

CASE NO. A-21-774

---

IN THE NEBRASKA COURT OF APPEALS

---

LANCASTER COUNTY BOARD OF EQUALIZATION

APPELLANT,

VS.

BRAD MOSER AND MARY MOSER,

APPELLEES.

---

APPEAL FROM THE  
TAX EQUALIZATION AND REVIEW COMMISSION

---

BRIEF OF APPELLANT

---

Prepared and Submitted by:

Daniel Zieg, #24742  
575 South 10th Street  
Lincoln, Nebraska 68508  
(402) 441-7321  
dzieg@lancaster.ne.gov  
Attorney for Appellant

---

December 10, 2021

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

BASIS OF JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

ASSIGNMENTS OF ERROR .....2

PROPOSITIONS OF LAW ..... 2

STATEMENT OF FACTS ..... 4

SUMMARY OF ARGUMENT .....5

ARGUMENT ..... 6

    I.    The TERC erred reversing the Lancaster County Board of  
          Equalization in finding there was clear and convincing evidence that  
          the value placed on the Moser property was grossly excessive and the  
          result of systematic exercise of intentional will or failure of plain legal  
          duty based on a single undervalued parcel .....6

CONCLUSION.....11

**TABLE OF AUTHORITIES**

**Cases**

*JQH La Vista Conf. Ctr. Dev. LLC v. Sarpy County Bd. of Equalization*,  
285 Neb. 120, (2013).....2

*Hastings Bldg. Co. v. Bd. of Equalization of Adams Cty.*,  
212 Neb. 847, 850–51, (1982)

*Brenner v. Banner County Bd. of Equalization*,  
276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008).

*Zabawa v. Douglas County Bd. of Equalization*,  
17 Neb.App. 221, 227 (2008)

*Cabela's, Inc. v. Cheyenne Cty. Bd. of Equalization*,  
8 Neb. App. 582, 597, (1999).

*Future Motels, Inc. v. Custer Cty. Bd. of Equalization*,  
252 Neb. 565, 570 (1997).

**Statutes**

Neb.Rev.Stat. 77-112

Neb.Rev.Stat. § 77-201

Neb.Rev.Stat. §77-1317

Neb.Rev.Stat. §77-1318.01

Neb.Rev.Stat. 77-1343

Neb.Rev.Stat. §77-1363

Neb.Rev.Stat. §77-1502.01

Neb.Rev.Stat. § 77-5019.....1, 3

## **BASIS OF JURISDICTION**

The Tax Equalization and Review Commission (TERC) reversed the decision of the Lancaster County Board of Equalization (Lancaster) on August 24, 2021. On September 2, 2021, the County filed a Motion to Reconsider. On September 23, 2021, the TERC issued an order finding that the Motion to Reconsider was being treated as a Motion for Rehearing and denying the same. The County timely filed the Petition for Judicial Review on September 23, 2021 after receiving TERC's Order. Jurisdiction is proper in the Nebraska Court of Appeals pursuant to Neb.Rev.Stat. §77-5019.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is an appeal from the decision by the TERC reversing the Lancaster County Board of Equalization regarding the value of a single parcel owned by Brad and Mary Moser in southern Lancaster County. The case involves the value of the property on January 1, 2018 and January 1, 2019.

### **B. Issues Tried to TERC**

The issue before the TERC was whether the Lancaster County Board of Equalization erred in determining the value of the subject property.

### **C. Issues Decided by TERC**

The TERC reversed the values of the subject properties as set by the Lancaster County Board of Equalization.

### **D. Scope of Review**

Appellate courts review decisions by the TERC for errors on the record. Neb. Rev. Stat. § 77-5019(5). An appellate court's review "is whether the decision conforms to the

law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.” *JQH La Vista Conf. Ctr. Dev. LLC v. Sarpy County Bd. Of Equalization*, 285 Neb. 120, 123-24, 825 N.W.2d 447, 451 (2013).

### **ASSIGNMENTS OF ERROR**

- I. The TERC erred reversing the Lancaster County Board of Equalization in finding there was clear and convincing evidence that the value placed on the Moser property was grossly excessive and the result of systematic exercise of intentional will or failure of plain legal duty based on a single undervalued parcel.

