

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

SHANE A. JENSEN,)	
)	
Appellant,)	Case No 05R-160
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE KEARNEY
KEARNEY COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Shane A. Jensen to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue, Kearney, Nebraska, on August 17, 2006, pursuant to a Notice and Order for Hearing issued May 25, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Shane A. Jensen, ("the Taxpayer") was present at the hearing with Daniel L. Lindstrom and Justin R. Herrmann as legal counsel.

The Kearney County Board of Equalization ("the County Board") appeared through legal counsel, David G. Wondra, County Attorney for Kearney 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.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described as Lot 1 Brandt's Lakewood Estates, a subdivision being part of Government Lot 2 and Government Lot 3 and accretion land abutting said lots and Lot 3, Block 2, Brandt's Lakewood 7th Subdivision (now vacated) and all located in Section 23, Township 8 North, Range 16 West of the 6th P.M. , Kearney County, Nebraska, ("the subject property").
2. Taxable value of the subject property placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Kearney County Assessor, value as proposed by the Taxpayer in a timely protest, and taxable value as determined by the County Board is shown in the following table:

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Description: Lot 1 Brandt's Lakewood Estates, a subdivision being part of Government Lot 2 and Government Lot 3 and accretion land abutting said lots and Lot 3, Block 2, Brandt's Lakewood 7th Subdivision (now vacated) and all located in Section 23, Township 8 North, Range 16 West of the 6th P.M. , Kearney County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$272,345.00	\$ 40,000.00	\$272,345.00
Improvement	\$353,560.00	\$323,857.00	\$353,560.00
Total	\$625,905.00	\$363,857.00	\$625,905.00

3. The Taxpayer timely filed an appeal of the County Board's decision to the Commission.
4. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.

5. An Amended Order for Hearing and Notice of Hearing issued on May 25, 2006, set a hearing of the Taxpayer's appeal for August 17, 2006, at 2:00 p.m. CDST.
6. 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.
7. Taxable value of the subject property for the tax year 2005 is:

Land value	\$272,345.00
Improvement value	<u>\$353,560.00</u>
Total value	<u>\$625,905.00.</u>

II. APPLICABLE LAW

1. “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).
2. 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).

3. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
4. “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).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
8. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the

contrary. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

9. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted)
10. The Commission can grant relief only if the Taxpayer establishes by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005).
11. "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).
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. “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).

III. DISCUSSION

The subject property is an improved residential parcel. Improvements on the parcel are a 3,190 square foot residence, and another 4,800 square foot building. (E5:2 and 3). The improvements were constructed in 1998. (E5:2). The improvements are adjacent to a lake. (E7:1). The subject property includes a portion of the lake bed. (E9:1).

The Taxpayer purchased the subject property on September 30, 2004, for \$675,000.00. (E2:1). The Taxpayer testified that the subject property was bought after an extensive search for a residence and consideration of alternatives. The purchase agreement was subject to a condition that the Buyer and Seller mutually agree to written rules, covenants, restrictions, and/or by-laws with regard to the lake. The documents meeting that requirement were introduced as Exhibit 15, a Lake Maintenance Agreement, Exhibit 16, a Mutual License, and Exhibit 17, a Declaration of Resistive and Protective Covenants. All three documents were recorded against the subject property by the County Clerk for Kearney County. (E15:1, 16:1 and 17:1).

The Lake Maintenance Agreement was executed by both the sellers, the buyers and Greg Brandt, Inc., a Nebraska corporation. (E15:4). That agreement in paragraph 5 is explicitly made binding on the parties, their heirs, personal representative, successors and assigns,

declared to be appurtenant to the land described in the instrument, directs that it is to be construed as a covenant running with the land, and provides for inurement and extension of its benefits to the heirs, personal representatives, successors, lessees, licensees, agents, employees and visitors of the parties. (E15:4). It is described as an easement. (E15:4). The land subject to the easement is in two tracts Tract A owned by Brandt and Tract B the subject property. Tract A is in three parts, a 37.67 acre part, a 5.07 acre part, and a .20 acre part. (E15:2 and 3). A private man-made lake is located on, over and above Tracts A and B. (E15:3). The effect of the agreement is to provide for management of the use of the lake by the parties for water related recreational activities including but not limited to swimming, fishing, snorkeling, scuba diving, boating, water skiing, jet skiing, and wake boarding. (E15:3 and 4). The agreement is supplemented by a Mutual License. (E15:3). The agreement can be amended, modified, abrogated or annulled by a 90% vote of owners. (E15:4).

