

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

BRIAN MOGENSEN,)	
)	
Appellant,)	CASE NO. 03A-78
)	
vs.)	
)	FINDINGS AND FINAL ORDER
HOLT COUNTY BOARD OF)	REVERSING THE BOARD'S
EQUALIZATION,)	DECISION AND GRANTING RELIEF
)	
Appellee.)	

Appearances:

For the Appellant: Richard C. Reier, Esq.
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For the Appellee: Thomas P. Herzog, Esq.
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Before: Commissioners Hans, Lore, Reynolds, and Wickersham.

**I.
STATEMENT OF THE CASE**

Brian Mogensen ("the Taxpayer") owns a 35.4 acre tract of land legally described as Part of the SW¼ Of Section 5, Township 25, Range 9, in Holt County, Nebraska. (E6:2). The tract of land is improved with 125,790 square foot, self-contained, commercial hog confinement facility built during 1998, 1999, and completed in 2000. (E2:12; E2:6). The hog confinement facility was designed to hold 5,240 sows, based on an initial permit authorized by the Nebraska Department of Environmental Quality. (E2:6; E2:11). Holt County adopted zoning regulations during the

course of construction of the subject property which limited the operating capacity to 2,399 sows. Operating the facility at a higher capacity requires a Special Use Permit. The Taxpayer requested that Permit in 2002, but his request was denied. The Taxpayer challenged the denial of the Special Use Permit, but that litigation was unsuccessful. The subject property's operation is therefore limited to a capacity of 2,399 sows, or 55% of the designed capacity.

The Holt County Assessor ("the Assessor") originally determined that the subject property's actual or fair market value was \$3,618,985 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and alleged that the subject property's actual or fair market value was \$1,393,985. (E1). The Assessor revised his opinion of value, and determined that the subject property's actual or fair market value was \$1,254,750. (E1). The Holt County Board of Equalization ("the Board") declined to accept the Assessor's recommendation, and denied the protest. (E1).

The Taxpayer appealed the Board's decision on August 22, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 10, 2003, which the Board answered on October 6, 2003. The Commission issued an Amended Order for Hearing and Notice of Hearing to each of the Parties on June 28, 2004. An

Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on November 2, 2004. The Taxpayer appeared personally at the hearing, and with counsel, Richard C. Reier. The Board appeared through Thomas P. Herzog, the Holt County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

II. ISSUES

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's valuation and equalization protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

III. APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51)). The "unreasonable or arbitrary"

element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV. FINDINGS OF FACT

The Commission finds and determines that:

1. The hog confinement facility was built as a 5,240 sow (2,620 Animal Unit) complex. Use of the facility is limited by Holt County Zoning Ordinances to 2,400 sows (1,200 Animal Units). An Animal Unit is defined in the Zoning Regulations as two sows with or without litters. (E2:98).
2. The Taxpayer's requested Special Use Permit allowing operation at the designed capacity was denied in 2002. (Stipulation of Parties; E2:11).
3. The original tenant vacated the premises in 2002 based on the lack of the Special Use Permit, and the subject property was vacant on the assessment date through the date of the Board's hearing on the Taxpayer's protest. (E2:11).

4. There is no evidence that the Assessor inspected the subject property for tax year 2003.

V.
ANALYSIS

Actual value of real property for purposes of taxation may be determined using professionally accepted mass appraisal methods, including, but not limited to, (1) the sales comparison approach, taking into account factors such as location, zoning, and current functional use; (2) the income approach; and (3) the cost approach. This statute does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine actual value of real estate for tax purposes. *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001). The cost approach usually works best for newer improvements, because construction costs are easier to estimate and there is less depreciation. This approach is especially useful for appraisal of properties for which sales and income data are scarce. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 128.

The Cost Approach, under professionally accepted mass appraisal methodologies, 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; (4) 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.

Determining the "highest and best use" is critical under the first step of the Cost Approach. "Highest and best use" is defined as "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially reasonable, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical probability, financial feasibility, and maximum profitability." *Dictionary of*

Real Estate Appraisal, 3rd Ed., Appraisal Institute, 1998, p. 171.

The lack of a Special Use Permit limits the legal use to which the property may be put to 55% of the designed capacity. (E2:11). The Board's value, \$3,618,985 (E1), was based on a \$1,000 per sow cost of construction. (E6:3). The Board failed to adduce any Cost Manual or other professionally recognized mass or fee appraisal reference work supporting this cost of construction.

"External obsolescence" is the loss in value as a result of an impairment in utility and desirability caused by factors external to the property (outside the property's boundaries) and is generally deemed to be incurable." *Property Assessment Valuation, 2nd Ed., International Association of Assessing Officers, 1996, pp. 155.* The Board's value failed to recognize any external obsolescence resulting from application of the zoning regulations and the denial of the Special Use Permit in 2002.

The Taxpayer retained a Certified General Appraiser licensed by the State of Nebraska. The Taxpayer's Appraiser testified without objection and ultimately determined that the subject property's actual or fair market value, using all three approaches to value, was \$1,450,000. (E2:89).

The Board's determination of value was not supported by the evidence not only because it did not recognize external depreciation but also because the base factor of 3,600 sows is not reflected in the buildings capacity or the useful capacity of the subject property. The Assessor's recommendation of value is unexplained, but, if based on the tables shown in Exhibit 6, pages 5 through 15, would not be clear and convincing evidence of value based on the age of the tables, dated 1979 through 1981. The opinion of the Taxpayer's Appraiser becomes therefore the only clear and convincing evidence of value.

The Taxpayer adduced no evidence concerning a lack of equalization at the Taxpayer's Appraiser's value, therefore no equalization of this value can be recognized.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the Board's action was incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51).
3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market

value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's value becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

4. "Actual value" is defined as the market value of real property in the ordinary course of trade, or 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 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. Neb. Rev. Stat. §77-112 (Reissue 2003).
5. Where an assessor does not inspect the subject property, the statutory presumption is extinguished. *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966).

6. The Board's decision was incorrect, and both unreasonable and arbitrary. Further, the Board's determination of value was also unreasonable. That decision must accordingly be vacated and reversed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Holt County Board of Equalization's Order setting the subject property's assessed value for tax year 2003 is vacated and reversed.
2. The Taxpayer's real property legally described as Part of the SW $\frac{1}{4}$ of Section 5, Township 25, Range 9, Holt County, Nebraska, shall be valued in the amount of \$1,450,000 for tax year 2003.
3. Any request for relief by any Party not specifically granted by this order is denied.
4. This decision, if no appeal is filed, shall be certified to the Holt County Treasurer, and the Holt County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51).
5. This decision shall only be applicable to tax year 2003.

6. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Lore made and entered the above and foregoing Findings and Orders in this appeal on the 2nd day of November, 2004. The same were approved and confirmed by Commissioners Hans, Reynolds and Wickersham and are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Reissue 2003).

Signed and sealed this 3rd day of November, 2004.

SEAL

Wm. R. Wickersham, Chair