### **PROPOSITIONS OF LAW**

- I. 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
- II. Special valuation means the value that the land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses. Neb.Rev.Stat. 77-1343(5).
- III. Agricultural land and horticultural land actively devoted to agricultural or horticultural purposes which has value for purposes other than agricultural or horticultural uses and which meets the qualifications for special valuation under section 77-1344 shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, and shall be valued for taxation at seventy-five percent of its special value as defined in section 77-1343. Neb. Rev. Stat. § 77-201(3)

- IV. [T]he taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.” *Hastings Bldg. Co. v. Bd. of Equalization of Adams Cty.*, 212 Neb. 847, 850–51, (1982)
- V. “There is a presumption that the board of equalization has properly performed its official duties and that in making an assessment, it 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 adduced on appeal to the contrary. From that point forward, 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.” *Brenner v. Banner County Bd. of Equalization*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008).
- VI. “In order that improvements to real property are properly assessed for property tax purposes, no building amounting to a value of two thousand five hundred dollars or more shall hereafter be erected, or structurally altered or repaired, and no electrical, heating, plumbing, or other installation or connection, or other improvement to real property, amounting to a value of two thousand five hundred dollars or more, shall hereafter be made until an

information statement has been filed with the county assessor in the county in which the improvement is to be made.” Neb.Rev.Stat. §77-1318.01

VII. “Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.” *Zabawa v. Douglas County Bd. of Equalization*, 17 Neb.App. 221, 227 (2008)

VIII. “If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief.” *Zabawa v. Douglas County Bd. of Equalization*, 17 Neb.App. 221, 227 (2008)

### **STATEMENT OF FACTS**

This case concerns a single property located in Lancaster County, Nebraska. The special value is at issue for the 2018 and 2019 tax years. The parcel is described as Section 36, Township 8, Range 5 6<sup>th</sup> Principal Meridian, NW, SE & S 1/2 SE and contains approximately 116.37 acres. (BOE 23:4). In 2018, the Lancaster County Board of Equalization (Lancaster) used a referee to hear property protests as authorized by Neb.Rev.Stat. §77-1502.01. That referee received documents and considered statements from the Appellee in making a recommendation to Lancaster. (BOE Exhibit 23:22) Appellees relied on an error by the Lancaster County Assessor in valuing nearby parcel (Morrison property) that was irrigated farmland. The Assessor had the Morrison property valued as dryland. (BOE Exhibit 24:21) The referee rejected the Appellee’s arguments to value their property the same as the Morrison property. (BOE Exhibit 23:22-25). For the 2018 tax year, the Lancaster County Board of Equalization adopted the referee’s recommendation and determined the value of the property to be \$598,900. (BOE Exhibit 23:27) For the 2019 tax year, Lancaster again used a referee to hear property protests.

That referee received documents and considered statements from the Appellee in making a recommendation to Lancaster. The Appellee again argued to be valued at the same rate as the Morrison property which was referee rejected the Appellee's arguments. (BOE 24:11-14) The Lancaster County Board of Equalization adopted the referee's recommendation and determined the value of the property to be \$570,300. (BOE 24:32).

On September 7, 2018, Appellees timely appealed the 2018 determination of value to the TERC. (T31). That appeal was docketed as 18A 0224. (T31). On August 28, 2019, Appellees timely appealed the 2019 determination of value to the TERC. (T40). That appeal was docketed as 19A 0127. (T62).

On November 9, 2020, the TERC issued an Order for Hearing and Notice of Hearing setting the appeals for hearing. On April 5, 2021, the TERC held a hearing to determine the taxable value of the subject property. On August 21, 2021, the TERC issued an order reversing Lancaster's determination of value of the subject property. (T88-105) On September 2, 2021, Lancaster filed a Motion to Reconsider. (T106-109) On September 23, 2021, the TERC issued an Order denying the Motion to reconsider. (T113-114) Lancaster filed its Petition for Judicial review on September 23, 2021.

### **SUMMARY OF AGRUMENT**

Appellant does not believe there are any relevant factual disputes in this case. The Appellees own a piece of irrigated farmland in Lancaster County. During the Appellees property protest with the Lancaster County Board of Equalization, they requested to be valued using the same rates as a nearby parcel. The nearby parcel was also irrigated, but had been classified as dryland by the Assessor due to an unreported pivot added to the property. During the hearing before the Tax Equalization and Review



Commission, the Appellee only offered evidence about a single parcel that was misclassified by the Lancaster County Assessor. The Tax Equalization and Review Commission incorrectly found that a single parcel was sufficient to reduce the Appellee's property value in the spirit of equalization.

