

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

D & D INVESTMENT CO. INC.,)	
)	
Appellant,)	CASE NOS. 05C-006 and 05C-007
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING and REVERSING
DODGE COUNTY BOARD OF)	DECISIONS OF THE DODGE COUNTY
EQUALIZATION,)	BOARD OF EQUALIZATION
)	
Appellee.)	

The above-captioned cases were called for a hearing on the merits of appeals by D & D Investment Co. Inc., to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on February 22, 2006, pursuant to a Notice and Order for Hearing issued December 7, 2005. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Don Hinds, President of D & D Investment Co. Inc., appeared at the hearing on behalf of D & D Investment Co. Inc. ("the Taxpayer") without counsel.

The Dodge County Board of Equalization ("the County Board") appeared through counsel, Stacey Hultquist, Esq., a Deputy County Attorney for Dodge County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) to state its final decision and order 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)(Supp. 2005). 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 appeal filed in Case No. 05C-006 as OT E30'S50' Lot 7, Blk 174, Fremont, ("Parcel A") and in the appeal filed in Case No. 05C-007 as OT S50' Lot 8, Blk 174, Fremont, ("Parcel B") Dodge County, Nebraska ("the subject property").

2. The actual or fair market value of each parcel of the subject property described in the appeals, placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Dodge County Assessor was:

	Parcel A
Land value	\$6,650.00
Total value	<u>\$6,650.00</u> (E1:2)
	Parcel B
Land value	\$ 9,140.00
Improvements	<u>\$105,060.00</u>
Total value	<u>\$114,200.00</u> (E2:2)

3. The Taxpayer timely protested those values to the County Board. The Taxpayer proposed the following values for each parcel of the subject property described in the appeals:

	Parcel A
Land value	\$3,375.00
Total value	<u>\$3,375.00</u> (E1:2)
	Parcel B
Land value	\$ 9,140.00
Improvements	<u>\$65,335.00</u>
Total value	<u>\$74,475.00.</u> (E2:2)

4. The County Board denied the protests. (E1:1 and E2:1)
5. The Taxpayer timely filed appeals of those decisions to the Commission.

6. The County Board was served with Notices in Lieu of Summons, and duly answered those Notices.
7. The Taxpayer's appeals were consolidated for hearing by order of the Commission.
8. An Order for Hearing and Notice of Hearing issued on December 7, 2005, set a hearing of the Taxpayer's appeals for February 22, 2006, at 9:00 am. CST.
9. 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.
10. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
11. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of each parcel of the subject property described in the case files for the tax year 2005 is:

Parcel A

Land value \$6,650.00

Total value \$6,650.00

Parcel B

Land value \$ 9,140.00

Improvements \$ 95,430.00

Total value \$104,570.00.

13. The decision of the County Board in Case No. 05C-006 (Parcel A) was neither arbitrary nor unreasonable.
14. The decision of the County Board in Case No. 05C-006 should be affirmed.

15. The decision of the County Board in Case No. 05C-007 (Parcel B) was arbitrary or unreasonable.
16. The decision of the County Board in Case No. 05C-007 should be reversed

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) (Supp 2005).
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. “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).
6. 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).
 7. “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).
 8. 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 2003).
 9. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
 10. 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) (Supp. 2005). 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).

11. 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).
12. 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).
13. 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).
14. "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).

15. “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).
16. “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).
17. The appraisal of real estate is not an exact science. *Matter of Bock’s Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874, (1977).
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. DISCUSSION

Parcel A of the subject property is an unimproved 30 X 80 foot portion of a lot. The Taxpayer asserts that Parcel A has limited utility because it could not be built on due to its size and lack of rear access. Parcel A does have street access and is used in conjunction with Parcel B. The evidence shows that the highest and best use of Parcel A is its use with the adjoining Parcel B of the subject property. The land component of Parcel B was valued at \$2.77 per square

foot. The Taxpayer did not object to that valuation. (E2:2). The Taxpayer asserts that Parcel A should be valued as “excess land” consistent with prior valuations. Prior valuations are not relevant for a current years determination. *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 did not produce other evidence to support its proposed valuation of Parcel A. Valuation of Parcel A and Parcel B at the same rate of \$2.77 per square feet is neither unreasonable or arbitrary.

