

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

DIETER, L.L.C.,)		
)		
Appellant,)	CASE NO.	03A-68
)		03A-69
vs.)		03A-70
)		03A-71
SAUNDERS COUNTY BOARD OF)		
EQUALIZATION,)	FINDINGS AND ORDER	
)		
Appellee.)		
)		

Appearances:

For the Appellant: James J. Dieter, Manager
Dieter LLC
10525 Adams Drive
Omaha, NE 68127

For the Appellee: Scott J. Tingelhoff, Esq.
Saunders County Attorney
433 North Chestnut Street
Wahoo, NE 68066

Before: Commissioners Hans, Reynolds, and Wickersham.

**I.
STATEMENT OF THE CASE**

Dieter, Inc., ("the Taxpayer") owns four unimproved tracts of agricultural land totaling approximately 399.39 acres in Saunders County, Nebraska. The State Assessing Official for Saunders County determined that 80% of the agricultural use value of the Taxpayer's real property was \$235,720 as of the January 1, 2003, assessment date. (E17:1; E18:1; E19:1; E20:1). The State Assessing Official also determined that 80% of the actual or fair market value of the Taxpayer's real property was \$469,380 as of the assessment date. (E30: 1 - 4).

The Taxpayer does not contest the agricultural use value, or "special value" value, of the subject properties. The Taxpayer protested the "recapture" value, or that value determined by the State Assessing Office representing 80% of actual or fair market value. The Board, however, treated the protests as challenges concerning "special" value and denied the Taxpayer's protests. (E1; E2; E3; E4).

The Taxpayer filed appeals of the Board's decisions on August 22, 2003. (Appeal Forms). The Commission served Notices in Lieu of Summons on the Board on September 10, 2003, which the Board answered on September 15, 2003. The Commission then ordered the appeals consolidated for hearing and issued an Order for Hearing and Notice of Hearing. Copies of each of the Orders were served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeals in the City of Lincoln, Lancaster County, Nebraska, on February 13, 2004. Commissioner Lore was excused from the proceedings. James J. Dieter, one of the Managers of the Limited Liability Company, appeared at the hearing on behalf of the Taxpayer. The Saunders County Board of Equalization appeared through Scott J. Tingelhoff, the Saunders County Attorney.

II.
ISSUES

The issues before the Commission are (1) whether the Board's decisions concerning the "recapture" value were incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's "recapture" values were reasonable.

III.
APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the Board's decisions were incorrect and (2) that the Board's decisions were unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7)(2003 Supp.)). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's values were unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

**IV.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer protested the "recapture value" as determined by the Saunders County State Assessing Official for each of the subject properties.
2. The Board treated the protests as challenges to "special value" and failed to consider the "recapture value" issue presented by the Taxpayer.
3. The sale by Josephine Dieter, Trustee, to Dieter LLC, an entity formed by her children, was not an arm's-length transaction reflecting actual value as defined in Neb. Rev. Stat. §77-112 (2003 Supp.).

**V.
ANALYSIS**

The Taxpayer's real property includes 399.39 acres of agricultural land. The four parcels are contiguous, and are located between two creeks. A railroad line and a Corps of Engineers dike run through the property.

Agricultural land must ordinarily be valued at 80% of actual or fair market value. Neb. Rev. Stat. §77-201(2) (Cum. Supp. 2002). Agricultural land used solely for agricultural purposes, however, may be valued at 80% of the property's "agricultural use" value, without reference to actual value. Neb. Rev. Stat.

§77-1343(6)(Cum. Supp. 2002). This "agricultural use" value is referred to as "special value." If agricultural land is valued at "special value" and thereafter is sold, "recapture" provisions are triggered. Neb. Rev. Stat. §77-1347(Cum. Supp. 2002).

"Recapture value" is 80% of the actual or fair market value of the property. Neb. Rev. Stat. §77-1343(5)(Cum. Supp. 2002).

"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 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." Neb. Rev. Stat. §77-112(2003 Supp.).

The State Assessing Official for Saunders County determined both the "special value" and the "recapture value" of the agricultural land in each of the appeals. (E30: 1- 4). The State Assessing Official determined that the "recapture value" of the Taxpayer's land in Case Number 03A-68 was \$44,990 (E30:1); the recapture value of the agricultural land in Case Number 03A-69 was \$140,910 (E30:2); the recapture value of the agricultural land in Case Number 03A-70 was \$188,840 (E30:3); and the recapture value of the agricultural land in Case Number 03A-71 was \$94,640 (E30:4). The Taxpayer was notified of these values

in writing by notices dated May 13, 2003 ("Notice of Valuation Change Statements"). (E30).