### **ARGUMENT**

**I. The TERC erred reversing the Lancaster County Board of Equalization in finding there was clear and convincing evidence that the value placed on the Moser property was grossly excessive and the result of systematic exercise of intentional will or failure of plain legal duty based on a single undervalued parcel.**

There is no dispute that the subject property owned by the Appellees is irrigated farmland. Nor can there be a reasonable dispute that the property was valued by both the Assessor and Lancaster as irrigated farmland. A summary of how agricultural land is valued in Lancaster County is useful in understanding why the TERC erred. The valuation method used by the Assessor and adopted by Lancaster is a table of values based on land use, soil qualities, and a special valuation methodology. (BOE Exhibit 84:2 & 87:11) "Special valuation means the value that the land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses." Neb.Rev.Stat. 77-1343(5). For special valuation, the county assessor is to assume that the highest and best use is for the land to be used as agricultural land, and not consider any develop potential for the land. In addition, agricultural land is only valued at 75% of the special value. Neb. Rev. Stat. § 77-201(3). The table of values reflects the special value rate. The special value, or base

rate, is then reduced to 75% to arrive at the final special valuation rate. The 75% of special value is referred to as an adjusted rate on the Property Record Card (PRC). From there, the number of acres of a particular soil quality and use is then multiplied by the adjusted rate. If a property has multiple agricultural uses or soil types, this process is repeated for each different use and soil quality. In the end, all the values are added together to arrive at the assessed value. All agricultural land in Lancaster County is valued by the same table of values. Agricultural land in the northwest part of Lancaster County is valued using the same table as agricultural land in the southeast part of Lancaster County.

The TERC did not find that a different schedule of values was used for the subject property, or that it was applied incorrectly. Instead, the TERC decision to reduce the value of the subject property was based entirely on a single parcel in Lancaster County that had an unreported improvement. The TERC found that the Assessor was unaware of the pivot being added to the Morrison land. (T101) The TERC focused on what they believe Lancaster should have known during the protest. (T101) During the referee hearing in 2018, the Appellees presented only a PRC in 2018 along with unsworn statements about the presence of a pivot on the Morrison property. In 2019 at the referee hearing, the Appellees again presented a PRC along with photos taken from what was claimed to be a pivot the Morrison property. What TERC inherently ruled was that Lancaster should have accepted what the Appellees stated to the referee about the land over what was reported to Lancaster by the Assessor. Even assuming that the TERC was correct in what Lancaster should have known, they still erred in applying the law to the facts.

The purpose of tax equalization is to ensure “that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.” *Zabawa v. Douglas County Bd. of Equalization*, 17 Neb.App. 221, 227 (2008). As stated above, there can be no dispute that the subject property is irrigated agricultural land and was treated as such by both the Assessor and Lancaster. This is not a situation where the subject property alone was valued at 100% of actual value and all other irrigated land was valued at only 50% of actual value. The Appellees identified a single parcel in Lancaster County that was irrigated but was treated as unirrigated land for valuation purposes. This was due solely to the landowners installing a pivot that was not reported to the Assessor. This omitted improvement resulted in the Morrison property being undervalued. Nebraska law requires that improvements over \$2,500 be reported to the county assessor. Neb.Rev.Stat. §77-1318.01. The undisputed testimony from Derrick Niederklein was that the pivot was not reported to the Lancaster County Assessor’s Office as required. (BOE 193) This omission resulted in the Assessor treating the Morrison property as the incorrect type of agricultural land.

When the TERC reduced the value of the Appellee’s property, the TERC increased the lack of uniformity and promoted further disequalization. “Where it is impossible to secure both the standards of the true value of a property for taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.” *Cabela’s, Inc. v. Cheyenne Cty. Bd. of Equalization*, 8 Neb. App. 582, 597, (1999). Prior to the TERC order, Appellees’ property was not valued more than 75% of its special value. The Appellee’s property was not brought into an equalized value with other all irrigated land, it was brought into

an equalized rate with all other dryland. The Appellees received a substantial windfall at the expense of all other taxpayers.

The TERC wants to value the properties the same, but they are classified differently. “Agricultural land and horticultural land shall be divided into classes and subclasses of real property...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.” Neb.Rev.Stat. §77-1363. Further, “[f]or purposes of equalizing the valuation of any real property, the county board of equalization shall make its adjustment so that the value of the real property compares to the average level of value of the class or subclass of property in which the real property is classified.” *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equalization*, 8 Neb. App. 582, 597, (1999). (emphasis added). When compared to the class of irrigated land, the Appellee’s property was treated the exact same as all other members of the class.

