

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

PHIL F. WHITE,)	
)	
Appellant,)	Case No. 09A 014
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
SARPY COUNTY BOARD OF)	THE SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Phil F. White ("the Taxpayer") 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 June 9, 2010, pursuant to an Order for Hearing and Notice of Hearing issued April 1, 2010. Commissioner Warnes, Vice-Chairperson of the Commission, was the presiding hearing officer. Commissioner Wickersham, Chairperson of the Commission, was absent. Commissioner Warnes, as Vice-Chairperson acting in the absence of the Chairperson, designated Commissioners Warnes, 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.

Phil F. White was present at the hearing. No one appeared as legal counsel for the Taxpayer.

John Reisz, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy 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 actual value of the subject property as of January 1, 2009, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

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

The actual 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. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely

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

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Description: TAX LOT K 29-13-12 (19.96 AC) REFER 10627189 & 10382593, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$108,954.00	\$50,000.00	\$103,454.00
Improvement	\$302,500.00	\$302,500.00	\$302,500.00
Total	\$411,454.00	\$352,500.00	\$405,954.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on April 1, 2010, set a hearing of the appeal for June 9, 2010, at 9:00 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. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 98,769.00

Improvement value \$302,447.00.

Total value \$401,216.00.

**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. 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).
8. 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).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. 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) (Cum. Supp. 2008).
11. 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).
12. "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).

13. 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).
14. 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).
15. "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).
16. 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).
17. 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).
18. 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).

IV. ANALYSIS

The subject property is a 19.96 acre rural residential parcel improved with a two story house of 2,983 square feet living area built in 1996. (E9:3 and E4:7). The house has been rated good + (45) for quality and average (30) for condition. (E4:7).

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is less than actual value as determined by the County Board. The Taxpayer has not put into dispute the valuation assessed for the improvements; only the land component of the subject property is in dispute. There is agreement among the parties that the actual value of the improvements of the subject property for 2009 is \$302,500. A portion of the land of the subject property is valued as agland (agricultural special value) and part as non-agland (rural residential).

The Taxpayer testified that he had four reasons for his belief that the taxable value of the land of the subject property is too high. His first and primary reason for believing the subject property is overvalued is its location. He testified that the subject property is located near a “rock quarry” that sets off dynamite once or twice per day and the noise and concussion from the explosions are a negative factor to the peaceful enjoyment of the property. The location of the subject property to the adjacent rock quarry can be seen on the map provided in Exhibit 8, page 1. The subject property is outlined in red off of 111th street. The Taxpayer did not provide evidence from which the Commission could quantify the negative impact of the location of the subject property. The Taxpayer did not provide the property record files for sales of alleged comparable parcels that are similarly affected. The appraiser for the County Assessor testified that only one sale had occurred of an alleged comparable parcel to the subject property. This

parcel sold on September 12, 2005. (E15:1) The parcel is shown on the map shown in Exhibit 8, page 1 as the rectangular shaped parcel outlined in red off Whitney Rd. The appraiser for the County Assessor testified that it was his opinion that the sale did not demonstrate a negative influence on the value of the subject property due to its location.

The second allegation testified to by the Taxpayer was that the general nature of the land comprising the subject property is inferior and would cause the agricultural value to be reduced. In particular, it was the opinion of the Taxpayer that the subject property had a severe grade which often made it impossible to navigate the driveway to the house in the winter. The Taxpayer did not provide evidence from which the Commission could quantify the negative effects of the severe grade on the agricultural or residential uses of the land. The Commission notes that the County valued the land using a breakout of the different soil types for the agland and in addition, a schedule was used to value the non agland acres. (E9:3). The appraiser for the County Assessor testified that he inspected the subject property on April 22, 2010 and made adjustments to the size of both the agland and nonagland acres which resulted in different net sizes for the various portions of the land components of the subject property. Exhibit 9, page 3 reflects each of these adjustments and resulted in a net 3.20 acres of land to be valued for the house and home site as nonagland. The first acre was valued at \$64,000/ acre, acres 2 and 3 were valued at \$9,000/acre and each additional acre after the third acre was valued at \$6,500/acre. This breakdown resulted in the following as stated on Exhibit 2, page 1 from the adjusted information on Exhibit 9, page 3. The nonagland acres of all other parcels in evidence were valued using the same schedule. (E14).

Non Agland -	\$83,300
Agland -	\$15,469
Improvements	<u>\$302,447</u>
Total	<u>\$401,216</u>

This new opinion of value opined by the appraiser for the County Assessor is given great weight by the Commission especially in the absence of any other evidence of actual value for the subject property for 2009. The Commission finds that the actual value of the subject property for 2009 is \$401,216.

The third allegation that the Taxpayer testified to in support of his belief that the subject property is valued too high for 2009 was that there was limited access to water. He testified that it was not possible to drill for a satisfactory source of water due to the rock formations beneath the soil. He stated that an “augured well” had to be drilled to satisfy basic daily consumption and household needs and that this was an inferior well and detracted from the value of the subject property. The Taxpayer did not provide evidence quantifying the negative impact that this lack of water had on the actual value of the subject property.

