

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

| | | |
|-------------------------|---|------------------------------|
| RONALD F. WESTERGARD, |) | |
| |) | |
| Appellant, |) | Case No 06R-078 |
| |) | |
| v. |) | DECISION AND ORDER REVERSING |
| |) | THE DECISION OF THE DOUGLAS |
| DOUGLAS COUNTY BOARD OF |) | COUNTY BOARD OF EQUALIZATION |
| EQUALIZATION, |) | |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Ronald F. Westergard ("the Taxpayer") 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 July 17, 2007, pursuant to an Order for Hearing and Notice of Hearing issued April 11, 2007. Commissioners Wickersham, Warnes, and Sorensen were present. Commissioner Wickersham presided at the hearing.

Ronald F. Westergard, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, appeared as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) 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.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2006, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2006.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lot 64, Block O, Bennington Lake, Douglas County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Case No. 06R-077

Description: Lot 64, Block O, Bennington Lake, Douglas County, Nebraska.

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------------|-----------------------|------------------------|------------------------|
| Land | \$141,600.00 | \$In Total | \$141,600.00 |
| Improvement | \$441,600.00 | \$In Total | \$397,500.00 |
| Total | \$583,200.00 | \$500,000.00 | \$539,100.00 |

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on April 11, 2007, set a hearing of the appeal for July 17, 2007, at 11:00 a.m. CDST.
7. 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.
8. Actual value of the subject property as of the assessment date for the tax year 2006 is:

| | |
|-------------------|----------------------|
| Land value | \$128,750.00 |
| Improvement value | <u>\$385,563.00</u> |
| Total value | <u>\$514,313.00.</u> |

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over 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. “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).
3. 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).
4. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).

5. “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).
6. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
7. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
8. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, art. VIII, §1
9. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).
10. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
11. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable*

Life v. Lincoln County Bd. of Equal., 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

12. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
13. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
14. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
15. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
16. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to

justify its action remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

17. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted)
18. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
19. "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).
20. 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).

21. 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).
22. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).
23. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of her property was not fairly and proportionately equalized or that valuation placed upon her property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
24. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

IV. ANALYSIS

The subject property is an improved residential parcel. The 2,344 square foot, single story residence was built in 2004, with a basement and attached garage. (E24:1).

An appraiser for the county testified that because the subject property was new construction in a new development the cost approach, based on Marshall & Swift cost tables,

was used to determine taxable value of the subject property as of January 1, 2006. Use of 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 contribution to value of the land component of the subject property was estimated at \$141,600.00 by the County Board. (E1:1). The contribution to value of the improvements component of the subject property was estimated to be \$397,500.00. (E1:1). The County Board’s total estimate of actual value of the subject property, using the cost approach, was \$539,100 ($\$141,600 + \$379,500 = \$539,100$). (E1:1).

The County Board offered the property record files of three parcels it considered to be comparable to the subject property in support of its determination as Exhibit 25. The proposed comparables are in the same subdivision as the subject property. Actual value for those parcels was also determined using the cost approach based on Marshall & Swift cost tables. Significant

disparities exist in use of the cost approach to value the subject property and the parcels offered as comparables. Disparities shown by the property record files are two fold; one is a mathematical error and the other is a systematic and intentional use of an adjustment factor that varied by year.

The mathematical error is shown in the calculation of “Total Replacement Cost New w/o Add Ons” (“TRCN”) section of the “Cost Detail of Building” for each parcel. The calculation of that amount for the subject property involves 9 items with a true total of \$337,630 (\$212,507 + \$42,525 + \$38,557 + \$20,698 + \$11,552 + \$2,210 + \$2,340 + \$2,985 + 4,256 = \$337,630). (E24:5). The total shown in the property record file is \$348,472. (E24:5). The difference between the calculated amount and the amount shown in the records is \$10,842 (\$348,472 - \$337,630 = \$10,842). Expressed as a rounded percentage TRCN as calculated was increased by 3% ($\$10,842 \div \$337,630 = 3\%$) to arrive at TRCN as shown. Similar calculations can be made for each parcel offered as a comparable in Exhibit 25. The following table shows the results derived from an analysis of the information provided.

| Parcel | Exhibit | TRCN shown | TRCN calculated | Gross difference | Percentage increase |
|--------|---------|------------|-----------------|------------------|---------------------|
| Comp 1 | 25:6 | \$348,841 | \$340,271 | \$8,5700 | 2% |
| Comp 2 | 25:12 | \$324,126 | \$311,608 | \$12,518 | 4% |
| Comp 3 | 25:19 | \$377,363 | \$214,503 | \$162,860 | 76% |

In no instance does the amount of “Total Replacement Cost New w/o Add Ons” equal the calculated total of the items shown for that category. If there is a pattern or uniformity to the mathematical error it is not apparent.

