

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

|                      |   |                               |
|----------------------|---|-------------------------------|
| ROBERT K. CLEMENTS,  | ) |                               |
|                      | ) |                               |
| Appellant,           | ) | CASE NO. 05R-079              |
|                      | ) |                               |
| vs.                  | ) | FINDINGS AND ORDER            |
|                      | ) | AFFIRMING THE DECISION OF THE |
| CASS COUNTY BOARD OF | ) | CASS COUNTY BOARD OF          |
| EQUALIZATION,        | ) | EQUALIZATION                  |
|                      | ) |                               |
| Appellee.            | ) |                               |

The above-captioned case was called for a hearing on the merits of an appeal by Robert K. Clements 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 January 11, 2006, pursuant to a Notice and Order for Hearing issued October 27, 2005, and agreement of the parties that the case be heard in conjunction with the hearing on Case No 05R-078. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Robert K. Clements ("the Taxpayer") appeared at the hearing with Richard L. Clements, Esq., his legal counsel.

The Cass County Board of Equalization ("the County Board") appeared through counsel, Nathan B. Cox, Esq., the 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 (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 as North Lake Lot 8, Leasehold and Improvements, Cass County, Nebraska ("the subject property").

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

|                   |                             |
|-------------------|-----------------------------|
| Leasehold value   | \$22,000.00                 |
| Improvement value | <u>\$70,757.00</u>          |
| Total value       | <u>\$92,757.00.</u> (E1:1). |

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

|                   |                        |
|-------------------|------------------------|
| Land value        | \$ -0-                 |
| Improvement value | <u>\$ -0-</u>          |
| Total value       | <u>\$ -0-.</u> (E1:1). |

4. The County Board determined that the actual or fair market value of the subject property as of the assessment date was:

|                   |                    |
|-------------------|--------------------|
| Leasehold value   | \$22,000.00        |
| Improvement value | <u>\$63,902.00</u> |
| Total value       | <u>\$85,902.00</u> |

and that it should be assessed to the Taxpayer. (E1:2).

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. An Order for Hearing and Notice of Hearing issued on October 27, 2005, set a hearing of the Taxpayer's appeal for January 11, 2006, at 9:00 a.m. CST.

8. 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.
9. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
10. Based on the entire record before it, the Commission finds and determines that assessment of the subject property for the tax year 2005 to the Taxpayer as follows:

|                   |                    |
|-------------------|--------------------|
| Leasehold value   | \$22,000.00        |
| Improvement value | <u>\$63,902.00</u> |
| Total value       | <u>\$85,902.00</u> |

conforms to law.

11. The decision of the County Board was correct and neither arbitrary nor unreasonable.
12. The decision of the County Board should be affirmed.

### **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. 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).
5. 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).
6. 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).
7. 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).

8. "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).
9. An assessment that is contrary to law is unreasonable and arbitrary.
10. Improvements on leased land are defined as any item of real property defined in subdivisions (2) through (4) of section 77-103 Nebraska Statutes which is located on land owned by a person other than the owner of the item. Neb. Rev. Stat. §77-117 (Reissue 2003).
11. Buildings, fixtures and improvement can be improvements to leased lands. Neb. Rev. Stat. §77-103. (Reissue 2003).
12. Improvements on leased land other than leased public lands are to be assessed to the owner of the leased lands unless before March 1, following any construction thereof or change in the improvements made on or before January 1, the owner of the leased lands or the lessee thereof files with the county assessor, on a form prescribed by the Property Tax Administrator, a request stating that specifically designated improvements on such leased land are the property of the lessee. Neb. Rev. Stat. §77-1376 (Reissue 2003).

13. Improvements on leased land are to be assessed as real property. Neb. Rev. Stat. §77-1376 (Reissue 2003).

#### **IV. DISCUSSION**

The subject property is the leasehold interest and improvements on a leased lot. (E1:2). The Taxpayer contends that neither the value of the leasehold or improvements may be assessed to him. The Taxpayer cites section 77-1376 of Nebraska Statutes in support of his position.

On its face the provisions of section 77-1376 are not applicable to the Taxpayer's leasehold interest in Lot 8 North Lake. The Taxpayer's leasehold interest in Lot 8 North Lake may be assessed to him.

The Taxpayer acquired the improvements on Lot 8 North Lake in 1999. (E5:1). There is no evidence that the Taxpayer has filed a request that improvements on the leasehold be assessed to him between the date of his purchase and March 1 of 2005. A request that improvements be assessed to the holder of the leasehold interest was filed in 1993 by a different leaseholder. (E9). The provisions of section 77-1376 of the statutes do not require a periodic, i.e., annual filing of a request for assessment of improvements. It requires an episodic filing of the form, ie upon a change in the improvements. The filing with the assessor notifies the assessor that designated improvements on leased land are not owned the land owner. Once that difference in ownership is established, it need not be established again for each transferee of the improvements. The Commission notes that no improvements are specifically described in the 1993 filing. (E9). Since a filing will be deemed to have some purpose the only conclusion which gives any effect to the document is a conclusion that all improvements in place on 2-16-93 were

the subject of the filing. The Taxpayer testified that since he had acquired a leasehold interest in Lot 8 North Lake that he had placed a well on the premises, had reroofed a garage, and had replaced a dock. The County Assessor testified that those activities would constitute changes in improvements or construction of improvements. Neither the owner of the leased land nor the Taxpayer timely filed a form requesting assessment of the new well, dock, or garage roof to the Taxpayer prior to March 1, 2005. Those items are not properly assessable to the Taxpayer pursuant to Neb. Rev. Stat. §77-1376. Neither a well nor a dock are listed in the Assessor's records. (E6:3,4 and 5). The Commission is unable to determine on the record before it that any value has been assigned by the Assessor to those items. In addition the records do not show that the value assigned to the garage by the Assessor is based on a reroofing of that structure. (6:3,4, and 5). The Taxpayer is required to show not only that he is entitled to relief, he must also show the relief he is entitled to. The Taxpayer has not shown the relief he is entitled to.

## V. ORDER

### IT IS THEREFORE ORDERED:

1. That the decision of the County Board determining assessment of the subject property as of the assessment date, January 1, 2005, as follows:

|                   |                           |
|-------------------|---------------------------|
| Leasehold value   | \$22,000.00               |
| Improvement value | <u>\$63,920.00</u>        |
| Total value       | <u><u>\$85,902.00</u></u> |

to the Taxpayer is affirmed.

2. 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 (Supp. 2005).
3. That any request for relief, by any party, which is not specifically provided for by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2005.
6. This order is effective for purposes of appeal January 19, 2006.

**Signed and Sealed.** January 19, 2006.

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Wm. R. Wickersham, Vice-Chairperson

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Susan S. Lore, Commissioner

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