

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

BROOKS CARMICHAEL,)	
)	
Appellant,)	CASE NO. 05R-294
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
JOHNSON COUNTY BOARD OF)	JOHNSON COUNTY BOARD OF
EQUALIZATION,)	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 February 21, 2006, pursuant to a Notice and Order for Hearing issued November 15, 2005, Amended December 1, 2005.

Commissioners Lore, Hans and Warnes were present. Commissioner Warnes 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, Randall Ritnour, Esq., the 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 (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 are 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 Tax Lot #1 IRR TR S ½ W1/2 SEC 31 - 4 - 9 45.44 AC, 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, 2005, ("the assessment date") by the Johnson County Assessor was:

Land value	\$ 37,110
Improvement value	<u>\$188,880</u>
Total value	<u>\$225,990.</u>

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

Land value	\$ 35,000
Improvement value	<u>\$155,000</u>
Total value	<u>\$190,000.</u>

- 4. The County Board determined that 80 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 were:

Land value	\$ 37,110
Improvement value	<u>\$179,380</u>
Total value	<u>\$216,490.</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. An Order for Hearing and Notice of Hearing issued on November 15, 2005 Amended December 1, 2005, set a hearing of the Taxpayer's appeal for February 21, 2006, at 1:00 P.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 80 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 2005 are:

Land value	\$ 37,110.
Buildings	\$179,380.
Total value	<u>\$216,490.</u>
11. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.
12. The decision of the County Board was correct and neither arbitrary nor unreasonable.
13. 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. 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 80 percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2003).
6. Agricultural land and horticultural land means land which are 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. Agricultural or horticultural products include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops. Neb. Rev. Stat. §77-1359 (2) (Reissue 2003).
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 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).
9. 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).
10. “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).
11. 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 2003).

12. 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).
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. 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).

16. "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).
17. "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).
18. "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).
19. "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).

20. 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. DISCUSSION

The subject property is a one story house of 2,128 finished square footage which was built in 2002. The house has or contains three bedrooms with two full baths. The property also consists of 45.44 total acres (E 13:1) and two support buildings, one a barn and the other a utility building. The property is located in Johnson County some 20 miles outside of the nearest town. The County had already adjusted its valuation to correct errors in square footage, see E 1:1, 1:3 and 14:1.

Taxpayer's Exhibit 2 stated he believed that the sales comparison method of valuation was the only method on which true valuation can be accomplished on his property. He did not believe the County's use of the mass appraisal of Marshall and Swift, E 8:1 to 2, E 9:1, E 10:1, E11: 1 and 12:1 was accurate since it did not take into account the lower cost of building materials and labor in the area of Nebraska where his house was located. The taxpayer provided four property sales as comparable, see Exhibits 4:1 - 5. (Please note that E 4:1 and E 4:3 are the same properties).

Marshall and Swift are an approved costing service that is used widely in Nebraska. It is used commonly throughout the state of Nebraska for valuation purposes. Exhibit 8:1 itemizes this property using the cost approach. Depreciation has been included in the valuation in the amount of 10% for economic adjustment and 5% for functional depreciation.

The comparable sales offered by Taxpayer are all significantly older than the subject property. Exhibit 4:1 was built in 1924; E4:2 in 1915; E4:4 in 1965 and E4:5 in 1969. There were no testimony or exhibits that adjusted the comparable sales to the subject property despite the obvious differences in age and size. The commission appreciates the lack of sales available to be used by Taxpayer, but it does not believe the Taxpayer has met his burden of proof that the County was incorrect in their valuation.

The Taxpayer testified that he contracted with a local builder named John Hippen to build the house on subject property. The builder lived in Lewiston some 7 miles away. Materials for construction were purchased and transported from the town of Pickerell some 30 miles away. The subcontractors were from the local area around Beatrice and the price for labor was calculated by the hour. The taxpayer relied on the lender to make payments when requested by the builder and the Taxpayer did not know the exact costs for materials or labor. The commission was not convinced that the cost to build the house on subject property would have been less due to its location. It would seem to the Commission that if anything, the cost to build said subject house would have cost more due to the travel time for workers to and from the job site and the distance materials had to be transported.

There was no supporting evidence to dispute the County's valuation of the farmland as shown on E13: 1 of \$37,110.

**V.
ORDER**

IT IS THEREFORE ORDERED:

1. That the decision of the County Board determining 80 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, 2005, as follows:

Land value \$ 37,110

Improvement value \$179,380

Total value \$216,490

is affirmed.

2. 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 (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 March 20, 2006.

Signed and Sealed. March 20, 2006.




Susan S. Lore, Commissioner


Robert L. Hans, Commissioner


William C. Warnes, 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.