After the “Total Replacement Cost New w/o Add Ons” “Total Add On Value” and

“Total Depreciation and Adjustments” were determined, the sum of those items was multiplied by an adjustment factor or “local multiplier”. The “local multiplier” number is not shown in the property record files but can be calculated for each parcel for which the property record file was furnished. The “local multiplier” is simply the multiplier necessary to increase the summed items to the amount shown as “Replacement Cost New Less Depreciation - RCNLD” (“RCNLD”). The “local multiplier” calculated for each parcel is shown in the following table.

| Parcel | Year Built | Exhibit | RCNLD summed | Local Multiplier | RCNLD Adjusted |
|---------|------------|-----------------|--------------|------------------|----------------|
| Subject | 2004 | 24:5 and 24:6 | \$361,067 | 1.1009 | \$397,500 |
| Comp 1 | 2005 | 25:6 | \$348,481 | 1.3057 | \$455,000 |
| Comp 2 | 2004 | 25:12 and 25:13 | \$349,795 | 1.3517 | \$472,833 |
| Comp 3 | 2005 | 25:19 | \$380,342 | 1.4000 | \$532,479 |

The table shows that the “local multiplier” varied by year and also varied by parcel within the same year.

“The principal of substitution is basic to the cost approach. This principle affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) pg 350. This cost approach rationale highlights the importance of an accurate estimate of cost to construct the improvement. Without an accurate estimate, it is impossible to draw any conclusion regarding the contribution to value of an improvement as might be determined by a buyer or seller. Multipliers are typically used with national cost services such as Marshall and Swift to recognize local cost differences or differences due to time. See, *Supra.*, pg. 369. Douglas

County has used a local multiplier in a much different way. Douglas County has not adjusted construction costs. Douglas County has instead adjusted the calculated estimate of contribution to value of the improvements, RCNLD. The “local multiplier” was used ostensibly to bring the final estimate of value using the cost approach to actual value. “Market evidence may reveal a value that is higher than the value indicated by the cost approach, but the cost approach has no internal mechanism to deal with the addition.” *Supra.*, pg 355. The County Board is not limited however to consideration of an estimate of value developed by the cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003). In addition some appraisers do include a market premium in the cost approach when that is indicated. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) pg 355. Use of a “local multiplier” to adjust the estimate of value determined though use of the cost approach to actual value may be an acceptable appraisal practice. The application of a “local multiplier” must however be examined for consistency and uniformity of application in mass appraisal. See, generally *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, ch 4.

The evidence in this appeal is that Douglas County multiplied RCNLD for each parcel in the Bennington Lake by the “local multiplier” that was determined in the year an improvement was completed. Application of the “local multiplier” for the parcel was then carried into subsequent years. Even if RCNLD for a parcel had been uniformly determined, before application of the “local multiplier” the final estimate of actual value might not be uniformly determined because the “local multiplier” could be different for other parcels in the same subdivision. Improved parcels in the same subdivision should be treated similarly.

There is no evidence that the estimate of actual value derived from use of the “local multiplier” is correlated to actual value except possibly in the year it is first applied. The evidence shows that use of the “local multiplier” determined for the first year a parcel was improved would not be correlated to actual value in the second or third year after improvement because a new “local multiplier” is applied to the RCNLD of other newly improved parcels in the subdivision. The evidence in this case shows that use of the “local multiplier” can result in substantial differences in the estimated actual value of comparable properties with minor differences in the date of construction of improvements.

Correlation of the cost approach to actual value by some means is necessary so that the estimates of value determined through that approach are related to actual value.

Depreciation can be defined as “the difference between the contributory value of an improvement and its cost at time of appraisal.” See, *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) pg 363. Differences, if any, in contributions to actual value due to the varying ages of improvements can be recognized though the uniformly determined and applied depreciation. A “local multiplier” which may be correlated to actual value only in the year a parcel is improved cannot produce equalized values as required by Nebraska’s Constitution.

The contribution to value of the land component of the subject property was determined at \$1,375 per front foot ($\$141,625 \div 103 = 1,375$). (E24:2). The contribution to value of the land component of all the parcels offered as comparables by the County Board was \$1,250. (E25:2, 8, and 15).

In this appeal the evidence is that neither the RCNLDs subject to the multiplier or the multiplier were uniformly determined. It is apparent that the assessment practices in evidence in this appeal resulted in valuations that were not uniformly determined creating gross disparities in valuation. The constitution requires that taxable value be determined uniformly and proportionately. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). The evidence is that the use of disparate adjustment factors with the resulting gross disparities between valuations was intentional and systematic. The Taxpayer is entitled to relief. *See, Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

The relief that the Taxpayer can receive is that which results in a uniformly determined taxable value even if that value is less than actual value. *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984). Further, a Taxpayer is entitled to the lowest value which may be determined. *Id.* The Commission finds that contribution to taxable value of the improvements on the subject property as of January 1, 2006, should be determined using the true sum of “Total Replacement Cost New w/o Add Ons” “Total Add On Value and “Total Depreciation and Adjustments” and the lowest adjustment factor 1.1009. The contribution of value of the land component at \$1,250 per front foot is \$128,750 ($\$1,250 \times 103 = \$128,750$). The calculations and result are $\$350,225 \times 1.1009 = \$385,563$ RCNLD improvements + $\$128,750$ land = \$514,313.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, is vacated and reversed.
2. Actual value of the subject property for the tax year 2006 is:

| | |
|-------------------|----------------------|
| Land value | \$128,750.00 |
| Improvement value | <u>\$385,563.00</u> |
| Total value | <u>\$514,313.00.</u> |
3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.

6. This decision shall only be applicable to tax year 2006.
7. This order is effective for purposes of appeal on July 31, 2007.

Signed and Sealed. July 31, 2007.

Wm. R. Wickersham, Commissioner

Ruth A. Sorensen, 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 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.