

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

WILLIAM D. LEMMERS)	
)	
Appellant,)	CASE NO. 02R-109
)	
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 William D. Lemmers to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Tax Equalization and Review Commission's Hearing Room on the sixth floor of the State Office Building in the City of Lincoln, Lancaster County, Nebraska, on March 11, 2003, pursuant to a Notice and Order for Hearing issued December 17, 2002. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

William D. Lemmers ("the Taxpayer") appeared at the hearing. 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 (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 in this case follows.

**I.
STANDARD OF REVIEW**

The appellant, in order to prevail, is required to demonstrate by clear and convincing evidence that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. § 77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291 § 9). The presumption created by the statute can be overcome if the appellant shows by clear and convincing evidence that the County Board of Equalization either failed to faithfully perform its official duties or that the County Board of Equalization failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the appellant's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators v. Adams County Bd.*, 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 residential real property described in the appeal as North Lake Lot 53 leasehold interest and improvements, Cass County, Nebraska ("the subject property").
2. The actual or fair market value as of January 1, 2002, ("the assessment date") placed on the assessment roll for the subject property by the Cass County Assessor was:

Land (leasehold) value	\$ 35,542.00
Improvement value	<u>\$139,638.00</u>
Total value	<u>\$175,180.00.</u>

3. The Taxpayer timely protested that value to the Cass County Board of Equalization. The Taxpayer proposed the following value:

Land (leasehold) value	\$ 3,616.00
Improvement value	<u>\$139,638.00</u>
Total value	<u>\$143,254.00.</u>

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

Land (leasehold) value	\$ 21,000.00
Improvement value	<u>\$154,180.00</u>
Total value	<u>\$175,180.00.</u> (E:1)

5. The Taxpayer timely filed an appeal of that decision to the Commission.
6. The Cass County Board of Equalization was served with a Notice in Lieu of Summons, and duly answered that Notice.
7. A Notice and Order for Hearing issued on December 17, 2002, set a hearing of the Taxpayer's appeal for March 11, 2003, at 10:30 A.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.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property, North Lake Lot 53 leasehold interest and improvements, Cass County, Nebraska, is owned by the Taxpayer.
2. A leased fee interest is the lessor's or landlord's interest. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, (2001), p. 81.
3. "The valuation of a leased fee interest is best accomplished using the income capitalization approach. ... The benefits that accrue to an owner of a leased fee estate generally consist of income throughout the lease and the reversion at the end of the lease." *Id.* p. 81 and 82.
4. A leasehold estate is the lessee's or tenant's estate. *Id.* p. 83.

5. "A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant." *Id.* p. 83.
6. "In mass appraisal, property is usually valued on an unencumbered fee simple basis, with appraised values for income properties based on market rents." *Mass Appraisal of Real Property*, Robert J. Gloudenmans, International Association of Assessing Officers, (1999), p. 260.
7. "Existing leases written at rates favorable to the owner command value and can be expected to increase sales prices, provided that tenants can sustain the payments. Leases written at below-market rates reduce value and usually result in lower sales prices." *Id.* p. 260.
8. "Sales prices for properties with assumed leases at nonmarket rents should be adjusted to a market basis. ... The amount of the adjustment for an assumed lease is calculated by capitalizing the difference between the market and contract rents." *Id.* p. 260 and 261.
9. Real property is defined as "(1) All land; (2) All buildings, fixtures, and improvements; (3) Mobile homes, cabin trailers, and similar property, not registered for highway use, which are used, or designed to be used for residential, office, commercial, agricultural, or similar purposes, but not including mobile homes, cabin trailers,

and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business; (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil and gas leases; and (5) All privileges pertaining to real property described in subdivisions (1) through (4) of this section." Neb. Rev. Stat. § 77-103 (Cum. Supp. 2002).

10. Privileges pertaining to real property means "the right to sell, lease, use, give away, or enter and the right to refuse to do any of these. All rights may or may not be vested in one owner or interest holder." Title 350 Neb. Admin. Code, Ch. 10, §001.01F (07/02).
11. The terms and conditions of a lease used by the County Board to value leasehold interests at North lake for the year 2002 are shown in Exhibit 6.
12. The leasehold interest described in Exhibit 6, is subject to the following conditions: Termination on December 31, 2033; Base rent of \$1,207.65 is to be adjusted periodically; Real estate taxes will be paid by the lessor up to \$11,000.00 aggregate for all lots at North Lake; Lessee is responsible for other taxes including "personal property taxes" levied upon buildings and leasehold improvements; Lessee will pay a

utility use fee on a pro rata basis with other leaseholders; Use of a lake subject to restrictions; Lessee grants a right of first refusal to lessor, in the event of a proposed sale of improvements; The leasehold interest is assignable subject to a right of first refusal and consent of the lessor which will not be unreasonably withheld; and a right to remove improvements at termination except those which are part of the land. (E6:3-22)

