

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

PAUL A. SUM,)	
)	
Appellant,)	CASE NO. 02R-37
)	
vs.)	FINDINGS AND ORDER
)	REVERSING THE DECISION OF THE
ANTELOPE COUNTY BOARD OF)	ANTELOPE COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Paul A. Sum to the Tax Equalization and Review Commission ("the Commission"). The hearing was held on May 29, 2003, in Conference Room C, First Floor, Holiday Inn Express, 920 South 20th St, in the City of Norfolk, Madison County Nebraska. Commissioners Wickersham, Reynolds, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Paul A. Sum ("the Taxpayer") appeared at the hearing without counsel.

The Antelope County Board of Equalization ("the County Board") did not appear through counsel. Julie A. Harrison, the County Assessor for Antelope County, was present and presented evidence.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002) 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) (Cum. Supp. 2002, as amended Neb. Laws, L.B. 291, §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 recreational real property consisting of approximately 38.64 acres described in the appeal as NE $\frac{1}{4}$ NW $\frac{1}{4}$ Except for .76 acres for State Hwy in Section 5, Township 25 North, Range 7 East 6th PM, Antelope County, Nebraska ("the subject property").
(E3:2)
2. The actual or fair market value for the subject property, as of January 1, 2002, ("the assessment date"), placed on the assessment roll by the Antelope County Assessor was:

Land value	\$23,290.00	
Improvement value	<u>\$47,805.00</u>	
Total value	<u>\$71,095.00.</u>	(E:1)
3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value:

Land value	\$21,721.00	
Improvement value	<u>\$32,000.00</u>	
Total value	<u>\$53,721.00.</u>	(E:1)
4. The County Board determined that the actual or fair market value of the subject property as of the assessment date was:

Land value	\$23,290.00	
Improvement value	<u>\$37,035.00</u>	
Total value	<u>\$60,325.00.</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. A Notice and Order for Hearing issued on February 21, 2003, as amended on May 19, 2003, set a hearing of the Taxpayer's appeal for May 29, 2003, at 2:00 p.m. CST.
8. 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.
9. The value, \$554.00, assigned to the light utility building by the Assessor was not disputed.

B.
SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property is 38.64 acres of recreational land, a partially completed cabin, and an outbuilding. The property has a wildlife management area on its north, west and south boundaries. The Elkhorn River is at the Southwest corner of the subject property. (E2:80).
2. The land was assessed as 37.64 acres of recreational land with a one-acre cabin site. (E2:10).

3. The Taxpayer asserted in his protest that a road 1.58 acres in extent is on the subject property. (E3:16).
4. Exhibit 2:8 clearly shows the road on the eastern portion of the subject property.
5. The Assessor testified that the road encompasses two acres.
6. Two acres of the subject property should have been classified as road. The Assessor has determined that roads have no value.
7. Two acres of the subject property should be classified as roads rather than recreational land. Roads have no value. The result is a reduction of value for the land component of the subject property in the amount of \$1,170.00 ($\585.00×2).
8. The value of the adjusted land component is \$22,120.00 ($\$23,290.00 - \$1,170.00$).
9. The Taxpayer asserted in his protest that the cabin site had a higher value than like home sites. (E3:16).
10. The Taxpayer did not present any evidence that the one-acre cabin site was valued differently than other cabin sites.
11. The Assessor valued the recreational land component at \$585.00 per acre for recreational land and the cabin site at \$1,270.00. Those values are consistent with the values placed on similar property by the Assessor. (E2:22).

12. The Taxpayer requested that a portion of the land component of the subject property be valued as agricultural and horticultural land. The Taxpayer offered proof that six acres were used for agricultural and horticultural purposes. Agricultural land and horticultural land values cannot however be determined from the evidence before the commission.
13. The Taxpayer testified that he bought the unimproved subject property in 1999 for \$24,500.00.
14. The Taxpayer testified that the subject property is in a flood plain, that it is impossible to obtain flood insurance for improvements, and that zoning rules prohibit construction of additional improvements.
15. The Taxpayer did not offer any evidence of any effect location of the subject property in a flood plain, unavailability of flood insurance, or zoning restrictions had on actual or fair market value as of the assessment date.
16. The Taxpayer testified that he does not own other real property in Antelope County and has not bought other real property in Antelope County.
17. The Taxpayer testified that in his opinion the actual or fair market value of the subject property as of January 1,

2002, was \$40,000.00. No allocation of that value between land and improvements was presented.

