

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

HOLMES PLUMBING & HEATING)	
SUPPLY CO.,)	
)	CASE NO. 04C-152
Appellant,)	04C-153
)	
vs.)	FINDINGS AND FINAL ORDER
)	AFFIRMING DECISIONS OF THE
BUFFALO COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

SUMMARY OF DECISION

Holmes Plumbing & Heating Supply Co. ("the Company") appeals the Buffalo County Board of Equalization's orders granting only in part the Company's 2004 valuation and equalization protests primarily concerning the value of a new warehouse and new mini-storage warehouses. The Commission affirms the Board's decisions.

**I.
ISSUES**

The issues before the Commission are (1) whether the Board's decisions to grant the Company's valuation and equalization protests only in part were incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determinations of value were unreasonable.

II.
STATEMENT OF THE CASE

The Company in Case Number 04C-152 owns a 3.695 acre tract of land legally described as Lot 1, Holmes Addition, City of Kearney, Buffalo County, Nebraska ("the first parcel"). (E19:1). The tract of land is improved with commercial structures used to store plumbing supplies sold to contractors, an office, a storage facility and a new storage warehouse. (E19:3). The Buffalo County Assessor ("the Assessor") determined that this parcel's actual or fair market value was \$188,710 as of the January 1, 2004, assessment date. (E19:1). The Company timely protested that determination and alleged that this parcel's actual or fair market value was \$113,920. (E19:1). The Buffalo County Board of Equalization ("the Board") granted the protest in part and found that this parcel's actual or fair market value was \$175,930 as of the assessment date based on the Assessor's recommendation for a reduction in assessed value. (E19:1).

The Company, in Case Number 04C-153, owns a 4.083 acre tract of land legally described as Lot 2, Holmes Addition, City of Kearney, Buffalo County, Nebraska ("the second parcel"). (E20:3). The tract of land is improved with an office building; a truck scale; and a number of mini-storage warehouses. (E20:3). The Assessor determined that the second parcel's actual or fair market value was \$719,345 as of the assessment date. (E2:1).

The Company timely protested that determination and alleged that this parcel's actual or fair market value was \$457,303. (E2:1). The Board granted the protest in part and found that the subject property's actual or fair market value was \$682,390 as of the assessment date based on the Assessor's recommendation for a reduction in assessed value. (E2:1).

The Company appealed each of the Board's decisions on August 23, 2004. The Commission served a Notice in Lieu of Summons on the Board on which the Board answered. The Commission consolidated the appeals for purpose of hearing and issued an Order for Hearing and Notice of Hearing on March 4, 2005. 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 cases for a hearing on the merits of the appeals in the City of Kearney, Buffalo County, Nebraska, on July 7, 2005. The Company appeared at the hearing through Donald D. Graham, its President, and through counsel, Paul F. Peters, Esq.. The Board appeared through Andrew W. Hoffmeister, Esq., Deputy Buffalo County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeals. Commissioner Wickersham served as the presiding officer.

III.
APPLICABLE LAW

The Company is required to demonstrate by clear and convincing evidence (1) that the Board's decisions were incorrect and (2) that the Board's decisions were either unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9). 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 decisions. The Company, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's values were 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 value of the land component is not at issue in either case [04C-152: \$32,920 (E1:1); 04C-153: \$44,800 (E2:1)].
2. The Company's only evidence of value is opinion testimony and certain documents pertaining to the cost of new construction.

**V.
ANALYSIS**

**A.
VALUATION AND EQUALIZATION IN CASE NUMBER 04C-152**

The Company's President testified that the values of the land component and the "old" buildings were not at issue in Case Number 04C-152. The President further testified that only the assessed values of the new warehouse and the asphalt paving were at issue.

The President testified in this case that the entire parcel's actual or fair market value was approximately \$450,000 as of the assessment date. The President based his opinion of actual or fair market value on his contention that "Cost is the best indicator of value." An officer or director may testify to the worth of his or her property if the owner is familiar with the property and knows the worth. In order to qualify, he or she must be shown to be familiar with the property and have a knowledge of values generally in the vicinity. *US Ecology v. Boyd Cty. Bd. of Equal., supra; Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 813 - 814, 638 N.W.2d 877, 881 (2002). The Company adduced no evidence demonstrating the President's knowledge of commercial property values in the City of Kearney.