13. The values placed on leasehold interests at North Lake by the Assessor for tax year 2002 are shown in Exhibit 8. The values shown range from \$3,616 to \$86,080.00.
14. Leasehold values as determined by the Assessor are either, one the difference between a previously determined combined value for lots and improvements based on sales in an appraisal for the assessment year 2000 and the depreciated value of improvements or two the average of the values assigned to leaseholds calculated by the first method.
(E8:1)
15. Leasehold estates had not been valued separately by the Assessor prior to the tax year 2002. (E8:1)
16. The Taxpayer testified that each leaseholder protesting the proposed value of a leasehold for the year 2002 had a value of \$21,000.00, assigned to their leasehold interest by the Cass County Board of Equalization.

17. Exhibit 2 page 1 shows that in the Taxpayer's instance the resulting decrease in value of the leasehold interest for Lot 53 North Lake, \$15,542.00, ($\$35,542.00 - \$21,000.00$) was added to improvement value of \$128,102.00 ($\$113,638.00 + \$15,542.00 = \$128,102$).
18. The result of County Board action was that the value of the leasehold (land) plus improvements remained at the level determined by the Assessor ($\$35,542.00 + \$113,560.00 + \$26,078.00 = \$175,180.00$ and $\$21,000.00 + \$128,102.00 + \$26,078.00 = \$175,180.00$).
19. The Taxpayer did not present any evidence concerning the actual or fair market value of leased fee interests at North Lake or the assessed value of leased fee interests at North Lake for the tax year 2002.
20. The Taxpayer did not present any evidence that the aggregate assessed value of the leasehold and improvements for the subject property were subject to taxation at a higher percentage of actual or fair market value than other residential real property in Cass County for the Tax year 2002.
21. The Taxpayer has not adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the County.
22. The decision of the County Board should be affirmed.

**III.
CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter of this appeal.
2. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record. Neb. Rev. Stat. § 77-5016(3) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, § 9).
3. 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, L.B. 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 Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

4. 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).
5. 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).
6. "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).
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. "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).

IV. DISCUSSION

The Taxpayer, at the hearing before the Commission, stated a belief that the leasehold interest in Lot 53, North Lake should not be subject to tax. The Commission can consider only issues raised in the County Board of Equalization proceedings. *Arcadian*

Fertilizer L.P. vs. Sarpy County Board of Equalization, 7 Neb.App. 499, 583 N.W.2d 353, (1998). The protest form filed by the Taxpayer with the County Board asks for valuation of the leasehold interest at \$3,616.00 or that it would be valued at the same level as another lot. (E1:1). Further the appeal form filed with the Commission asks that Lot 53 be valued at \$3,616.00. The Commission could not consider the Taxpayer's claim that the leasehold interest in Lot 53 should not be subject to taxation when that issue was raised for the first time at a hearing before the Commission. *Arcadian*, Supra.

Prior to tax year 2002 the Assessor had not assigned a separate value to leasehold interests in lots at North Lake. (E8:1). Three approaches to the valuation of leasehold interests at North Lake were eventually used in Cass County for tax year 2002. Two approaches were used by the Assessor to set initial values. A third approach was used by the County Board as it heard protests. County Board adjustments to leasehold values were offset by compensating changes to the values assigned to improvements. The details of Assessor action and County Board action follow.

The Assessor determined values for leasehold interests in lots at North Lake for the year 2002 in two different ways. The first group of lots, consisting of those which were vacant and those whose improvements had been valued using depreciated cost,

was valued based on the average difference between depreciated cost and a market analysis of lot values. (E6:1). Lots with improvements valued at depreciated cost were those with mobile homes or garages. (E8:1). The value determined for the leasehold interest in a vacant lot or a lot with improvements valued at depreciated cost was \$30,000.00.

All remaining leasehold interests in lots at North Lake were assigned a value which was the difference between the depreciated cost of improvements and market value for tax year of 2000 of both the leasehold interest and improvements (updated for additional improvements). (E8:1-6). The range of values for leasehold interests at North Lake determined using the second method ranked from \$3,616 for Lot 58 to \$86,080 for Lot 26. (E8:2 & 3).