18. The partially completed cabin on the subject property is 1,024 square feet in size. (E3:3).
19. The Taxpayer testified that he is a self-employed general contractor primarily building on commercial and industrial sites. He has some experience with residential construction.
20. The Taxpayer testified that he was acting as general contractor for construction of the cabin and that a general contractor wants a profit margin of 7.5%. No testimony was adduced concerning the amount necessary to cover overhead.
21. The Taxpayer testified that as of January 1, 2002, he had \$20,680.00 in labor and materials incorporated in the partially completed cabin. The Taxpayer's testimony is based in part on Exhibits 5 and 6. Exhibit 6 is a cost breakdown. Exhibit 6 shows an estimate of 800 man hours to construct the cabin. (E6:1). Labor costs of \$6 per hour for a laborer, \$12 per hour for a carpenter, and \$12 per hour for a cement finisher are estimated but an average cost of \$8 per hour is used to calculate cost. (E6:1). No estimate is made for plumbing or electrician wages. With the addition of his general contractor's profit margin the total

cost as of January 1, 2002, was \$22,231.00 ($\$20,680.00 \times 1.075 = \$22,231.00$).

22. Different cost factors apply to different communities. *Marshall and Swift Residential Cost Handbook*, Marshall & Swift L.P. 9/2002 p. F-6.
23. Different cost factors are used for the estimation of construction costs for commercial buildings. *Marshall Valuation Service*.
24. The Taxpayers evidence fails to include general contractors overhead.
25. The Taxpayer's evidence is not clear and convincing evidence of the replacement cost of the cabin.
26. The Assessor determined, using Marshall & Swift costing factors, that the replacement cost new of the completed cabin would be \$50,207.00. (E3:18).
27. The Assessor also determined that the cabin was 86.5% complete on January 1, 2002. (E3:19).
28. Exhibit 3 page 19, the Assessors worksheet, indicated that 86.5% of the work on itemized components of the cabin was partially completed as of January 1, 2002. (E3:19).
29. The Taxpayer testified that some items on Exhibit 3 page 19 would not be constructed or installed.
30. The Taxpayer testified that some items on the worksheet had been complete. The items completed were: excavation; forms;

concrete; backfill; lumber, rough; roofing; insulation and weatherstrip; exterior finish; sash, door, shutters, on the outside; and electrical.

31. The Assessor attributed a 16% depreciation factor to the replacement cost new. The Assessor concluded that the replacement cost new less depreciation of a completed cabin would be \$42,174. (E3:3).
32. Replacement cost new less depreciation was reduced by 13.5% because the cabin was incomplete on the assessment date. (E3:3). The resulting value is \$36,480. (E3:3).
33. The County Board determined that the actual or fair market value of the incomplete cabin was \$36,480 as of the assessment date. (E3:16 and 17).
34. The Taxpayer introduced property record cards from properties he considered comparable to the subject property.
35. "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98.
36. None of the comparable properties offered for the purpose of determining the value of the cabin were truly comparable as they differed in size, style and age from the incomplete cabin on the subject property.

- 37. The value of the land component of the subject property was determined by the Assessor without consideration of two acres of roads on the subject property.
- 38. The Taxpayer has adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board as it concerns valuation of the roads.
- 39. The Taxpayer has failed to adduce sufficient clear and convincing evidence to overcome the statutory presumption in favor of the County Board's valuation of the improvement component of the subject property.
- 40. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for the tax year 2002 is:

Land value	\$22,120.00
Cabin	\$36,480.00
Outbuilding	<u>\$ 555.00</u>
Total value	<u>\$59,155.00.</u>

- 41. The value of the subject property as of the assessment date determined by the County Board is not supported by the evidence.
- 42. The decision of the County Board was incorrect, and arbitrary and unreasonable.
- 43. The decision 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. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).
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) (Cum. Supp. 2002, as amended by 2003 Neb. Laws 291, §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).

