

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

BROOKS CARMICHAEL,)	
)	
Appellant,)	CASE NO. 04R-79
)	
vs.)	FINDINGS AND ORDER
)	REVERSING IN PART
JOHNSON COUNTY BOARD OF)	THE DECISION OF THE JOHNSON
EQUALIZATION,)	COUNTY BOARD OF EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Brooks Carmichael 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 28, 2005, pursuant to a Notice and Order for Hearing issued March 1, 2005. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Brooks Carmichael ("the Taxpayer") appeared at the hearing without counsel.

The Johnson County Board of Equalization ("the County Board") appeared through counsel, Julie D. Smith, Esq., a Deputy County Attorney for Johnson County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2003, as amended by 2005 Neb. Laws L.B. 15 §10) to state its final decision concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The decision and order of the Commission 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)(Cum. Supp. 2004, as amended by 2005 Neb. Laws L.B. 15 §9). 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:

A.
PROCEDURAL FINDINGS

1. The Taxpayer is the owner of record of certain real property described in the appeal as Tax Lot 1, an irregular tract in the S½ of Section 31, Township 4 North, Range 9 East, 6th PM, Johnson County, Nebraska ("the subject property").

2. Eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural and horticultural land and improvements which together constitute the subject property, placed on the assessment roll as of January 1, 2004, ("the assessment date") by the Johnson County Assessor was:

Land value	\$ 37,110.00
Improvement value	<u>\$206,450.00</u>
Total value	<u>\$243,560.00.</u> (E7)

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

Land value	\$ 34,824.00
Improvement value	<u>\$155,000.00</u>
Total value	<u>\$180,000.00.</u> (E1)

The Commission noted that a mathematical or entry error had been made on the Form 422. The Taxpayer's total proposed value, based on the entries for land and improvements is \$189,824.00.

4. The County Board determined that eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural land and horticultural land and improvements, which constitute the subject property as of the assessment date was:

Land value	\$ 44,130.00
Improvement value	<u>\$193,880.00</u>
Total value	<u>\$238,010.00.</u> (E:1)

5. The Taxpayer timely filed an appeal of that decision to the Commission.
6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.
7. A Notice and Order for Hearing issued on March 1, 2005, set a hearing of the Taxpayer's appeal for June 28, 2005, at 1:00 p.m. CDST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property is a 45.44 acre tract of real property with two residences, a barn and a farm utility building. (E:8 through E:13).
2. The Taxpayer has adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
3. Based on the entire record before it, the Commission finds and determines that eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural land and horticultural land and improvements which together constitute the subject property for the tax year 2004 is:

Land value	\$ 37,117.00
Improvement value	<u>\$193,880.00</u>
Total value	<u>\$230,997.00.</u>

4. The value of the subject property as of the assessment date determined by the County Board is not supported by the evidence.
5. The decision of the County Board was incorrect and either arbitrary or unreasonable.
6. The decision of the County Board 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) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9).
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. Agricultural land and horticultural land shall be valued for purposes of taxation at eighty percent of its actual value. Neb. Rev. Stat. §77-201(2)(Reissue 2003).
6. Agricultural land and horticultural land means land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. Land retained or protected for future agricultural or horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or horticultural land. 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. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stat. §77-1359(1)(Reissue 2003)
7. “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).
8. 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).

9. “Actual value, market value, and fair market value mean exactly the same thing.”
Richards v. Board of Equalization, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965).
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) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9). 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. The term "unreasonable" can be applied to a decision of an administrative agency 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. 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).

17. 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 Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
18. Farm home site shall mean not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road. Neb. Rev. Stat. 77-1359 (3) (Reissue 2003).
19. Properly adopted rules and regulations have the force and effect of law. *Alexander v. J. D. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).

IV. ANALYSIS

The Taxpayer purchased the subject property in 2001, with plans to remodel the existing residence. The Taxpayer determined that the expense of remodeling and correcting structural problems in the existing residence was greater than the cost of building a new residence on the subject property. The Taxpayer then constructed a new 2,128 square foot one story residence with an unfinished basement on the land to replace the older residence. (E7 and E8:1). On the assessment date the older residence was occupied by a tenant. At the hearing the Taxpayer made two arguments, first that the new residence was overvalued, and second that the County Board should not have classified two acres of the tract as a home site.

