

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

CHARLES R. CLATTERBUCK,)	
)	
Appellant,)	Case Nos 06A-037
)	
v.)	DECISION AND ORDER AFFIRMING A
)	DECISION OF THE SARPY COUNTY
SARPY COUNTY BOARD OF)	BOARD OF EQUALIZATION
EQUALIZATION,)	
)	Case No 06A-038
Appellee.)	
)	DISMISSING AN APPEAL FOR WANT
)	OF JURISDICTION
)	

The above-captioned cases were called for a hearing on the merits of appeals by Charles R. Clatterbuck ("the Taxpayer") 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 23, 2007, pursuant to an Order for Hearing and Notice of Hearing issued November 17, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Charles R. Clatterbuck, was present at the hearing. Brian C. Doyle appeared as legal counsel for the Taxpayer.

Nicole O'Keefe, a Deputy County Attorney for Sarpy County, Nebraska, appeared as legal counsel for the Sarpy County Board of Equalization ("the County Board").

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) 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 the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that recapture value of the subject property as of January 1, 2006, is less than recapture value as determined by the County Board. The issues on appeal related to that assertion are:

Was the decision of the County Board determining recapture value of the subject property unreasonable or arbitrary?

What was recapture value of the subject property on January 1, 2006?

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has an interest, sufficient to maintain the above captioned appeals, in parcels of real property described below. Those parcels are the ("subject property").
2. Recapture value of each parcel of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Sarpy County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following tables:

Case No. 06A-037

Description: Tax Lot 4A, Section 20, Township 14, Range 12, Sarpy County, Nebraska.

	Assessor Notice Recapture Value	Taxpayer Protest Recapture Value	Board Determined Recapture Value
Agricultural Land	\$3,100,829.00	\$	\$3,100,829.00
Home Site	\$ 30,000.00	\$	\$ 30,000.00
Total	\$3,130,829.00	\$2,171,815.00	\$3,130,829.00

Case No. 06A-38

Description: Tax Lot 4B, Section 20, Township 14, Range 12, Sarpy County, Nebraska.

	Assessor Notice Recapture Value	Taxpayer Protest Recapture Value	Board Determined Recapture Value
Agricultural Land	\$5,313.00	\$3,335.00	\$3,680.00
Total	\$5,313.00	\$3,335.00	\$3,680.00

3. Appeals of the County Board's decisions were filed with the Commission.
4. The County Board was served with Notices in Lieu of Summons and duly answered those Notices.
5. The appeals were consolidated for hearing by order of the Commission.
6. An Order for Hearing and Notice of Hearing issued on November 17, 2006, set a hearing of the appeals for January 23, 2007, at 1:00 p.m. CST.
7. 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.
8. The Taxpayer did not file a separate protest of the recapture value of Tax Lot B, Section 20, Township 14, Range 12, Sarpy County, Nebraska for the tax year 2006.

9. The Final Determination of the County Board as evidenced by Exhibit 1 page 1 and Exhibit 2 Page 1 pertains only to Tax Lot 4A, Section 20, Township 14, Range 12, Sarpy County, Nebraska for the tax year 2006.
10. Recapture value of the eligible portion of Tax Lot 4A, Section 20, Township 14, Range 12, Sarpy County, Nebraska for the tax year 2006 is:

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

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeals is over issues raised during the county board of equalization proceedings on the appealed decision. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998).
2. “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).

3. 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).
4. 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).
5. “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).
6. 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).
7. 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. 2006).
8. Qualified agricultural land and horticultural land shall be valued for purposes of taxation at eighty percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2003).
9. Qualified agricultural land and horticultural land means land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production

of agricultural or horticultural products. Land retained or protected for future agricultural or horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or horticultural land. Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stat. §77-1359 (1) (Reissue 2003).

10. Agricultural or horticultural products include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops. Neb. Rev. Stat. §77-1359 (2) (Reissue 2003).
11. No residential, commercial, industrial, or agricultural building or enclosed structure or the directly associated land or site of the building or enclosed structure shall be assessed as qualified agricultural or horticultural land. Neb. Rev. Stat. §77-1361 (2) (Reissue 2003).
12. Agricultural land and horticultural land which has been valued for taxation at eighty percent of its special value, is taxable at eighty percent of its recapture value when it becomes ineligible for special valuation. Neb. Rev. Stat. §77-201(3) (Supp. 2005).
13. 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.*

14. Recapture value means the actual value of land. Neb. Rev. Stat. §77-1443 (Cum. Supp. 2004).
15. 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).
16. 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).
17. 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)
18. 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) (Cum. Supp. 2006).

