

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

CHARLES R. CLATTERBUCK,)	
)	
Appellant,)	CASE NO. 05A-008
)	
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 Charles R. Clatterbuck 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, and Hans were present. Commissioner Wickersham presided at the hearing.

Charles R. Clatterbuck ("the Taxpayer") appeared at the hearing without counsel.

The Sarpy County Board of Equalization ("the County Board") appeared through counsel, Brett S. Charles, 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 Tax Lot 4A, Section 20, Township 14, Range 12, Sarpy County, Nebraska ("the subject property").

2. The Taxpayer timely protested recapture value of the subject property for the tax year 2005 to the County Board. The Taxpayer proposed the following recapture assessment value for the subject property:

Recapture Land value	\$2,096,962.00
Total Recapture value	<u>\$2,096,962.00.</u> (E31:1)

3. The County Board granted the protest in part and determined that recapture assessment value for the agricultural and horticultural land eligible for special valuation was:

Recapture Land value	\$3,100,829.00
Total Recapture value	<u>\$3,100,829.00</u>

(\$3,130,829 Total Rcp - \$30,000 home site = \$3,100,829)(E1:1) (E16:4)

4. The values stated in Exhibit 1, the County Board’s notice of its action taken on the Taxpayers protest, does not disclose the recapture assessment value as determined for agricultural and horticultural land eligible for special valuation.

5. The Taxpayer timely filed an appeal of the County Board’s 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 1:00 p.m. CST. With the consent of the parties the appeal was heard, in conjunction with a hearing on the appeal in Case No. 05A-009.

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 burden of proof in favor of the County Board.
10. The decision of the County Board should be affirmed because the Commission cannot increase values on appeal.
11. Based on the entire record before it, the Commission finds and determines that recapture assessment value of that portion of the subject property eligible for special valuation for tax year 2005 based on the values shown in Exhibit 16 at page 4 is:

Recapture land assessment value \$3,100,829.00.

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). Neb. Rev. Stat. §77-5016 (3) (Supp 2005).
4. Agricultural and horticultural land which has been valued for taxation at eighty percent of its special value, and is taxable at eighty percent of its recapture value when it becomes ineligible for special valuation. Neb. Rev. Stat. 77-201(3) (Supp. 2005).

5. Improvements and the land on which improvements are located are not for special value and do not have a recapture value assigned to them. *Id.*
6. Recapture value means the actual value of land. Neb. Rev. Stat. 77-1443 (Cum. supp. 2004).
7. “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).
8. 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).
9. “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).
10. 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).
11. 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).

12. 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).
13. 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).
14. 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).
15. "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).
16. “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).
17. “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).
18. 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).
19. The prior year’s assessment is not relevant to the subsequent year’s valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201,206 (1988).

IV. DISCUSSION

The subject property is a larger tract of improved agricultural and horticultural land adjoining an unimproved smaller tract of agricultural and horticultural land also owned by the Taxpayer. (E18:1) Case No. 05A-008. The County's determination of recapture value for the smaller tract was also appealed to the Commission in Case No. 05A-009. The taxable value of the improvement and the land on which the improvements are located are not at issue in this appeal. Improvements and land on which improvements are located are not eligible for special valuation and therefore do not have recapture value assigned to them. Neb. Rev. Stat. 77-201(3) (Supp. 2005). The Commission in this appeal is asked only to consider recapture value of the agricultural and horticultural land eligible for special valuation. (E31:1) As noted only agricultural and horticultural lands are eligible for special valuation. Home sites and roads are not considered agricultural and horticultural lands. 350 Neb. Admin. Code, ch 11, §002.01I (03/04). Waste lands are considered to be agricultural and horticultural lands if they lie in or adjacent to lands in common ownership being used for agricultural and horticultural purposes. 350 Neb. Admin Code, ch 11, §002.01J (03/04). The portion of the subject property eligible for special valuation is 144.78 acres (139.11 + 5.67). (E16:4). A portion of the subject property is in a flood plain.

The Taxpayer contended that recapture value or actual value for the agricultural and horticultural land eligible for special valuation had been determined based on the sale of an adjoining tract to the North. Sale of the Northern tract for \$31,798, per acre is referenced in a block on the Property Valuation Protest, Form 422, as a justification for a rejection of the

Taxpayer's protest. The County's Appraiser testified however that the sale referenced on the Form 422 was not the basis for the County Board's determination of recapture assessment value. The County's Appraiser testified that the 16.65 acres of the subject property in the flood plain was assigned an actual value of \$11,000.00 per acre and a recapture assessment value of 8,470.00 by the County Board. (E16:4 soil symbol CK). The balance of the subject property eligible for special value had an actual value of \$30,000.00 per acre and a recapture assessment value of \$23,100.00. (E16:4). Recapture assessment value had been determined by the County Board to be 77% of recapture or actual value. (E12:1). That determination is contrary to law which requires assessment at 80% of recapture value. Neb. Rev. Stat. 77-77-201 (3) (Supp. 2005). Any presumption that the County Boards decision was correct is extinguished. Likewise the calculations shown in Exhibit 16:4 and in Exhibit 1 do not properly disclose recapture assessment value for the subject property.

