

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

COTTONWOOD FLATS, INC.,)	
)	
Appellant,)	Case Nos. 09A 016, 09A 017, & 09A 018
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISIONS OF
DAKOTA COUNTY BOARD OF)	THE DAKOTA COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by Cottonwood Flats, Inc. ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 920 S. 20th St., Norfolk, Nebraska, on November 1, 2010, pursuant to an Order for Hearing and Notice of Hearing issued June 17, 2010 as amended by an Order dated August 25, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Kurt Hohenstein, Vice President of Cottonwood Flats, Inc., was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Kim Watson, County Attorney for Dakota County, Nebraska, was present as legal counsel for the Dakota County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board, determining taxable value of the subject property, is unreasonable or arbitrary; and

The taxable value of the subject property on January 1, 2009.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.
2. The parcels of real property to which the above captioned appeals pertain are ("the Subject Property") described in the tables below.
3. Taxable value of each parcel of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Dakota County Assessor, value as

proposed in timely protests, and taxable value as determined by the County Board is

shown in the following tables:

Case No. 09A 016

Description: Lot 1 and 1A Except Land in WRP Easement Section 4, Township 27, Range 9, 139.79 Acres, Dakota County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$270,880.00	\$0	Protest Dismissed
Total	\$270,880.00	\$0.00	Protest Dismissed

Case No. 09A 017

Description: Lot 2 in SE¼ Except Drainage Ditch and Except Land in the WRP Easement Section 5, Township 27, Range 9, 143.98 Acres, Dakota County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$340,605.00	\$314,850.00	\$340,605.00
Farm Site	\$11,100.00	In Ag Land	\$11,100.00
Outbuilding	\$8,035.00	In Ag Land	\$8,035.00
Total	\$359,740.00	\$314,850.00	\$359,740.00

Case No. 09A 018

Description: NW¼ Being Lot 7, Lot 7A, Part Lot 8, N½S½ Section 9 Except Land in WRP Easement Section 9, Township 27, Range 9 437, Acres, Dakota County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$1,015,075.00	\$897,390.00	\$1,015,075.00
Total	\$1,015,075.00	\$897,390.00	\$1,015,075.00

4. Appeals of the County Board's decisions were filed with the Commission.
5. The appeals were consolidated for hearing by order of the Commission.

6. An Order for Hearing and Notice of Hearing issued on June 17, 2010, as amended by an Order issued on August 25, 2010, set a hearing of the appeals for November 1, 2010, at 11:00 a.m. CDST.
7. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Taxable value of each parcel for the tax year 2009 is:

Case No. 09A 016

Agricultural land	\$ 270,880.00
Total	<u>\$ 270,880.00</u>

Case No. 09A 017

Agricultural land	\$ 340,605.00
Farm Site	\$ 11,100.00
Outbuildings	\$ 8,035.00
Total	<u>\$ 359,740.00</u>

Case No. 09A 018

Agricultural land	\$ 1,015,075.00
Total	<u>\$ 1,015,075.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
2. “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 2009).
3. “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.” Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “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, 829 (2002).

5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
6. 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) (Reissue 2009).
7. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009).
8. "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." Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).
9. "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. Agricultural or horticultural purposes includes the following uses of land:
 - (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

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

10. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
11. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
12. The presumption disappears if there is competent evidence to the contrary. *Id.*
13. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).
14. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. *See, e.g., Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

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. 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).
17. A decision is unreasonable 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).
18. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d 881 (2002).
19. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
20. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

21. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

One parcel of the subject property is improved. All of the parcels were assessed as agricultural land and horticultural land. The contribution to value of the improvements on the improved parcel is not at issue.

Section 77-1502 of Nebraska Statutes requires that a protest be dismissed unless the protestant states a reason or reasons for the protest. The Taxpayer's protest of the assessment of the parcel described in Case No 09A 016 was dismissed by the County Board because it believed the protest was filed without a statement of a reason or reasons for the protest. A statement containing reasons for the protest was attached to the protest as filed with the County Clerk, but a copy of that statement was not in the information furnished to the County Assessor and the County Board. The Commission determined that the protest should not have been dismissed and that it had jurisdiction to hear the appeal on its merits.

The Taxpayer asserted that the notices of valuation change given for the tax year 2009 were defective and that any increase in valuation should be voided. Regardless of any defects in the notice, the Taxpayer protested valuation of the parcels for tax year 2009 and by doing so

waived any defects. *Gamboni v. County of Otoe*, 159 Neb. 417, 428, 67 N.W.2d 489, 498 (1954).