The Mutual License was entered into between the buyers and Greg Brandt, Inc., a Nebraska corporation. (E16:5). The License pertains to two tracts, Tract A held by Brandt and Tract B held by the buyers. (E15:1 and 2). Tract A in the mutual license is 37.76 acres in extent and bears the same description as the 37.76 acre part of Tract A described in the Lake Maintenance Agreement. Tract B described in the Mutual License is the subject property. The Mutual License allows for reciprocal use of portions of Tract A and B subject to rules and regulations set out in the license. E(16:2 and 3). The Mutual License is revocable for breach of its terms on conditions specified in the License. (E16:3 and 4). The Mutual License is held as an appurtenance to Tracts A and B. (E16:4).

The Declaration of Restrictive and Protective Covenants was signed by sellers and the President of Greg Brandt, Inc., a Nebraska corporation. (E17:6). The Declaration of Restrictive and Protective Covenants pertains to all of Tracts A and B as described in the Lake Maintenance Agreement. (E17:1-3). A Covenant restrict future development to 6 (six) lots with 6 (six) single family dwellings. (E17:4). Other Covenants also restrict the size and construction of improvements, restrict signs, prohibit nuisances, require maintenance of the land and otherwise provide for future use of the land. (E4-5). The Covenants have an initial duration of 25 (twenty five) years but are renewable perpetually each 10 (ten) years thereafter. (E17:3). The Covenants may be amended. (E17:3 and 4). The Covenants are to run with the land and bind on the heirs, administrators, personal representatives and assigns of any grantee of the parties. (E17:6).

An extended description of the agreements which were part of the bargain on sale and purchase of the subject property in 2004 is included because they have been characterized by an appraiser appearing for the Taxpayer as personal property, the value of which if it were known could be subtracted from the sale. (E12:11). Real property is defined for purposes of taxation to include privileges pertaining to real property. 350 Neb. Admin. Code, ch 10 §001.01 (03/04). Privileges pertaining to real estate are defined as the right to sell, lease, use, give away, or enter and the right to refuse to do any of these. 350 Neb. Admin. Code, ch 10 §001.01F (03/04). Properly adopted rules and regulations have the force and effect of law. *Alexander v. J. D. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). Clearly, Exhibits 15, 16 and 17 concern use of and the right to enter or refuse entry upon land. The rights and restrictions detailed in the documents are to run with the land, are deemed appurtenant to land

or both. The interests detailed in the documents are interests or privileges pertaining to real estate that both benefit and burden the subject property. The characterization of the agreements submitted as Exhibits 15, 16, and 17 as personal property in Exhibit 12, an appraisal of the subject property with an effective date of January 1, 2005 submitted by the Taxpayer, does not conform to the law.

The appraisal submitted on behalf of the Taxpayer is problematic in other respects. The opinion of value contained in the appraisal is based on the use of two approaches to the determination of value, the sales comparison approach and the cost approach. (E12:2). Market value, as defined in the appraisal, indicated by the sales comparison approach is \$600,000.00. (E12:2). Market value as defined in the appraisal indicated by the cost approach is \$500,000.00. (12:2). The reconciled opinion of value is \$500,000.00. (E12:2). The appraiser explains the reconciliation as follows: “The Sales Comparison Analysis produced a range from \$429,800 to \$604,600 with a most probable selling price of \$500,000.00.” (E12:2). The appraiser does note that the property had sold within the previous year. (E12:2). As noted above that transaction was for \$675,000.00. There is not explanation for the difference between the appraiser’s estimate of a probable selling price with the price paid by a knowledgeable buyer who had researched the market for a home and purchased from a developer. The Appraiser goes on to note that “Since the subject is a newer custom built structure the Cost Approach to Value was used and given the most weight, (because of the principle of substitution), the final analysis of this appraisal problem.” (E12:2).