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. "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).
10. "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).

11. 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

Taxpayer's protest to the County Board raised two valuation issues, the value of a cabin and the value of the land. Issues impacting the actual or fair market value of the cabin are: The percentage of completion on January 1, 2002; Replacement cost new; potential for floods; and an inability to obtain flood insurance. (E3:16) The protest raised two issues concerning valuation of the land: value of 1.58 acres of road; and the value of the homesite. (E3:16) The Taxpayer raised a third issue, the value of 6 acres of hay ground, at the County Board hearing. (E2:37).

The Assessor determined that 37.64 acres of the land was recreational land at \$585.00 per acre and that 1 acre was a homesite valued at \$1,270.00 per acre. The values assigned by the assessor are those assigned to similarly classified land. (E2:22) The claim of the Taxpayer that the cabin site is valued higher than other cabin sites is not supported by the evidence.

Exhibit 2:8, an aerial photograph of the subject property, clearly shows the presence of a road in the eastern part of the parcel. The Assessor testified the road is 2 acres in extent. The value of roads as shown in Exhibits 2:17 and 30 and 4:9 is \$0 per acre.

The Taxpayer testified that the portion of the subject property lying east of the road is hayed by the adjoining landowner. The Assessor testified that the area east of the road consists of 6 acres. The appropriate use classification for that tract may be dry cropland. 350 Neb. Admin. Code, ch. 14, §002.21A (2002). The use classification could also be as grassland. 350 Neb. Admin. Code, Chap. 14, §002.31 (2002). Whether dry cropland or grassland no evidence was presented concerning the land capability groups present in the 6 acres of land. The assignment of land capability groups based on soil types is required for the valuation of agricultural and horticultural land. 350 Neb. Admin. Code, Chap 14, §004.08 (2002). In addition no table or lists of values which might be attributed to land classification groups was presented to the Commission for valuation of the 6 acre tract in a manner consistent with the valuation of other agricultural and horticultural land in Antelope County.

The Taxpayer adduced no evidence concerning use of the remaining 31.64 acres classified by the Assessor as recreational

land. The record establishes that the principal use of the subject property is for recreational purposes.

The Taxpayer testified that he had hunted in the area for 18 years prior to purchase of the subject property, found the property, and bought it unimproved in 1999 for \$24,500.00. The character of the land has remained unchanged except for commencement of cabin construction. The Taxpayer testified that zoning was implemented in Antelope County after purchase of the subject property. After purchase the Taxpayer also became aware that the subject property lies in a flood plain. The Taxpayer testified that as a result of zoning and flood plain conditions that construction of another cabin on the subject property would not be possible. The Taxpayer also testified that it is not possible to obtain flood insurance for improvements on the subject property. No evidence was adduced concerning the impact on fair market value of flood plain, zoning, or insurance status.

The Taxpayer testified that in his opinion value of the subject property as of January 1, 2002, was \$40,000.00. No allocation to land versus improvements was made by the Taxpayer.

Based on the evidence presented to the Commission, valuation of the land as 35.64 acres of recreational land at \$585 per acre (\$20,849.00), a cabin site of 1 acre at \$1,270.00 and 2 acres of road with no value totaling \$22,119.00 is supported by the

record. The Taxpayer's other evidence of value for the land component of the subject property is not persuasive.

The Taxpayer is a self-employed general contractor specializing in the construction of commercial and industrial buildings in Omaha, Nebraska. The Taxpayer introduced as Exhibit 6 an itemization of projected costs for construction of a cabin on the subject property. The total projected itemized cost of material and labor is \$30,063.00. The Taxpayer testified that he was acting as general contractor for construction of the cabin and that a general contractor would like to realize a margin of 7.5%. If that margin is added total construction cost estimated by the Taxpayer is \$32,318. ($\$30,063 \times 1.075 = \$32,318$). No evidence was presented concerning any charge for a general contractor's overhead.