The Taxpayer protested the "2003 Assessment" values listed in the Notice of Valuation Change Statements by letter dated June 30, 2003. The Taxpayer's letter was filed by the Saunders County Clerk on July 1, 2003. (E29). The values shown on the Taxpayer's letter did not include any of the "Special Values" shown on the Notice of Valuation Change Statements. The Taxpayer's letter however specifically listed those values shown under the "Current Value" column on the Notice of Valuation Change Statement (E30: 1 - 4) for each of the properties, and totaled those amounts. (\$469,380.00). (E29). The Taxpayer alleged in its letter that the value of the four properties was \$369,075, which was "\$100,000 below the current assessment (\$469,380)." (E29). This uncontroverted evidence establishes that the Taxpayer protested the "recapture value" for its properties.

The Board denied each of the Taxpayer's protests. (E1 - E4). The Board's determination of value in Case Number 03A-68 was \$94,750. (E1). This amount is the same as the State Assessing Official's determination of "special value" for the land. (E30:1). The Board's determination of value in Case Number 03A-68 was \$77,770. (E1). This amount is the same as the State Assessing Official's determination of "special value" for

the land. (E30:2). The Board's determination of value in Case Number 03A-69 was \$77,770. (E2). This amount is the same as the State Assessing Official's determination of "special value" for the land. (E30:3). The Board's determination of value in Case Number 03A-70 was \$16,540. (E3). This value is the same as the State Assessing Official for "special value" for the land. (E30:3).

This uncontroverted evidence establishes that the Board denied the protest concerning "special value." The Taxpayer did not protest these "special values." Jurisdiction is the inherent power or authority to decide a case. *Wickersham v. State*, 218 Neb. 175, 183, 354 N.W.2d 134, 140 (1984). The Board only has that "authority" specifically conferred upon it by state law, or by the construction necessary to achieve the purpose of the relevant provisions or act. *See, e.g., Grand Island Latin Club v. Nebraska Liquor Control Commission*, 251 Neb. 61, 67, 554 N.W.2d 778, 782 (1996). The Board's jurisdiction is governed by Neb. Rev. Stat. §77-1502 (2002 Cum. Supp.). The Board, pursuant to that statute, only had jurisdiction to consider those issues raised by the Taxpayer. The Board accordingly lacked subject matter jurisdiction over the "special values" determined by the State Assessing Official, since the Taxpayer did not protest those values.

The Board also failed to address the issues raised by the Taxpayer: the "recapture value" of the subject properties. A Board which fails to address a protest within the time frame allowed is deemed to have denied those protests. *Sumner v. Colfax County*, 14 Neb. 524, 16 N.W. 756 (1883). The Board's decisions, which addressed an issue over which it lacked subject matter jurisdiction (special value) while failing to decide the issue presented (recapture value), was incorrect, and both unreasonable and arbitrary.

The Board's decisions denied the Taxpayer's recapture value protests. *Sumner*, supra. The Board's inaction effectively affirmed the State Assessing Official's determination of recapture value. This decision, as noted above, was incorrect, and both unreasonable and arbitrary. The record demonstrates that the Taxpayer has satisfied the first component of its burden of proof. The only issue remaining is whether the Board's determinations of "recapture value" were reasonable. The burden of demonstrating that those values were unreasonable remains on the Taxpayer.

The Taxpayer offered as evidence an appraisal. (E6 - E16; E32). The author of the appraisal was not present at the hearing. The Board offered two objections concerning receipt of Exhibits 6 through and including 16. The Board objected to the receipt of the exhibits and alleged that (1) the Taxpayer failed

to provide copies of the exhibits to the Board at least 30-days prior to the hearing as required by the Commission's Rules and Regulations and (2) the author of the appraisal was not present to testify, which would violate the Board's statutory right to cross-examine witnesses if the exhibits were received.

The Taxpayer admitted that its evidence was mailed seven days after the deadline imposed by the Commission's rules and regulations, and did not contest the Board's position that the exhibits were not received until one or two days after mailing. State law mandates that "Every party shall have the right of cross-examination of the witnesses who testify. . . . Neb. Rev. Stat. §77-5016(4)(2003 Supp.). Receipt of an appraisal without affording the opposing party an opportunity to cross-examine the author would violate the statute. The Commission denied receipt of the exhibits for the reasons urged by the Board.

The only other evidence of value adduced by the Taxpayer is opinion evidence of the Taxpayer's Manager that the actual or fair market value was \$410,000. This opinion was based on the sale of the property from Frank Dieter Trust to the Taxpayer. The Trustee of the Frank Dieter Trust was Josephine Dieter. All members of Dieter LLC are Josephine Dieter's children. All beneficiaries of the Frank Dieter Trust were cousins or aunts and uncles of the cousins or a parent of the LLC members. The property was not listed for sale on the open market. Although

the evidence establishes that the principal beneficiaries (aunts and uncles) consented to the transaction, there is no evidence in the record that these individuals were knowledgeable of actual or fair market value as required by Neb. Rev. Stat. §77-112(2003 Supp.). The purchase price paid was based on a preliminary estimate of value given by an appraiser which was finally adopted as a matter of convenience to allow closing of the real estate transfer prior to the end of calendar year 2002.

