

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

| | | |
|----------------------|---|-------------------------------|
| RUDOLPH E. LESAC, |) | |
| |) | |
| Appellant, |) | CASE NOs. 04R-147 and 04R-148 |
| |) | |
| vs. |) | FINDINGS AND ORDER |
| |) | REVERSING THE DECISION OF THE |
| CASS COUNTY BOARD OF |) | CASS COUNTY BOARD OF |
| EQUALIZATION, |) | EQUALIZATION |
| |) | |
| Appellee. |) | |

The above-captioned cases were called for a hearing on the merits of appeals by Rudolph E. Lesac 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 April 7, 2005, pursuant to a Notice and Order for Hearing issued December 10, 2004. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Rudolph E. Lesac and Shelley Walker Lesac ("the Taxpayer") appeared at the hearing Larry Morten, Esq., appeared as counsel for the Taxpayer.

The Cass County Board of Equalization ("the County Board") appeared through counsel, Colin Palm, Esq., a Deputy County Attorney for Cass 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 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(7)(Reissue 2003 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 appeals filed as Konfrst Add Pt D B102 P455, SE¼ SW ¼ Section 14, Township 11, Range 13 East

described in appeal 04R-147 and Lot 21 Konfrst 4th Addition to Murray, described in appeal 04R-148 both in Cass 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, 2004, ("the assessment date") by the Cass County Assessor, the values proposed by the Taxpayer, and the values assigned by the County Board after hearing Taxpayers' protests were as follows:

Case No. 04R-147

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|------------------|-----------------------|------------------------|------------------------|
| Residential Land | \$30,630.00 | | \$30,630.00 |
| Improvement | \$139,990.00 | | \$135,495.00 |
| Total | \$170,620.00 | Reevaluate | \$166,125.00 |

Case No. 04R-148

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|------------------|-----------------------|------------------------|------------------------|
| Residential Land | \$30,630.00 | | \$30,630.00 |
| Improvement | -0- | | -0- |
| Total | \$30,630.00 | Reevaluate | \$30,630.00 |

3. The Taxpayer timely filed appeals of the decisions of the County Board to the Commission.
4. The County Board was served with Notices in Lieu of Summons, and duly answered those Notices.
5. The Taxpayer's appeals were consolidated for hearing by order of the Commission.

6. A Notice and Order for Hearing issued on December 10, 2004, set a hearing of the Taxpayer's appeals for April 7, 2005, at 1:00 p.m. CDST.
7. 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 Taxpayer has adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
2. 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 2004 are as follows:

Case No. 04R-147

| | |
|-----------------|---------------------|
| Residential Lan | \$ 13,600.00 |
| Improvement | <u>\$135,495.00</u> |
| Total | <u>\$149,095.00</u> |

Case No. 04R-148

| | |
|------------------|--------------------|
| Residential Land | \$13,600.00 |
| Improvement | <u>-0-</u> |
| Total | <u>\$13,600.00</u> |

3. The values of the subject property as of the assessment date determined by the County Board are not supported by the evidence.
4. The decisions of the County Board were incorrect, arbitrary and unreasonable.

5. The decisions of the County Board should be vacated and 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 Commissions 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. “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.” *Richards v. Board of Equalization*, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965).
8. 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).
9. 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).

10. 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).
11. 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).
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. "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).

14. “It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based.” *Bottorf v. Clay County Bd. Of Equalization*, 7 Neb. App. 162, 167, 580 N.W.2d 561, 565 (1998).
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 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).

IV. ANALYSIS

The property which is the subject of the Taxpayers’ appeals consists of two lots in the town of Murray, Cass County, Nebraska. One of the lots is improved; the other is not. The improvements consist of a single family residence built in 1966. The residence built in 1966 consists of 1,684 square feet of above grade finished living area, a partial basement with minimal finish, an attached garage, and a detached garage. (E6:2,4). The subject property was valued by the County using the cost approach. Utilizing 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; (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.

The first step in the cost approach is valuation of the land as though vacant. In these appeals the Taxpayer asserts that the value assigned to the land component is excessive. The County produced information about 5 sales of vacant land (Lots) in Murray over a period from August, 2000 to May, 2003. (E12). Three of the sales occurred three years or more prior to January 1, 2004, the valuation date at issue in the Taxpayers’ appeals. Those three sales were not utilized by the Commission in its decision. One sale, in December of 2002, involved two tracts. One of the two tracts in that sale was the subject of a later sale in May, 2003. The May, 2003, sale is of a 1.47 acre tract for \$.34 per square foot. (E12). The subject property contains 1.84 acres. The land component of the subject property was valued at \$.84 by the County. (E6:1,2). The value assigned to the land component by the County may have been derived from an “extraction” shown in Exhibits 13 and 14. Those exhibits are unexplained and the Commission could not interpret the information they contained. The Commission was left then, with the May 2003 sale as the best evidence of value for the land component. While reliance on one sale is not desirable it was necessary in these appeals.

The residential improvement’s condition was rated as average by the Assessor. (E6:2). The rating occurred after an inspection. While assigning a condition rating is necessarily a

subjective process, there are guidelines. Improvements in “average condition” show “some evidence of deferred maintenance and normal obsolescence with age in that a few minor repairs are needed along with some refinishing. But all major components are still functional and contributing toward an extended life expectancy, effective age and utility is standard for like properties of its class and usage.” Marshall and Swift, *Residential Cost Handbook*, page E-6 (9/2002). The Taxpayer presented photographs showing a need for repairs. While a usable evaluation of condition is not possible without a site inspection, the photos call into question the Assessor’s rating.

The Taxpayer gave a variety of indications of an opinion of actual or fair market value for the subject property as of January 1, 2004. The testimony of the Taxpayer was not supported by other evidence nor was the basis for the testimony fully explained. That testimony was given no weight by the Commission.

The evidence supports a finding that the County did not properly value the land component in its utilization of the cost approach for a determination of actual value. The land component, using the cost approach, should be valued at \$.34 per square foot or \$13,600.00 for each 40,000 square foot lot owned by the Taxpayer. There is insufficient evidence to support an adjustment to the value of improvements on the land.

**V.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the decisions of the County Board determining the actual or fair market value of each parcel of the subject property described in the appeals as of the assessment date, January 1, 2004, are vacated and reversed
2. That the actual or fair market value of each parcel of the subject property described in the appeals for the tax year 2004 shall be:

Case No. 04R-147

Real property described as : Konfrst Add Pt D B102 P455, Murray,
SE¼ SW ¼ Section 14, Township 11, Range 13 East Cass County , Nebraska

| | |
|------------------|----------------------------|
| Residential Land | \$ 13,600.00 |
| Improvement | <u>\$135,495.00</u> |
| Total | <u><u>\$149,095.00</u></u> |

Case No. 04R-148

Real Property Described as: Lot 21 Konfrst 4th Addition to Murray, Cass County, Nebraska

| | |
|------------------|---------------------------|
| Residential Land | \$13,600.00 |
| Improvement | <u>-0-</u> |
| Total | <u><u>\$13,600.00</u></u> |

3. That this decision, if no appeal is timely filed, shall be certified to the Cass County Treasurer, and the Cass 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 April 14, 2005.

Signed and Sealed. April 14, 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 Neb. Laws L.B. 15 §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.