It is still necessary to determine whether the recapture assessment value determined by the County Board is reasonable. The County's Appraiser testified that recapture or actual value of land in the flood plain had been determined based on a single sale with land in the flood plain. The County's Appraiser testified that recapture or actual value of land eligible for special value and lying outside the flood plain had been determined based on sales shown in Exhibit 19 Case No. 05A-008, highlighted in yellow. Exhibit 19 in Case No 05A-008 is identical to Exhibit 18 in Case No. 05A-009. The sales range in size from 40.03 acres of ag land selling for \$33,198 per acre to 180.63 ag acres selling for \$40,114 er acre. (E19 Case No. 05A-008). The County's Appraiser testified that some of the sales had drainage ditches in them or had other conditions which might have detracted from their sale price. None of the parcels had all of the conditions

which might detract from value that the Taxpayer described for the subject property. Recapture or actual value for the agricultural and horticultural land eligible for special valuation as indicated by the County Board's determination of recapture or actual value is \$4,027,050. (139.11 acres crop land + 5.67 acres waste land = 144.78 recapture acres, 144.78 recapture acres - 16.65 recapture acres flood plain = 128.13 acres, 128.13 acres x \$30,000 + 16.65 acres x \$11,000 = \$4,027,050). Recapture or actual value per acre is $\$4,027,050 \div 144.78 = \$27,815$. That is lower than any actual value indicated by the sales presented by the County.

The Taxpayer testified that the subject property is subject to conditions that affect its recapture or actual value. The conditions noted by the Taxpayer are lack of a paved road for access, a high voltage power line across the property, a drainage ditch, current zoning, topography including elevations within the flood plain, and lack of utilities. The Taxpayer testified that the subject property had been listed for sale for several years, that the listing was at a value below the recapture or actual value determined by the County Board, and that no offers for purchase had been received. A tract to the north of the subject property had sold in May of 2004, for \$31,798.00 per acre after it was filled as necessary to have elevations above the flood plain. (E28:1) Case No. 05A-008. The Taxpayer testified that if recapture or actual value for the subject property was to be determined by reference to a sale of the adjoining tract to the north that recapture or actual value should be adjusted to reflect various development costs including the cost of raising a portion of the subject property out of the flood plain. The Taxpayer further testified that he thought that recapture or actual value as determined by the County for the prior year, \$2,096,962.00 was reasonable and that was his suggested recapture or actual value.

The Commission also heard testimony from a real estate broker who acknowledged that he had done business with the Taxpayer in the past, that he hoped to do further business with the Taxpayer, and that he considered the Taxpayer to be his friend. The real estate broker testified that he was familiar with the sale of the tract to the north of the subject property and that it was an unusual sale because of the size of the tract sold. The real estate broker and the Taxpayer agreed that the some of the subject property would likely be sold for industrial or light industrial use because it abutted a tract with those uses. Potential use of the balance of the parcel was uncertain. The Taxpayer is an experienced real estate investor as a developer and manager of property and will maximize value by sale of a large or small tract as did the developer owner of the tract to the north of the subject property.

The Taxpayer's evidence is not persuasive. As noted above any value determined in a prior year is not relevant to a determination of value for a subsequent year. The evidence is that actual value and by extension recapture value of the subject property was not determined by reference to a sale of neighboring property but sales of several tracts of land in the area. The evidence is that the County Board did not determine recapture assessment value correctly because it applied a 77% factor rather than an 80% assessment factor to the recapture or actual value. In addition the schedule on page 4 of Exhibit 16 and Exhibit 1 could lead the uninformed to conclude that a home site and improvements are subject to recapture assessment valuation. Those presentations by the County Board are unnecessarily confusing. Recapture value or actual value as determined by the County Board is not unreasonable and the Taxpayer has failed to prove that recapture or actual value is other than shown by the County Board's evidence.

Recapture assessment value as determined by the County Board is unlawful but the Commission may not increase value on appeal and is forced to affirm the County Board's determination.

**V.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining recapture assessment value for the portion subject property eligible for special valuation as of the assessment date, January 1, 2005, as follows:

Recapture land assessment value \$3,100,829.00

is affirmed.

2. 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. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this matter.
5. This decision shall only be applicable to tax year 2005.

6. This order is effective for purposes of appeal February 28, 2006.

Signed and Sealed. February 28, 2006.

Wm. R. Wickersham, Commissioner

SEAL

William C. Warnes, Commissioner

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.

Commissioner Hans, Dissenting,

The parcel in Case No. 05A-008 and the parcel in Case No. 05A-009 together form a 150.01 acre piece of land which together make up the subject property. The Evidence presented by the Taxpayer and the County treat these two parcels as a single property and so will this dissent unless otherwise noted. Additionally, all references to exhibits will be to exhibits found in Case No. 05A-008. I do not agree with the determination of the Findings and Orders in this case for the following reasons.