The Cost Approach 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; (5) 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.

Various estimates for the cost to construct or replace the improvements on the subject property were received. The Taxpayer’s appraiser estimated replacement costs less depreciation at \$406,783 (E12:7). A contractor produced a preliminary cost estimate of \$341,900. (E13:1). The builder of the home produced a cost estimate of \$317,688. (E14:6). The County estimated replacement cost less depreciation at \$353,560. ((E5:2 and 3). Site value as determined by the County was \$272,345. (E5:4). Site value as estimated by the Taxpayer’s appraiser was \$95,000. (E12:7). The subject property contains 9.87 acres (429,937 square feet). (E12:6). The largest site utilized as a comparable by the appraiser was 3.167 acres. (12:6). When using “comparables” to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105. The appraiser testified that larger sites offer greater privacy and that privacy had

value in the market. The Taxpayer's appraiser relied on the sale price of the smallest comparable .524 acres to establish the value. (E12:6). No adjustment was made for the 9.87 acre size of the subject property. (E12:6). About one third of the subject property is a lake bed. (E9). The Taxpayer testified that he knew of other residential parcels that were in part a lake bed. No adjustment was made by the Taxpayer's appraiser for the portion of the subject property that lays under the lake. (E12:6). Likewise no adjustment was made for the rights and restrictions appurtenant and applicable to the subject property as opposed to rights and restrictions that might be applicable to other lake sites particularly the right to use other property, most of the lake, as a common area.

The Taxpayer's appraiser as noted had developed an estimate of value based on the sales comparison approach. (E12:2). The Taxpayer's appraiser opined that the most probable sale price was \$500,000. (E12:2). The Taxpayer's appraiser also opined that the five comparables he offered indicated a range in value of \$429,800 to \$604,600 and that the upper end of the indicated range was reflective of value given a recent sale of the subject for an amount above the top of the range. (E12:11). The two statements do not seem reconcilable. The Taxpayer's appraiser made various adjustment to comparables and described the basis for those adjustments. (E12:11). The adjustments as the Commission understands them were made based on a calculation derived from its price per square foot. That methodology makes each adjustment unique not only for the factor adjusted but the unit cost assigned to the factor. The methodology employed by the Taxpayer's appraiser is not among the twelve quantitative or qualitative methods identified by the Appraisal Institute as useful for determining the amount of adjustments. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, p. 427, (2001).

Finally the Commission notes that two appraisals were presented as evidence. Both appraisals contained an estimate of value using the sales comparison approach. The appraisals had five comparable sales in common. The estimate of value for one appraisal using the sales comparison approach was \$675,000 as of July 14, 2004 and the other \$600,000 as of January 1, 2005. (E28:1 and 3 E12:1 and 2). A casual observer, without an analysis of the appraisals, would note that values determined by the two appraisers using the sales comparison approach bracket the determination of actual value made by the County Board.

The Taxpayer has not shown by clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.

IV CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. Subject matter jurisdiction of the Commission in this appeal 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).
3. The Commission has jurisdiction over the parties to this appeal.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary, and the decision of the County Board should be affirmed.

**V.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2005, is affirmed.
2. Taxable value of the subject property for the tax year 2005 is:

Land value	\$272,345.00
Improvement value	<u>\$353,560.00</u>
Total value	<u>\$625,905.00.</u>
3. This decision, if no appeal is timely filed, shall be certified to the Kearney County Treasurer, and the Kearney County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2005.

7. This order is effective for purposes of appeal September 8, 2006.

Signed and Sealed. September 8, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, 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.