The Company's President further testified that the new warehouse construction had not been completed as of the

assessment date. The only evidence contained in the record establishing the percentage of completion was the Assessor's opinion that the warehouse construction was 25% complete. (E19:3). The Company's President testified that the new warehouse's total cost of construction was \$331,190.56. Based on his contention that "cost is the best indicator of value" he contends that the new warehouse's actual or fair market value as of the assessment date could not exceed 25% of the construction costs of \$331,190.56, which is approximately \$82,797.64.

The Company's President also disputed the assessed value of the asphalt paving component. He testified that the cost of the asphalt, installed four or five years prior to the assessment date, was \$30,000. The President offered no evidence of the new construction costs for the four or five year old asphalt component. The President offered no evidence other than opinion testimony of the actual or fair market value for this component as of the assessment date.

The Company's President testified that the only issues in this appeal were the assessed values of two components: the new warehouse and the asphalt paving. The Cost Approach Worksheet for this parcel, however, does not separately identify the assessed values for the individual improvement components. The value of the entire parcel including land and all improvements as determined by the Board was \$175,930. (E1). This value is well

below the Company's President's opinion of value of \$450,000. The Company's contention that the first parcel's assessed value exceeds actual or fair market value is not supported by the record, and has no merit.

The Company further contends, however, that the 39% external or "economic" obsolescence factor used by the Assessor to reach his determination of value for the improvement component of the first parcel should also be applied to the Company's costs of construction. Applying this external or "economic" obsolescence factor to the Company's actual costs of construction would yield a value of \$50,506.56. [$\$331,190.56$ (E8) - 39% ($\$129,164.32$) = $\$202,026.24$ x 25% completion = $\$50,506.56$].

The Company's conclusion is based on allegations which may or may not be correct. First, the President's contention that cost represents value is not necessarily true. Construction costs do not necessarily establish actual or fair market value although construction costs should be given some consideration when determining value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982). Second, the Company's contention that a 39% economic depreciation factor must be applied to the Company's actual construction costs may or may not be correct. The Cost Approach, under professionally accepted mass appraisal

methodologies, includes six steps which may be summarized as requiring: (1) an estimate of land value; (2) an estimate of the total or replacement cost new reduced by total accrued depreciation; (3) adding the estimated land value to the estimated replacement cost new less accrued depreciation to arrive at an indicated value. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. "Accrued depreciation" is the difference between the replacement cost new of a property and its market value as of the date of the appraisal. *Supra*, at 153. Depreciation may result from physical obsolescence, functional obsolescence, and external or economic obsolescence. *Supra*, at 154 - 155. "Economic Obsolescence" is defined as "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 Company here adduced no evidence of market value other than the President's unsupported opinion of value. The Company adduced no evidence to establish that a deduction from this opinion of value would be necessary as a result of any impairment in utility or desirability caused by any factors external to the property. The burden of proof is on the Company, and the Company

has failed to meet that burden regarding application of any economic obsolescence factor. The President's testimony that the property had an actual or fair market value of approximately \$450,000 contradicts the idea that an external obsolescence factor should be applied. The Company's contention that a 39% economic obsolescence factor should be applied has no merit.

The Company also alleged in Case Number 04C-152 that the assessed value of the new improvement was not equalized with comparable properties. (E2). Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. If a Company's property is assessed in excess of the value at which others are taxed, then the Company has a right to relief. However, the burden is on the Company to show by clear and convincing evidence that the valuation placed upon the Company's property when compared with valuation placed on other similar property is grossly excessive." *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). The Company here adduced no evidence of assessed values of any other properties. The Company's claim that the assessed value of the new improvement was not equalized with comparable properties is not supported by any evidence, and therefore has no merit.

Finally, although not raised by the Parties, the values shown on the Assessor's Recommendation do not add up to the total shown. (Land - **\$32,960** + Buildings - \$143,010 = Total **\$175,970**, not \$175,930). (E1). However, the Property Record File indicates that the correct land value was \$32,920, not \$32,960. (E19:1). The Commission finds and determines that the recommended land value of \$32,920 was not at issue, and therefore determines that the Assessor's original recommendation of value for the land component, \$32,920, should be reinstated.

B.
VALUATION AND EQUALIZATION IN CASE NUMBER 04C-153

The Company's President testified that in his opinion the actual or fair market value of the second parcel was approximately \$400,000. The Company did not protest the value of the land component in Case Number 04C-153 (\$44,800). The Company did protest the assessed value of the commercial improvements as determined by the Assessor (\$674,545), including the assessed value of an old office building and an unused truck scale. (E2:1). The Assessor testified that his recommendation for a reduction in assessed value was based in part on a determination that neither the old office building nor the inoperable truck scale had any value as of the assessment date. The only issue remaining is the value of the new mini-storage warehouses and the value of the paving on Lot 2.