The Taxpayer offered the testimony of a real estate broker who has been retained to list the subject property for sale (“the Broker”). (E3). The Broker testified that he has had the

property listed for sale since April of 2002 and that in that time “there have been no offers, not even a nibble.” The Broker identified several factors that were not considered by the Board, but which would reduce the value of the subject property. The biggest factor was the portion of the subject property which is located in the flood plain. The Broker testified that sixty (60) acres were located in the flood plain (E4), and the county identified sixteen (16) acres located in the flood plain (E18). The record before the Commission includes a flood plain map (E8) which demonstrates that the acres of the subject property located in the flood plain are greater than the 16 acres utilized by the Board in their determination of value. The flood plain map shows that the flood plain runs down the “ditch” which crosses the subject property from the northeast corner toward the western edge of the property. (E8). Additionally the flood plain map shows the property to the north of the subject property as mostly in the flood plain even though that northern site was filled to raise it out of the 100 year flood plain. (E8) Approximately 700,000 cubic yards of fill was trucked to the northern property to accomplish this raising. (E9). The land which has been raised out of the 100 year flood plain will cause any flood waters to be displaced to adjoining sites, most likely including a portion of the subject property. The second factor identified by the broker was the location of high tension electrical line running across the subject property. These lines have an easement described as “N-S , 150' wide” and “E-W, 50' wide” which encumbers 9.3 acres of the subject property. (E7). Finally the Broker identified the lack of utilities running to the subject property and the lack of hard surfaced roads abutting the subject property as factors which would reduce the market value of the subject property. (E4).

The Taxpayer offered an engineering estimate which addresses the factors listed by the Broker, and identifies the cost to remedy them in order for the subject property to be developed.

(E7). These estimated costs would include \$91,000 for sanitary sewers, \$127,000 for water service, and \$349,000 for street improvements. This would only be the cost for preparing the site for development, any grading/fill work that would need to be done to prepare the subject property for development would be an additional expense on top of the \$567,000. While part of the subject property currently located in the flood plain could be developed by raising the level of the land to one foot above the 100 year flood plain, no one knows how many acres are located in the flood plain after the fill in of the portion of the flood plain on the property to the north. The subject property also includes flood way areas that cannot be filled and utilized for development. (E7).

The record demonstrates that the “comparables” utilized by the County Appraiser were not, in fact, comparable to the subject property. The County’s Appraiser used eight sales as comparables to determine the value of the subject property. Unfortunately, only one of these comparables was as large as the subject property (180 acres), while the others ranged in size from 40 to 84 acres. (E19). “Land that must be divided or subdivided to achieve a higher and better use is commonly sold in bulk at a price less than the sum of the retail prices of its components. The lower unit price for the bulk sale reflects market allowances for risk, time, management, development and related costs, sales costs, profit, and other considerations associated with dividing and marketing the land.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, 2001, p 197-198. Additionally the comparable properties did not have all of the negative factors of the subject property. The comparables were also located immediately adjacent to growing, established urban areas while the subject property does not even have a

paved access road. They were not similar to the subject property, the County recognized a small part of these dissimilarities when they lowered the Assessor's initial proposed valuation (E1).

The basis for the action taken by the Board was "Adjacent Sale referenced by property owner sold in May '04 for \$31,798/acre after raising out of flood plain. Listed for \$29,956 per acre. Maintain recapture value of \$3,130,829 and assessed value of \$176,305. DW" (E1:1). The Board, however, failed to account for the \$1,250,000 cost to raise portions of that adjacent property out of the 100 year flood plain incurred by the seller. (E10). In order to account for that cost the sale price of the adjacent property would have to be reduced by the cost of the fill to get a sale price of \$2,714,755. ($\$3,964,755 \text{ sale price (E12:2)} - \$1,250,000 \text{ fill cost (E12)} = \$2,714,755$). This would result in a per acre price of \$21,877 rather than \$31,798 utilized by the Board. ($\$2,714,755 \div 124.09 \text{ acres (E12:2)} = \$21,877 \text{ per acre}$).

For all of the forgoing reasons I would find that the fair market value of the subject property would be \$2,090,371.95, or \$13,934.88 per acre. This determination of value is reached by taking the per acre sales price of the adjacent property to the north, including the cost of the fill project (\$21,877), multiplying that by the size of the subject property (150.01 acres) subtracting the cost of correcting the negative factors of the subject property (\$567,000) and then adjusting that figure to reflect a recapture value of 77% (E12:1). ($\$21,877 \times 150.01 \text{ acres} = \$3,281,768.77 - \$567,000 = \$2,714,768.77 \times .77 = 2,090,371.95$). The value of the parcel of property in Case No. 05A-008 would be \$2,087,166.93 ($149.78 \text{ acres} \times \$13,934.88 = \$2,087,166.93$) and the value of the property in Case No. 05A-9 would be \$3,205.02 ($.23 \text{ acres} \times \$13,934.88 = \$3,205.02$). There is some question about the County's use of 77% of market value to reach recapture value, when the law says 80% of market value is the recapture value.

Following the law rather than the County's action would result in a recapture value for the parcel of property in Case No. 05A-008 of \$2,171,815.00 and in Case No. 05A-009 of \$3,335.00.

Robert L. Hans, Commissioner