The Taxpayer's Manager testified that he had become familiar with the real estate market by reviewing real estate transactions listed in the Wahoo newspaper and in conversations with his tenant. Based on this information, the Taxpayer's Manager testified that \$410,000 was the actual or fair market value of the subject properties. The record, however, doesn't support an inference that the Manager's opinion of value was developed independently of the preliminary number provided by the appraiser, which was not an opinion of value supported by an appraisal developed in conformity with state law and the *Uniform Standards of Professional Appraisal Practice*.

The Commission, from the entire record before it, cannot conclude that the sale between Dieter Trust and Dieter, LLC, was an arm's length transaction. Furthermore, the purchase price of property may be taken into consideration when determining actual or fair market value. Purchase price alone, however, is not

conclusive of actual or fair market value. Other matters relevant to the actual value must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998).

The Taxpayer's evidence of actual or fair market value, the sale price from the Dieter Trust to Dieter LLC, is not clear and convincing evidence that the Board's "recapture values" were unreasonable.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the action of the Board was incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002).
3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the

- presumption is extinguished 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 on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
4. Jurisdiction is the inherent power or authority to decide a case. *Wickersham v. State*, 218 Neb. 175, 183, 354 N.W.2d 134, 140 (1984).
 5. A county board of equalization has only that authority specifically conferred upon it by state law, or by the construction necessary to achieve the purpose of the relevant provisions or act. *See, e.g., Grand Island Latin Club v. Nebraska Liquor Control Commission*, 251 Neb. 61, 67, 554 N.W.2d 778, 782 (1996).
 6. A county board of equalization's decision on an issue over which it has no jurisdiction, while failing to act on the issue over which it has subject matter jurisdiction, is incorrect and both unreasonable and arbitrary.
 7. A Board which fails to address a protest within the time frame allowed for such protests is deemed to have denied those protests. *Sumner v. Colfax County*, 14 Neb. 524, 16 N.W. 756 (1883).

8. 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 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. Neb. Rev. Stat. §77-112(2003 Supp.).
9. The purchase price of property may be taken into consideration when determining actual or fair market value. Purchase price alone, however, is not conclusive of actual or fair market value. Other matters relevant to the actual value must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998).
10. The Taxpayer failed to adduce sufficient clear and convincing evidence that the Board's "recapture values" were unreasonable. The Board's decisions must accordingly be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Saunders County Board of Equalization's Orders setting the recapture values of the subject properties for tax year 2003 are affirmed.
2. The Taxpayer's 160-acre tract of agricultural real property in Case Number 03A-68, legally described as SE $\frac{1}{4}$ of Section 12, Township 13, Range 9, Saunders County, Nebraska, shall be valued as follows for tax year 2003, as determined by the Board:

	<u>Recapture Value</u>
Land	\$188,840
Improvements	\$ -0-
Total	\$188,840

3. The Taxpayer's 121.49-acre tract of agricultural real property in Case Number 03A-69 legally described as BAL SW $\frac{1}{4}$ of Section 12, Township 13, Range 8, Saunders County, Nebraska, shall be valued as follows for tax year 2003, as determined by the Board:

	<u>Recapture Value</u>
Land	\$140,910
Improvements	\$ -0-
Total	\$140,910

4. The Taxpayer's 40.28-acre tract of agricultural real property in Case Number 03A-70 legally described as SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, Township 13, Range 9, Saunders County, Nebraska, shall be valued as follows for tax year 2003 as determined by the Board:

	<u>Recapture Value</u>
Land	\$44,990
Improvements	\$ -0-
Total	\$44,990

5. The Taxpayer's 77.62-acre tract of agricultural real property in Case Number 03A-71 legally described as the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7, Township 13, Range 9, Saunders County, Nebraska, shall be valued as follows for tax year 2003 as determined by the Board:

	<u>Recapture Value</u>
Land	\$94,640
Improvements	\$ -0-
Total	\$94,640

6. Any request for relief by any Party not specifically granted by this order is denied.
7. This decision, if no appeal is filed, shall be certified to the Saunders County Treasurer, and the State Assessing Official for Saunders County, pursuant to Neb. Rev. Stat. §77-5016(7) (2003 Supp.).

8. This decision shall only be applicable to tax year 2003.
9. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Wickersham made and entered the above and foregoing Findings and Orders in this appeal on the 13th day of February, 2004. Commissioner Hans dissented, and would have held the purchase price paid for the subject property was a valid indicator of actual or fair market value and finds no indication of factors that might establish non-agricultural influence for recapture. He would therefore have granted the Taxpayer's requested relief. Commissioner Reynolds affirmed Chairman Wickersham's Findings and Order. The Findings and Order, having been approved and confirmed by Commissioners Reynolds are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (2003 Supp.).

Signed and sealed this 13th day of February, 2004.

SEAL

Wm. R. Wickersham, Chair