After determining values for the leasehold interests in all lots at North Lake for the year 2002 using two different methods, the Assessor determined the aggregate value of leasehold interests and improvements for the year 2002 at North Lake in two different ways. The first method was to add a new component of value, "land" (Leasehold interest), assign a value of \$30,000.00 to that component, and add the prior year's improvement value. (E8:1). The result was a \$30,000.00 increase in value over the prior year. That method was used for vacant lots and lots whose improvements had been valued at depreciated cost. (E8:1). The

second method for determining aggregate value involved several steps. The first step was to add a new component of value "land" (leasehold interest), assign a value to it derived from subtraction of the depreciated cost of improvements from market value of the lot. Next, the Assessor subtracted the value of the leasehold interest from the prior year's value for improvements. Outbuilding value was not adjusted. Finally the values of all components leasehold, improvements, and outbuildings were added together for the aggregate or total value. The result for lots valued with the second method was no change from the prior year's aggregate value.

The value of the Taxpayer's leasehold interest in Lot 53 placed on the assessment rolls by the Assessor for the tax year 2002 was \$35,542.00. (E1:2).

The Taxpayer requested a leasehold value of \$3,616.00. (E2:1)

The County Board, as it considered protests of 2002 assessed values for leasehold interests, had available a land study of similar sandpit lake lot sales. (E6:1). The County Board used the study as the basis for a third method of valuation of leasehold interests at North Lake for the tax year 2002. The market value indicated for a fee interest in that study for lots at North Lake was \$35,000.00. (E6:1). The County Board utilized a rate of return of 10% to determine a "market rent" of

\$3,500.00. (E6:2). The difference between "market rent", \$3,500.00, and the "actual rent", \$1,400.00, assumed to be due under the lease over the life of the lease was calculated.

(E6:2). The difference between the rent paid and the calculated market rent was determined to be \$2,100.00. (E6:2). That amount was capitalized at 10% suggesting a leasehold value of \$21,000.00 for each lot. Other calculations were made suggesting different values, \$26,092.00 and \$32,541.00, for a leasehold interest. (E6:2). The indicated value for the leased fee, capitalizing actual rent of \$1,400.00 at 10% was \$14,000.00 (E6:2). The County Board assigned a leasehold value of \$21,000.00 to Lot 53 of North Lake for the year 2002. (E2:1). The sum of the leased fee and the leasehold at those values equaled the indicated actual or market value of a fee interest, \$35,000.00. (E6:2).

The County Board did not, however, confine its actions to adjustments of the leasehold value for Lot 53, North Lake. The County board adjusted the value for improvements on Lot 53, North Lake as well. The increase made to improvement value on Lot 53 North Lake equaled the decrease in the value assigned to the leasehold interest for Lot 53 North Lake. Aggregate value for the two components were unchanged from the Assessor's aggregate. (E1:2).

The aggregate of land and improvements is the value of real property that is to be considered for equalization purposes. *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981).

A uniform tax rate applied to uniform and proportionate values, however they are determined, insures that no taxpayer similarly situated, bears a disproportionate share of taxes. Achievement of that objective is the purpose of equalization. *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 588 N.W.2d 190 (1999). "The burden is on the Taxpayer to show by clear and convincing evidence that the valuation placed on other similar property is grossly excessive." *Cabela's, Inc. v. Cheyenne County Board of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). In this case no evidence was presented showing that the value determined by the County Board for the leasehold interest for Lot 53 North Lake, when combined with the value of improvements, was not equalized with the values assigned to other leasehold interests and improvements on Lots at North Lake for the year 2002. No evidence was presented in this case showing the 2002 assessed or taxable value of the leased fee interest in Lot 53 North Lake. Without that evidence the Commission was unable to compare assessed or taxable value of the leased fee interest to its actual or market value. The Commission was, therefore, unable to determine whether the

Taxpayer's leasehold interest was assessed and taxed at the same percentage of its actual or fair market value as the leased fee.

**IV.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the Cass County Board of Equalization determining the actual or fair market value of the subject property as of the assessment date, January 1, 2002, is affirmed as follows:

Land (leasehold) value	\$ 21,000.00
Improvement value	<u>\$154,180.00</u>
Total value	<u>\$175,180.00</u>

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 (Cum. Supp. 2002).
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 2002.

6. This order is effective for purposes of appeal July 9, 2003.

IT IS SO ORDERED.

Dated: July 9, 2003.

Wm. R. Wickersham, Vice-Chair

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

SEAL