The Taxpayer testified that he had constructed the new residence for a cost of \$133,000.00. (\$136,000.00 loan less \$3,000.00 closing costs). The value of the new residence as determined by the County Board was \$178,780.00. (E8:1). The Board derived that value

from the 2003 value deleting 5% functional depreciation and adding 1% physical depreciation to a replacement cost new of \$200,475.00, and then reducing that value by 10% economic depreciation. (E8:1). While cost of construction may be an indicator of actual value, cost alone is not conclusive for a determination of actual value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637, (1998). The Taxpayer testified that in his opinion the value of the subject property as of the assessment date was \$200,000.00. The Taxpayer formed his opinion based on conversations with contractors and an examination of records in the County Assessor's office. The Taxpayer did not produce evidence of sales of comparable property in support of his opinion. The Taxpayer testified that he did not know of any sales of comparable property.

The Assessor testified that the new residence had been valued using the cost approach. The cost approach is recognized as having greater validity for new construction. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001). That under professionally accepted mass appraisal methodologies, 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; (4) 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. "Market evidence may reveal a value that is higher than the value indicated by the cost approach ..." . *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p 355. The Assessor utilized the Marshall and Swift residential cost system to estimate the replacement cost new and allowed 10% economic depreciation. That “External Obsolescence is loss in value as a result of an impairment in utility and desirability caused by factors external to the property (outside the property’s boundaries) and is generally deemed to be incurable.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 155. The Assessor testified that economic depreciation had been applied to adjust the calculated replacement cost new less physical depreciation to a level indicated by an analysis of sales. That result was adopted by the Board. The Board's determination of value for the new residence, is not, on the evidence presented to the Commission unreasonable or arbitrary.

The County Assessor had determined that four acres of the subject property should be classified as either a farm site or as a home site. The County Assessor had allocated one acre to a home site and three to a farm site. The County Board allocated two acres to home sites and two to a farm site. (E12:1). The Taxpayer testified that less than four acres should be receiving a “site” value. The Taxpayer offered no proof of that assertion. The Assessor testified that it is the practice of the Assessor's Office to allocate one acre of land to each home on a parcel as a home site and to value each of those acres separately. The Board determined that two acres of the subject property should be valued as home sites. The Taxpayer testified that while there are two

houses located on the subject property they share the same water and septic systems. A farm home site is defined as not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road. Neb. Rev. Stat. 77-1359 (3). The rules and regulations of the Property Tax Administrator give further guidance. Title 350 of the Nebraska Administrative Code, chapter 10, section 001.02A (03/04) states that “A farm home site shall mean one acre or less of land that is contiguous to a farm site and upon which is located a residence and necessary improvements needed for residential purposes.” Properly adopted rules and regulations have the force and effect of law. *Alexander v. J. D. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). The record before the Commission indicates that while there were two occupied residences located on the subject property as of the assessment date, there was only one set of necessary improvements needed for residential purposes (sewer and water). By definition there is only one farm home site of one acre or less on the subject property. Allocation of two acres of the subject property as farm home site by the Board is not in conformity with the law based on evidence before the Commission and is therefore arbitrary and unreasonable. The allocation of the four site acres on the subject property should be one acre to the farm home site and three acres to the farm site. The result is a reduction in value of \$8,013.00, one acre of farm home site removed, and an increase of \$1,000.00 for one additional acre of farm site. The resulting value for the land component of the subject property is \$37,117.00 ($\$44,130.00 - \$8,013.00 + \$1,000.00 = \$37,117.00$).

**V.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the decision of the County Board determining eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural land and horticultural land, and improvements which together constitute the subject property as of the assessment date, January 1, 2004, as follows:

Land value	\$ 44,130.00
Improvement value	<u>\$193,880.00</u>
Total value	<u>\$238,010.00</u>

is reversed.

2. That eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural land and horticultural land and improvements which together constitute the subject property for the tax year 2004 is:

Land value	\$ 37,117.00
Improvement value	<u>\$193,880.00</u>
Total value	<u>\$230,997.00.</u>

3. That this decision, if no appeal is timely filed, shall be certified to the Johnson County Treasurer, and the Johnson County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2003).

4. That any request for relief, by any party, which is not specifically provided for by this order is denied.
5. That each party is to bear its own costs in this matter.
6. That this decision shall only be applicable to tax year 2004.
7. This order is effective for purposes of appeal July 19, 2005.

Signed and Sealed. July 19, 2005.

Wm. R. Wickersham, Chairperson

Susan S. Lore, Commissioner

Robert L. Hans, 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 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS L.B. 15 §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.