

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

COTTONWOOD FLATS, INC.,)	
)	
Appellant,)	Case No. 09A 019
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
DAKOTA COUNTY BOARD OF)	THE DAKOTA COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal 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 this case 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 appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Taxable value 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 a timely

protest, and taxable value as determined by the County Board is shown in the following table:

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Description: Wetlands Reserve Program Agreement #66-6526-4-060 Known as Tracts 1 & 2 Located in part in Sections 4, 5, 9, and 10 Section 1, Dakota County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$255,830.00	\$0	\$255,830.00
Total	\$255,830.00	\$0	\$255,830.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on June 17, 2010, set a hearing of the appeal for August 16, 2010, at 1:00 p.m. CDST.
6. The hearing on the appeal was consolidated with other appeals bearing Case Nos. 09A 016, 09A 017, and 09A 018.
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 the subject property as of the assessment date for the tax year 2009 is:

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Agricultural land \$ 0
Total \$ 0.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal 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

The subject property is 217.85 acres subject to a Wetlands Reserve Program (“WRP”) easement granted in the year 2005. As described and as shown in a plat received as Exhibit 7, the lands subject to the WRP easement are found in sections 5, 4, and 9 of Township 27, Range 9, in Dakota County. Easements granting access to the land subject to the WRP easement are found in Section 8 of Township 27, Range 9, in Dakota County. (E5:7). The inclusion of lands

in section 10 of Township 27, Range 9, as lands subject to the WRP easement is disputed by the Taxpayer even though described in the easement and on the plat. The easement as described in the plat contains two parcels; one containing 19.21 acres and the other containing 199.64 acres, for a total of 218.85 acres. There may be some confusion concerning a one acre tract excluded from the easement. The one acre is not excluded from the 199.64 acres, described as Tract 1. (E7). Regardless, the County sought to assess 217.85 acres as subject to the WRP easement. (E24:32).

The subject property is described in the Dakota County assessment records as a “parcel” containing the WRP lands owned by the Taxpayer. The “parcel” as described in the County Assessor’s records contains lands in at least three different sections. Nebraska law requires an assessor to prepare an assessment roll each year. Neb. Rev. Stat. §77-1303 (Reissue 2009). The assessment roll lists each parcel, its owner, the number of acres or lots which comprise it and the value thereof, and the improvements and the value thereof. *Id.* A parcel is defined as “a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same district, they may be included in one parcel.” Neb. Rev. Stat. §77-132 (Reissue 2009). Rules and Regulations promulgated by the Department of Revenue, Property Assessment Division, require that a parcel contain lands from only one section. *See* Title 350, Neb. Admin. Code, ch. 14 §002.57 (3/09). The assessment of lands from three different sections as one parcel is contrary to express statutory provisions. Because the subject property, as described in the Dakota County records, could not be lawfully assessed as a “parcel” the assessment is void.

**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 Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.
4. The assessment of the subject property as described in the assessment records is void

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2009, is vacated and reversed and assessment of the parcel as described in the assessment records is void
2. Taxable value, for the tax year 2009, of the subject property is:

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Agricultural land \$ 0

Total \$ 0.

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.

Commissioner Hotz, concurring,

I concur in the result. The County Board has not provided competent evidence of the description or value of any one of the multiple parcels in non-contiguous sections that may comprise the subject property.

Robert W. Hotz, Commissioner