Parcel B is improved with a building used as an office and warehouse. The cost approach was used by the County Assessor and County Board to determine actual or fair market value for Parcel B of the subject property as of the assessment date . (E20 and E22). Use of the Cost Approach includes six steps: “(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (5) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. In this case the Taxpayer has not disputed site value.

The Taxpayer does assert that the value attributable to the improvement is incorrect because it was developed assuming that 1,544 square feet of the building was used for a service repair garage. (E9:2). The correct characterization of that portion of the building is warehouse storage. (E20:2). Correcting the characterization of that portion of the building has a significant impact on the calculation of value \$105,060 versus \$95,430. (E9:2 and 20:2). The decision of the County Board, based on an incorrect use characterization for a 1,544 square foot portion of the building, is arbitrary and the value determined on that basis was not reasonable.

The Taxpayer's representative testified that in his opinion the actual value of Parcel B together with Parcel A as of the assessment date was \$77,850. That opinion was based on an ROI formula. The formula had been utilized by the County for valuation of the subject property for tax year 2004. (E7:1). The Taxpayer's representative testified that rents for the subject property were below market in an effort to maintain full occupancy. If a value indication is developed using the income approach, ROI (return on income), market rents are to be used. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001, p. 500. The value determined by the Taxpayer's representative utilizing the income approach or ROI with below market rents was not clear and convincing evidence of actual or fair market value as of the assessment date.

The Taxpayer's representative also presented evidence of sales of comparable properties to support his determination of actual or fair market value. (E10:5). The Taxpayer's representative relied on the sale of property adjacent to Parcel B. A property record file for that property appears as Exhibit 18 pages 5 and 6. The property record file shows that the offered comparable was built in 1948, contains 2,880 square feet of which 540 are office and the balance

a warehouse, and the parcel has a 540 square foot concrete parking lot. (E18:6). The parcel sold in June of 2002 for \$65,000. (E18:5). The second comparable offered by the Taxpayer's representative sold in July of 2004 for \$100,000. (E12:6). A property record file was produced for that parcel as Exhibit 12 at pages 16 and 17. The Property record file for that parcel shows that the building was constructed in 1925 and contains 4,400 square feet. (E12:17). The subject property was built in 1946 with an office remodeling in 1998, has 1,756 square feet of office space and 1,544 square feet of warehouse space. (E20:2). If valued in conjunction with Parcel A it has 2,400 square feet of parking and loading area. (E21:2). "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . ." *Property Assessment Valuation*, 2nd Ed., 1996, p. 98. The Taxpayer has not produced evidence to adjust for difference in size, age, use or other difference between Parcel B and the offered comparables. The Taxpayer's use of the sales comparison approach did not produce clear and convincing evidence of actual value of the subject property as of the assessment date.

Errors made by the County Assessor and the County Board using the cost approach to determine actual value of Parcel B may be corrected and value determined using that approach as

show in Exhibit 20 at page 2. The Commission determines that actual value as of the assessment date for Parcel B correctly using the cost approach was \$104,570.

**V.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining the actual or fair market value of each parcel of the subject property described in the appeal in Case No. 005C-006 as of the assessment date, January 1, 2005, as follows:

Parcel A

Land value	\$6,650.00
Total value	<u>\$6,650.00</u>

is affirmed.

3. The decision of the County Board determining the actual or fair market value of each parcel of the subject property described in the appeal in Case No. 005C-007 as of the assessment date, January 1, 2005, as follows

Parcel B

Land value	\$ 9,140.00
Impositions	\$105,060.00
Total value	<u>\$114,200.00</u>

is reversed and the actual or fair market value of that parcel as of the assessment date is

Land value \$ 9,140.00

Improvements \$ 95,430.00

Total value \$104,570.00.

2. This decision, if no appeal is timely filed, shall be certified to the Dodge County Treasurer, and the Dodge County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this matter.
5. This decision shall only be applicable to tax year 2005.

6. This order is effective for purposes of appeal March 13, 2006.

Signed and Sealed. March 13, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

William C. Warnes, 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 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.