Another contention of the Taxpayer is that because the County changed the manner in which land subject to a Wetlands Reserve Program (“WRP”) easement were assessed it is unable to determine whether the assessment of the parcels subject to appeal is correct. The Taxpayer’s confusion is based on the fact that for the tax year 2009 the County reduced the acres assessed for the parcels comprising the subject property by excluding land subject to a WRP easement and created a new parcel which only contained the land subject to the WRP easement. The Commission notes that the easement was granted in November of 2005. (E5:6). The Commission notes also that 29 acres were assessed as WRP lands in tax year 2008. (E24:11). And the Commission notes that 217.85 acres were assessed as WRP lands in tax year 2009. (E24:32). Valuation of the 217.85 acres of WRP land identified for the tax year 2009 was appealed by the Taxpayer and is the subject of an order entered in Case NO. 09A 019.

The Taxpayer contends, in part, that it cannot determine whether the assessment of the subject property is correct because it cannot determine whether the number of acres identified as agricultural and horticultural land in each parcel is correct because an unknown number of acres of WRP land was removed from each parcel. The following table shows the 2008 assessed values, the 2009 assessed values, and the 2009 number of acres in the parcels by Case No. comprising the subject property and another parcel containing the lands subject to the WRP easement.

Case No.	08 Assessment	09 Assessment	Acres Assessed 09
09A 016	\$279,125.00	\$270,880.00	139.79
09A 017	\$314,850.00	\$359,740.00	143.98
09A 018	\$897,390.00	\$1,015,075.00	437.00
Case No. 09A 019 WRP		\$255,830.00	217.85
Total	\$1,491,365.00	\$1,901,525.00	938.62

Responses to interrogatories show that acres of WRP lands had been assessed in tax year 2008. (E24:11). For tax year 2009 there were 217.85 acres assessed as WRP lands. 188.85 additional acres were classified as WRP lands for the tax year 2009 ($217.85 - 29 = 188.85$). The Taxpayer, through interrogatories, asked the County Board to identify the number of acres removed from each parcel of the subject property for inclusion in the WRP land assessment for the tax year 2009. The response referenced property record files which simply showed the lands assessed for the year 2009. If the parcels comprising the subject property had contained the acres subject to the WRP easement, more acres would have been assessed and the assessed values would have been higher. A plat map recorded in Dakota County, received as Exhibit 7, shows that all of the WRP lands are located in sections 4, 5, and 9, Township 27, Range 9, Dakota County, the parcels comprising the subject property. In addition, the acres identified as WRP lands, have been classified by soil types for valuation. (E24:32). The soil classifications could only have been obtained from a soils map. The soils map shows section, township and range boundaries in a manner that allows their use for assessment purposes. *See Soil Survey of Dakota County, Nebraska*, United States Department of Agriculture, Soil Conservation Service, (1976). The

County Board could have identified the number of acres of WRP lands within those parts of sections 4, 5, and 9, Township 27, Range 9, of Dakota County owned by the Taxpayer but did not. The failure to identify WRP acres in the manner sought by the Taxpayer raises doubts concerning an appropriate assessment of the parcels comprising the subject property.

Confusion and unresponsive answers to interrogatories are not, however, a sufficient basis for relief. A Taxpayer, who only produces evidence that is aimed at discrediting valuation methods utilized by the county assessor, fails to meet the burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983). A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value). There is no evidence that assessed values of the parcels comprising the subject property as described in the assessment records were not properly determined based on the lands contained in the parcels as described, and there is no evidence they should contain fewer acres.

V. CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2009, are affirmed.
2. Taxable value, for the tax year 2009, of each parcel described in an appeal as referenced by the Case No. is:

Case No. 09A 016

Agricultural land	\$ 270,880.00
Total	<u>\$ 270,880.00</u>

Case No. 09A 017

Agricultural land	\$ 340,605.00
Farm Site	\$ 11,100.00
Outbuildings	\$ 8,035.00
Total	<u>\$ 359,740.00</u>

Case No. 09A 018

Agricultural land	\$ 1,015,075.00
Total	<u>\$ 1,015,075.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Dakota County Treasurer, and the Dakota County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on May 25, 2011.

Signed and Sealed. May 25, 2011.

Wm. R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result in these three appeals.

Robert W. Hotz, Commissioner