While the TERC believes Lancaster should have accepted the Appellees statements to the referee and reduced the subject property, that action would have been just as wrong and unconstitutional as when the TERC ordered the reduction. Instead of a single irrigated parcel being undervalued, the TERC created two parcels that are undervalued. The TERC impermissibly shifted the tax burden to every other irrigated parcel that did not protest. “The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to pay a disproportionate share of the tax.” *Id.* The TERC wants to consider the properties the same, but they were valued using different methods

due to the unreported improvement and have caused one part to now pay a disproportionate share of the tax.

Equalization requires more than a taxpayer identifying a single parcel that is undervalued. “The burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuations placed on other similar property is grossly excessive.” *Future Motels, Inc. v. Custer Cty. Bd. of Equalization*, 252 Neb. 565, 570 (1997). While it has never been specifically stated, the burden of proving disequalization has never been understood to be met by the taxpayer identifying a single parcel that is valued at a lower percentage of actual value. A taxpayer who seeks property tax relief should be required, at a minimum, to prove that they fall within a distinct minority of property owners in a class that have been valued percentage of actual value higher than other members of the class. As the court in *Zabawa* recognized, when a single taxpayer alone is valued at full market value in comparison to the rest of the class, then the board of equalization has failed. *Zabawa* at 228. The comparison of a single property to another single parcel a class is too narrow of a view for equalization purposes. A property must be compared to the entire class of properties. If a property when compared to entire the class is valued grossly excessive, then it is appropriate to reduce the value to equalize it with the entire class. In this case, all irrigated land was valued using the same schedule of values and process. Regardless of how the Assessor classified the Morrison property, it was a single outlier. When the Appellee’s property is compared to the entire class of irrigated land, it is equalized.

The precedent created by the TERC order is dangerous, incorrect, and cannot be allowed to stand. Under that order, all a taxpayer must do is locate a single unknown or

unreported improvement to receive a reduction on their property value. A taxpayer with a finished basement would only need to locate a single house with a finished basement that is unknown to a county assessor and by the TERC's standard, the taxpayer would have met their burden for proving a lack of equalization. Similarly, a residence that is built and unreported to a county assessor would result in all improvements being removed from the assessment roll under the TERC's standard. There is nothing in the TERC's order to curb its overreaching effects.

Nebraska law allows for a county board and assessor to add omitted real property to the assessment rolls. Neb.Rev.Stat. §77-1317. The TERC order renders this process meaningless. Assuming Lancaster should have known about the omitted pivot, the TERC order requires Lancaster to reduce the value of the Appellee's property, while simultaneously Nebraska law requires the Assessor to add the omitted property to the assessment rolls. "It shall be the duty of the county assessor to report to the county board of equalization all real property in his or her county that, for any reason, was omitted from the assessment roll for the current year...or any former year." Neb.Rev.Stat. §77-1317. In this case, if Lancaster attempted to add the value of the pivot for 2018 and 2019, there is the obvious problem that the TERC has relied on those omitted improvements in reducing another property's value.

### **CONCLUSION**

The order from the TERC has moved the taxes further from uniformity and equalization. For the foregoing reasons, Appellee respectfully requests that the Nebraska Court of Appeals reverse the Tax Equalization and Review Commission's Order and affirm the decision of the Lancaster County Board of Equalization.

LANCASTER COUNTY BOARD  
OF EQUALIZATION, Appellant

Patrick Condon, County Attorney

By: s/ Daniel J. Zieg  
Daniel J. Zieg, # 24742  
Deputy Lancaster County Attorney  
575 South 10th Street  
Lincoln, NE 68508  
(402) 441-7321  
dzieg@lancaster.ne.gov  
Attorney for Appellant

# Certificate of Service

I hereby certify that on Friday, December 10, 2021 I provided a true and correct copy of this *Brief Appellant Lancaster Co. Bd. Equal.* to the following:

Tax Equalization and Review Commission represented by Joseph Patrick Thompson (25962) service method: Electronic Service to **joseph.thompson@nebraska.gov**

Brad Moser represented by David Charles Solheim (24782) service method: Electronic Service to **david@solheimlaw.com**

Mary Moser represented by David Charles Solheim (24782) service method: Electronic Service to **david@solheimlaw.com**

Signature: /s/ Daniel J. Zieg (24742)