nebraska.

Land	<u>\$180,180.00</u>
Total	<u>\$180,180.00</u>

are affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Harlan County Treasurer, and the Harlan County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2003).
3. That any request for relief, by any party, which is not specifically provided for by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2004.
6. This order is effective for purposes of appeal August 10, 2005.

Signed and Sealed. August 10, 2005.

Wm. R. Wickersham, Chairperson

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS L.B. 15 §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.