

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

CROWN PROPERTIES, LLC,)	
)	
Appellant,)	CASE NO. 05C-35
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
SARPY COUNTY BOARD OF)	SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Crown Properties, LLC, 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 February 1, 2006, pursuant to a Notice and Order for Hearing issued November 29, 2005. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Charles R. Clatterbuck, Managing Member of Crown Properties, LLC, appeared at the hearing on behalf of Crown Properties, LLC ("the Taxpayer") without counsel.

The Sarpy County Board of Equalization ("the County Board") appeared through counsel, Michael A. Smith, Esq., a Deputy County Attorney for Sarpy County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) 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. 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(8)(Supp. 2005). 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:

1. The Taxpayer is the owner of record of certain real property described in the appeal as Lot 8, Tillers 4th Addition, Bellevue, Sarpy County, Nebraska ("the subject property").
2. The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Sarpy County Assessor was:

Land value	\$ 210,396.00
Improvement value	<u>\$1,639,604.00</u>
Total value	<u>\$1,850,000.00.</u> (E1:1)

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property to the County Board:

Land value	\$ 210,396.00
Improvement value	<u>\$1,269,604.00</u>
Total value	<u>\$1,480,000.00.</u> (E19:1)

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

Land value	\$ 210,396.00
Improvement value	<u>\$1,378,387.00</u>
Total value	<u>\$1,588,783.00.</u> (E1:1)

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. An Order for Hearing and Notice of Hearing issued on November 29, 2005, set a hearing of the Taxpayer's appeal for February 1, 2006, at 9:00 a.m. CST.
8. 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.
9. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.

10. 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 2005 is:

Land value	\$ 210,396.00
Improvement value	<u>\$1,378,387.00</u>
Total value	<u>\$1,588,783.00.</u>

11. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.
12. The decision of the County Board was correct and neither arbitrary nor unreasonable.
13. The decision of the County Board should be affirmed.

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 Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016 (3) (Supp 2005).

4. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
5. “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).
6. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
7. “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).
8. 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).
9. 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) (Supp. 2005). 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).

10. 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).
11. 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).
12. 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).
13. "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).
14. "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).
15. "It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based." *Bottorf v. Clay County Bd. Of Equalization*, 7 Neb. App. 162, 167, 580 N.W.2d 561, 565, (1998).
16. "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).
17. 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

The subject property is an improved parcel. Improvements on the parcel as shown by the County Assessor's records are two commercial buildings one building constructed in 1986 contains 9,802 square feet the other building built in 1988 contains 9,580 square feet. (E5:3). An appraisal submitted by the Taxpayer shows minor difference in the building measurements. (E11:6). Other improvements are paved parking, lot curbs, landscaping a pole sign, lighting, canopy, and lawn sprinkler system. (E5:4) and (E11:6). The determination of value made by the County Board was based on the income approach. (E5:2). The Taxpayer's Appraiser testified that he had relied the most on the income approach to make his determination of value.

The Income Approach to valuation can be defined as "a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One years' income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate." *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, (2002), p143. The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of*

Real Estate 12th Edition, The Appraisal Institute, 2001, pp. 493 - 494. A variety of techniques may be used to determine various components of the approach. *Supra*, chs 20-24, (2001).

The Taxpayer's Managing Member asserted that the effective income determined by the County Board was too high. In support of his assertion he offered copies of leases applicable to the subject property. The Taxpayer's Appraiser testified that he had used actual rents for the subject property to make his determination of value because he believed the subject properties actual rents to be market rates. The Taxpayer's Appraiser testified that his opinion concerning rents was based on his experience as a property manager and knowledge of the market he had gained as an appraiser of commercial properties. The Taxpayer's Appraiser testified that he had estimated expenses based on his knowledge and experience. The Taxpayer's Appraiser testified that he did not use actual expenses for the subject property, and that he thought expense statements that he might have obtained for other properties were generally unreliable. The Taxpayer's Appraiser deducted taxes with a credit for taxes paid by a tenant. (E4:8). "When property is valued for ad valorem tax purposes, taxes should not be considered an expense item." *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 240. The estimate of expenses by the Taxpayer's appraiser without consideration of taxes or the credit for taxes paid is \$33,630.00. ($\$48,630.00 - \$25,000.00 + \$10,170.00 = \$33,800.00$). The adjusted estimate is 17.22% of effective income ($\$33,800.00 \div \$196,253.00$). The County Board determined that expenses were 20% of effective income. (E5:5). The Appraiser's use of the income approach may have varied from the standard indicated because the Appraisal had been prepared for the purpose of valuing the estate of Lee Clatterbuck. (E4:2).

A “loaded” capitalization rate includes the effective tax rate in addition to the capitalization rate and allows tax rates to be accounted for in a determination of value utilizing the income approach. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 233. The tax rate applicable to the subject property is unknown making it impossible to convert the Taxpayer Appraiser’s capitalization rate to a loaded rate. For any given net income the higher the capitalization rate the lower the resulting value. *Supra*, p. 232.

The Taxpayer’s Managing Member testified concerning his extensive real estate interests, knowledge of the market for property and the subject property. The Taxpayer’s Managing Member testified that his opinion on actual or fair market value as of the assessment date for the subject property was \$1,520,000.00, the value which had been determined by the Taxpayer’s Appraiser. The value testified to is higher than the value requested on the Property Valuation Protest Form 422. (E1:1). The difference between the value determined by the Taxpayer’s Appraiser and the County Board’s determination is \$68,783.00. ($\$1,588,783.00 - \$1,520,000.00 = \$68,783.00$). The difference between the two values is 4.03% of the County Board’s value ($\$68,783.00 \div \$1,58,783.00 = .043$). 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).

The Appraisal offered by the Taxpayer had an effective date of June 25, 2005. (E4:2). The date of assessment or valuation date at issue in this appeal is January 1, 2005. The Taxpayer’s Appraiser testified that the market was stable between January 1, 2005 and June 25, 2005 but did not offer an opinion of value as of January 1, 2005.

The Appraisal offered had an effective date nearly 7 months after the valuation date at issue in this appeal, had been prepared for a different purpose, used methodology that is not recommended for appraisals used to determine value for ad valorem purposes, and in various aspects was credible only as the unsupported opinion of the Appraiser. The Appraisal and the opinion of the Appraiser which it supports are not clear and convincing evidence that the decision of the County Board was incorrect unreasonable or arbitrary.

**V.
ORDER**

IT IS THEREFORE ORDERED:

1. That the decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2005, as follows:


Land value	\$ 210,396.00
Improvement value	<u>\$1,378,387.00</u>
Total value	<u>\$1,588,783.00</u>

is affirmed.

- 2. That this decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
- 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 2005.
- 6. This order is effective for purposes of appeal February 6, 2006.


Signed and Sealed. February 6, 2006.


Wm. R. Wickersham, Chairperson




Susan S. Lore, Commissioner


Robert L. Hans, Commissioner


William C. Warnes, Vice-Chairperson

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 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.