

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

THOMAS J. TRACY,)	
)	
Appellant,)	CASE NO. 05R-5
)	
vs.)	FINDINGS AND ORDER
)	REVERSING THE DECISION OF THE
DOUGLAS COUNTY BOARD OF)	DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Thomas J. Tracy 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 January 4, 2006, pursuant to a Notice and Order for Hearing issued October 27, 2005. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Thomas J. Tracy ("the Taxpayer") appeared at the hearing without counsel.

The Douglas County Board of Equalization ("the County Board") appeared through counsel, James R. Thibodeau, Esq., a Deputy County Attorney for Douglas 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 11, Block O, The Woodlands, Omaha, Douglas 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 Douglas County Assessor was:

Land value	\$ 19,000.00
Improvement value	<u>\$128,000.00</u>
Total value	<u>\$147,100.00.</u>

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

Total value	<u>\$ 12,400.00.</u>
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4. The County Board denied the protest. (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. An Order for Hearing and Notice of Hearing issued on October 27, 2005, set a hearing of the Taxpayer's appeal for January 4, 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 adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
10. The taxable value of the subject property as of the assessment date determined by the County Board is not supported by the evidence.
11. The decision of the County Board was incorrect, arbitrary and unreasonable.
12. The decision of the County Board should be vacated and reversed.

13. Based on the entire record before it, the Commission finds and determines that the taxable value of the subject property for the tax year 2005 is:

Total value \$ 12,400.00.

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) of Nebraska Statutes. 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. 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).
 9. 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).

10. 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).
11. "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).
12. "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).
13. "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).

14. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Cons.*, art. VIII, §1
15. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
16. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
17. “Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to pay a disproportionate share of the tax. Where it is impossible to secure both the standards of the true value of a property for taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief. However, the burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer'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).

18. Equalization requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).
19. “The right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.” *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

IV. DISCUSSION

On the assessment date the subject property consisted of a lot and partially constructed residence. The Taxpayer asserts that the subject property’s taxable value should be equalized for the tax year 2005 with comparable properties. It is necessary to determine both whether there are grounds for relief and whether there is sufficient evidence to determine the relief to be granted. *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

The basis for the Taxpayers’ equalization claim is disparate taxable values assigned to partially constructed residences in The Woodlands subdivision and other subdivisions in Douglas County. An Appraiser employed by the Douglas County Assessor (“Appraiser”) testified that the practice of the Assessor’s office was to assign lot values to the land and

improvements of a parcel until a measurable structure was in place on the land. A measurable structure was described as one with framing in place but not enclosed. After a measurable structure was in place the structure was assigned a value and the value of the lot was changed to eliminate the developer's discount applied to vacant lots. The Appraiser testified that lots in The Woodlands subdivision similar to the lot for the subject property were valued at \$12,400.00 as of the assessment date after application of a developer's discount. The Appraiser testified that lots similar to the lot of the subject property on which there were measurable structures were valued at \$19,000.00 as of the assessment date. The residence on the subject property was incomplete as of January 1, 2005. The estimate of completion provided to the County Board was 75%. (E22:5). It is necessary to note however that the report containing the estimate of completion did not accurately describe the structure being placed on the lot and in fact described an entirely different structure. The estimate of completion provided by the Appraiser to the Commission for a properly described structure on the subject property is 50%. (E29:1). Regardless of the actual percentage of completion, the Taxpayer testified that the residence had been framed, closed in with windows and doors and interior sheet rock was in place on January 1, 2005, easily falling within the definition of a measurable structure. The Taxpayer offered proof that if the practice of the Assessor was as described by the appraiser it was not followed for valuation of various parcels with measurable improvements for tax year 2005. The Taxpayer testified that he had been at the subject property on a daily basis before and after January 1, 2005, to review construction. While at the subject property he had also observed construction on an adjacent lot and a lot with a common corner, a cornering lot. The uncontroverted evidence is that a measurable structure was present on both the adjacent lot and the cornering lot as of January 1,

2005. The taxable value assigned to the adjacent lot as of January 1, 2005 was \$12,400.00. (E27 and E5:3). The taxable value assigned to the cornering lot was \$12,400.00. (E27 and E5:3). The Taxpayer testified in detail concerning the construction process employed at the subject property and other lots in its immediate vicinity. The taxpayer identified three other lots within a block of the subject which would have had measurable structures on them as of January 1, 2005, but were valued at lot value with a builder's discount. (E27, E4:3, E15:1, and E15:1). The Taxpayer testified concerning other inequities in the valuation of properties in the immediate vicinity of the subject property but a discussion of them is not necessary for the Commission's decision. The evidence produced by the Taxpayer is sufficient to support a conclusion that the subject property was selectively and intentionally valued at a higher percentage of its actual or fair market value as of January 1, 2005, than comparable properties.

The Taxpayer has proven that comparable lots with measurable structures on them were assigned taxable values as of January 1, 2005, without regard to actual or fair market value as improved. Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution. *Neb. Const.* art. VIII §1.

Several principles of uniformity clause jurisprudence guide analysis of the clause. While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity. *County of Sarpy v. State Board of Equalization & Assessment*, 185 Neb. 760, 178 N.W.2d 765 (1970). "The object of the uniformity clause is accomplished "if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value." *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 755, 178 N.W.2d

759, 764 (1970). Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964). In the instant case, the Taxpayers are contesting the valuation method applied to their residential property valued.

The rules as to uniformity and equal protection of the laws apply to valuation by the assessing officers. The Taxpayer is entitled to the benefit of a valuation practice that the County applied to other comparable property. *Constructors, Inc v. Cass County Board of Equalization*, 228 Neb. 866, 606N.W.2d 786 (2000). The Taxpayer is also entitled to proportionate assessment of the subject property. *Cablela's supra*. The Appraiser testified that lots in The Woodlands subdivision without measurable improvements had an actual or fair market value as of January 1, 2005 of \$12,400.00, the value assigned to them by the County. The County values various lots in The Woodlands subdivision at lot value with a builder's discount even though measurable improvements had been erected on them as of the assessment date. The taxpayer as noted above is entitled to uniformity and proportionality in the taxable value of the subject property. The taxable value of the subject property as of January 1, 2005, is \$12,400.00.

**V.
ORDER**

IT IS THEREFORE ORDERED:

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

Land value	\$ 19,000.00
Improvement value	<u>\$128,000.00</u>
Total value	<u><u>\$147,100.00</u></u>

is vacated and reversed.

2. That the taxable value of the subject property for the tax year 2005 shall be:
- | | |
|-------------|----------------------------|
| Total value | <u><u>\$12,400.00.</u></u> |
|-------------|----------------------------|
3. That this decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
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 2005.

7. This order is effective for purposes of appeal January 10, 2006.

Signed and Sealed. January 10, 2006.

Wm. R. Wickersham, Vice-Chairperson

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

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.