The Company's President testified that "Cost is the best indicator of value." Assuming without deciding that this contention is accurate, the Company's total cost of construction, for the mini-warehouses and paving was \$676,235. (E5:1). The assessed value of those same items after Board action was \$637,590, or \$38,645 less than the Company's costs of construction. (E2:1). The Company contends, however, that the 39% external or "economic" obsolescence factor used by the Assessor to reconcile his determination of Replacement Cost New to actual or fair market value should also be applied to the Company's construction costs. Applying this 39% external or "economic" obsolescence factor to the Company's actual costs of construction would yield a value of \$412,503.45. [$\$676,235.17 - 39\% (\$263,731.12) = \$412,503.45$].

The Company's allegations in this case again do not rise to the level of clear and convincing evidence of actual or fair market value. Cost does not necessarily equal value, although costs of construction should be given consideration in determining value. *Forney, supra; Potts, supra*. Second, the Company adduced no evidence supporting its contention that actual costs of construction should be reduced by the same economic or external obsolescence factor as applied to **estimated** cost factors from a commercial cost factor publication to arrive at actual or fair market value.

The Company adduced no evidence of the actual or fair market value of the mini-storage warehouses other than the President's opinion testimony. The President's testimony was neither clear nor convincing evidence of actual or fair market value. He is not a resident of Buffalo County, and he was unable to identify the number of units, the size of the units, or the rent rolls for the mini-storage warehouses. He further testified that he had not been involved in the construction or management of any other mini-warehouses, and he adduced no evidence of "comparable" properties. The record contains no evidence that the Company's officer knows the worth of the property or has knowledge of values generally in the vicinity. His opinion of "market value," if credible, does not rise to the level of clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary.

The Company, in the absence of any evidence of market value, cannot establish the difference between its costs of construction and market value. There is, therefore, no evidence supporting a 39% reduction in the Company's cost of construction in order to reach actual or fair market value.

The Company also alleged in this case that the assessed value of the mini-storage warehouses was not equalized with "comparable" properties. The Company adduced no evidence of assessed values of other mini-storage warehouses. The Company's

equalization claim therefore is not supported by any evidence in the record, and must be denied. *See Cabela's, Inc., supra.*

**C.
CONCLUSION**

The Company adduced opinion testimony and cost data in support of its overvaluation claims. The opinion evidence, summarized, indicates that the two adjoining parcels had actual or fair market values of approximately \$400,000 and \$450,000, for a total of approximately \$855,000. The Board's determination of value for the two adjoining parcels, which are under common ownership and management, was \$858,320. This difference amounts to a mere difference of opinion, and does not satisfy the Company's burden of proof. *See, e.g., US Ecology, supra.*

The Company's evidence of actual or fair market value for the two parcels, when considered independently, does not rise to the level of clear and convincing evidence that the Board's decisions were incorrect, and either unreasonable or arbitrary. There is no evidence that the subject properties assessed values were not equalized with comparable properties. The Company's appeals must accordingly be denied.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of these appeals.
2. The Commission is required to affirm the Board's decisions unless evidence is adduced establishing that the Board's actions were incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
3. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted upon sufficient competent evidence to justify its decisions. These presumptions remain until the Company presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's values becomes one of fact based upon all the evidence presented. The burden of showing such valuations to be unreasonable rests on the Company. *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).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Buffalo County Board of Equalization's Orders setting the subject properties' 2004 assessed values are affirmed.
2. The Company's real property in Case Number 04C-152, legally described as Lot 1, Holmes Addition, City of Kearney, Buffalo County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board and corrected after the clerical error of reciting an incorrect recommended land value:

Land	\$ 32,920
Improvements	\$142,010
Total	\$175,930

3. The Company's real property in Case Number 04C-152, legally described as Lot 2, Holmes Addition, City of Kearney, Buffalo County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board:

Land \$ 44,800
Improvements \$637,590
Total \$682,390

4. Any request for relief by any Party not specifically granted by this Order is denied.
5. This decision, if no appeal is filed, shall be certified to the Buffalo County Treasurer, and the Buffalo County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
6. This decision shall only be applicable to tax year 2004.
7. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 11th day of August, 2005.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

SEAL

Wm. R. Wickersham, Chair

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 APPEAL MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW. SEE NEB. REV. STAT. §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS, L.B. 15, §11). IF A PETITION IS NOT TIMELY FILED, THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.