The fourth allegation that the Taxpayer made was that he was relying on the “appraisal” done by a referee for the County Board. This appraisal is shown on Exhibit 5, pages 1 to 5. The Taxpayer was not able to explain the basis for the valuation placed on the subject property by the referee, but felt that it was appropriate for him to rely on this opinion of value since the referee was an appraiser and “... therefore an expert.” The Taxpayer testified that his opinion of actual value for the subject property was the same as the referee, \$375,454, broken down as \$52,500 for

the non-agland, \$20,454 for the agland and \$302,500 for the improvements. The Commission notes that the Taxpayer's opinion of value, \$375,454, at the time of this appeal hearing was different from \$352,500, the amount which he stated on his Protest Form 422 submitted to the County Board of Equalization. The appraiser for the County Assessor testified that it was his opinion that the referee determined his determination of valuation using a "schedule B," as shown by the designation in the upper right corner of Exhibit 4, page 4. The referee's valuation of the land component of the subject property can then be determined by using schedule B from Exhibit 5, page 5. The Commission notes that using the referee's schedule, the first acre of the subject property is valued at \$30,000/acre, the second and third acres at \$7,500/acre, and the excess acreage at \$7,000/acre. (E5:5). Both the Taxpayer and the appraiser for the County Assessor testified that the referee did not make an inspection of the subject property to the best of their knowledge and instead calculated the valuation based on the statements made by the Taxpayer to him and by reviewing the maps and photos provided as shown in Exhibit 6.

The appraiser for the County Assessor testified that the County Board's determination of value for the nonagland did not use either the recommendation and schedule promoted by the County Assessor or the referee, but instead used a third schedule. The evidence did not explain or support the basis of the County Board's schedule of nonagland value and there was no evidence that any other property was valued per this same schedule. The three schedules for the nonagland valuations are shown below. Schedule One is the County Assessor's initial and final opinion of value. Schedule Two is that used by a referee for the County Board. Schedule Three is that used by the County Board in making its determination. Each of the valuations determined by the three schedules below were based on 4 acres of non agland and 16.0 acres of agland. The

agland portion of the land component for the subject property was valued in each of the three examples below at \$20,454. The focus of attention by the Commission is on the method and schedule used to determine the non agland valuation. The Commission notes that the inspection of the appraiser for the County Assessor did not occur until after these three determinations of value had occurred.

	Acre 1	Acres 2 & 3	Acre 4
Schedule #1			
Initial Recommendation by County Assessor (E4:9)	\$64,000	\$9,000	\$6,500
Total Valuation = \$411,454 (Non Agland - \$88,500 (1 x \$64,000 + \$18,000 (2 x \$9,000) + 1 x \$6,500) + Agland \$20,454 + Improvement \$302,500 = \$411,454)			

Schedule #2			
Referee for County Board - Schedule "B" (E5:5)	\$30,000	\$7,500	\$7,000
Total Valuation = \$375,454 (Non Agland - \$52,500 (1 x \$30,000 + \$15,000 (2 x \$7,500) + 1x \$7,000) + Agland \$20,454 + Improvement \$302,500 = \$375,454) (The Commission notes a mathematical error. This calculation should have been: Non Agland - \$52,000 (1 x \$30,000 + \$15,000 (2 x \$7,500) + 1 x \$7,000) + Agland \$20,454 + Improvement \$302, 500 = \$374, 954) This error is immaterial to the Commission's decision.)			

Schedule #3			
County Board of Equalization (E6:4)	\$47,000	\$12,000	\$12,000
Total Valuation = \$405,954 (Non Agland - \$83,300 (1 x \$47,000 + \$36,000 (3 x \$12,000) + Agland \$20,454 + Improvements \$302,500 + \$405,954)			

The Commission notes that the Assessor's records for the size of the agland and nonagland portions of the subject property changed April 22, 2010 as a result of the inspection by the appraiser for the County Assessor, and adjustments were made to the property record file as shown on Exhibit 9, page 3. The size of the agland area increased to 16.76 acres, but its

valuation decreased to \$15,469 as shown on Exhibit 9, page 3. The non agland area decreased to 3.2 acres.

Schedule #4 (same as Schedule #1)

Revised/Final Opinion of Value by County Assessor (E9:3) \$64,000 \$9,000 \$6,500

Total Valuation = **\$401,216** (Non Agland - \$83,300 (1 x \$64,000 + \$18,000 (2 x \$9,000) + \$1,300 (.2 x \$6,500) + Agland \$15,469 + Improvements \$302,447)

The Commission compares the new opinion of valuation by the County Board as presented by the appraiser for the County Assessor, \$401,216 to what the valuation would have been calculated using the schedule of the County Board shown on Exhibit 6, page 4.

Commission's Computation of Total Valuation Using CBOE's schedule (E6:4) and adjusted land sizes as shown on Exhibit 9 page 3.

Total Valuation = **\$391,316** (Non Agland - \$73,400 (1 x \$47,000 + \$24,000 (2 x \$12,000) + \$2,400 (.2 x \$12,000) + Agland \$15,469 + Improvements \$302,447).

The appraiser for the County Assessor testified that the County Board of Equalization utilized its schedule for valuation for each of the protests it heard involving similar properties to the subject property, however no evidence was offered in the form of property record files to support this testimony. This schedule valued the first acre at \$47,000 and each remaining acre at \$12,000 per acre.

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. The 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. In an appeal to the county board of equalization or to the district court, and from the district court 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. *Id.* Taxpayer must introduce competent evidence of actual value of its property in order to successfully claim that a property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N. W. 2d 515 (1981).

The Commission finds there was not sufficient competent evidence to support the County Board's determination. The Taxpayer has rebutted the presumption that the County Board had faithfully performed its duties and had sufficient competent evidence for its determination and has shown by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable.

The Commission finds that the Taxpayer has provided clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The Commission finds that taxable value of the subject property is \$401,216 (Nonagland \$83,300, Agland \$15,469, Improvements \$302,447).

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 produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. 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.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2009, is vacated and reversed.
2. Actual value, for the tax year 2009, of the subject property is:

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Land value \$ 98,769.00

Improvement value \$302,447.00

Total value \$401,216.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy 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 July 21, 2010.

Robert W. Hotz, Commissioner

William C. Warnes, 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.**