The Assessor valued the cabin using the cost approach with Marshall & Swift costing. (E3:18). The Assessor's office estimated the percentage of completion as of January 1, 2002, at 86.5% based on a telephone call. (E3:19).

Two differences between the Taxpayer's and the Assessor's evidence appear. First the Taxpayer estimated total construction cost will be \$30,063.00 without consideration of the general contractors margin or overhead charges. (E6:1) The Assessor estimated total construction cost at \$50,207.00. (E3:19).

Differences between the two cost estimates are not reconciled by the evidence presented to the Commission.

The second difference is the percentage of completion on January 1, 2002. The Taxpayer testified that as of January 1, 2002, labor and materials with a value of \$20,680.00 had been consumed in construction of the cabin. If a general contractor's margin of 7.5% is applied to the labor and material that the Taxpayer testified had been consumed as of January 1, 2002, the result is a cost of \$22,231.00 ($\$20,680 \times 1.075 = \$22,231$). Based on the Taxpayer's testimony 68.79% of the total estimated completion cost with the addition of a contractor's margin had been expended as of January 1, 2002, ($\$22,231.00 \div \$32,318.00 = .6879$).

The worksheet shown as Exhibit 3 page 19 does not indicate that any portion of the cabin was complete on January 1, 2002. (E3:19). Items totaling 15.5% of the total work are not checked. (E3:19). Some items were omitted because they would not be installed. (E3:19). The Taxpayer testified that in fact some items were completed. Items completed as of the assessment date based on the Taxpayer's testimony are: excavation, forms, concrete, backfill; lumber, rough; roofing; insulation and weatherstrip; exterior finish; sash, door, shutters on the outside; and electrical.

The percentage of completion indicated by the Taxpayer's cost estimate without overhead, but including contractors profit margin and cost incurred as of January 1, 2002 is 68.79%. ($\$22,231.00 \div \$32,3318.00 = .6879$). The Taxpayer is a general contractor constructing commercial and public buildings in Omaha, Nebraska. Different cost factors apply to different communities. *Marshall and Swift Residential Cost Handbook*, Marshall & Swift L.P. 9/2002 p. F-6. Different cost factors are used for the estimation of construction costs for commercial buildings. *Marshall Valuation Service*.

The Taxpayer's estimate of total construction cost does not include contractors overhead, does not include labor cost for electrical work, and utilizes an average for labor costs while detailing costs for some kinds of labor on the cabin. The Assessor's calculation of construction costs is based on accepted mass appraisal techniques. The Taxpayer's evidence was not persuasive concerning the percentage of completion as of the assessment date.

The County Board's determination of value considered the cabin 86.5% complete based on a worksheet completed by an appraiser based on a phone call with the owner. The Taxpayer testified that some items marked incomplete on the worksheet were in fact complete. The percentage of completion derived from the

worksheet was more credible than that derived from information furnished by the Taxpayer at the hearing.

The value of a utility outbuilding in the amount of \$554 rounded to \$555 for assessment was not at issue.

Value of the subject property as of January 1, 2002 is therefore land \$22,120.00, cabin \$36,480.00, outbuilding \$555.00 Total Value \$59,155.00.

**V.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2002, is vacated and reversed.
2. That the actual or fair market value of the residential real property described in the appeal as NE¹/₄NW¹/₄ Except for .76 acres for State Hwy in Section 5, Township 25 North, Range 7 East 6th PM, Antelope County, Nebraska, for the tax year 2002 shall be:

Land value	\$22,120.00
Outbuilding	\$ 555.00
Cabin	<u>\$36,480.00</u>
Total value	<u>\$59,155.00.</u>

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

County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002).

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 2002.
7. This order is effective for purposes of appeal August 6, 2003.

IT IS SO ORDERED.

Dated August 6, 2003.

Wm. R. Wickersham, Vice-Chair

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

Mark P. Reynolds, Chair

SEAL