19. "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).
20. 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).
21. 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).
22. "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).

IV. DISCUSSION

One parcel of the subject property is improved. Improvements and the land associated with them are not eligible for special value assessment and recapture value cannot be determined for those components. Neb. Rev. Stat. §77-201(3) (Supp. 2005). Recapture value as determined by the County Board included actual value of a home site. (E17:5 and E1:1)

The Taxpayer conceded the question of the equalized recapture value of the subject property was not raised before the County Board. The commission has jurisdiction only over the questions raised during the County Board proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998). The only remaining

issue for consideration by the Commission is actual or recapture value of the unimproved agricultural land and horticultural land component of the subject property as of the assessment date.

Case No 06A-037

**TAX LOT 4A, SECTION 20, TOWNSHIP 14, RANGE 12, SARPY COUNTY,
NEBRASKA**

Exhibit 3 at page 4 and Exhibit 17 at page 35 are copies of a letter containing an opinion that actual value of the subject property is between \$17,000.00 and \$19,000.00 per acre. The author of the letter asserts that he has 26 years of experience as a certified appraiser and as a broker. (E3:4 and E17:35). The letter is dated July 17, 2006 and states that the opinion expressed is of the “current market value”. (E3:4 and E17:35). The date of valuation at issue in the appeals is January 1, 2006. The letter does not disclose the basis for the opinion offered nor does it indicate that any basis other than the author’s 26 years of experience exists. The letter does not define the term “market value” as used in the letter. The letter does not contain a legal description sufficient to identify the property without reference to other documents. The letter does not disclose the appraisal approach used to arrive at the stated opinion of value. The letter does not comply in other respects with requirements of the Uniform Standards of Appraisal Practice (USPAP). USPAP provides a useful standard for the development of an opinion and an expression of that opinion that is probative. The letter does not provide an adequate basis for evaluation of the opinion offered and its author did not appear to explain or support the offered opinion. The letter shown in Exhibit 3 at page 4 and Exhibit 17 at page 35

is not probative evidence of actual value as of the assessment date at issue in the captioned appeals.

The Taxpayer is an experienced developer and manager of real estate. The highest and best use of the subject property is development for commercial, industrial or residential purposes. The Taxpayer testified that actual value of the subject property was negatively affected by power lines and their associated easements, by land in a flood plain, by land in a flood way, by the topography of the land, lack of paved roads, and a lack of adjacent sewer and water services. Costs to remediate some of the negative factors were estimated by an engineer. (E17:42). Merely providing the cost of remediation is insufficient. The cost of remediation cannot be deducted from an estimate of unremediated value. Unremediated value would already be discounted for known costs of remediation or the uncertainty of those costs. If the cost of remediation is to be deducted from a remediated value, no evidence of remediated value was presented to the Commission.

The Taxpayer presented evidence of the actual value of adjoining and nearby parcels of undeveloped agricultural land and horticultural land. (E6, 7, 8, 9, 10, and 11). Actual or fair market value can be determined using the sales comparison approach, the cost approach, the income approach, or a combination of those approaches. Comparison of assessed values is not a recognized valuation approach. Assessed value is itself the product of application of one or more of the recognized approaches. While a presumption exists that a county board acted correctly to determine the taxable value of a parcel, that presumption cannot extend to the assessed value of parcels which have not been disputed. The presumption has as its purpose deference to a decision made after consideration of disputed facts. The presumption disappears

when it is clear that relevant facts were not before the board. The presumption disappears for example when an assessor fails to inspect improved property or when it becomes clear that the facts relied on for a decision were not accurate in some material respect. Without a presumption of correctness the assessed value of a parcel would have relevance only if all of the information utilized to produce the value were presented for consideration. When all of the evidence in support of a conclusion of “actual value” for a parcel is presented, the conclusion is then properly subject to evaluation as an opinion or judgement that might or might not be persuasive. “Actual value” of a parcel whose value was not subject to dispute cannot be persuasive evidence of the value of another parcel without that examination. It is necessary to show the difference in procedure or misapplication of correct information that resulted in different conclusions if the claim is that an assessor had acted correctly to determine assessed value for a parcel but had not acted correctly with regard to another parcel. Without additional evidence a simple comparison of assessed values for various parcels does not make it possible to determine which parcel is undervalued and which parcel is overvalued. Assessed value of a parcel without additional evidence that the value is actual value is not clear and convincing evidence of the actual or fair market value for any other property.

The Taxpayer testified that in his opinion actual value of the subject property was between \$14,000.00 and \$17,000.00 per acre. The Taxpayer testified that his opinion was not based on comparable sales and did not offer any other basis for his opinion.

The Commission cannot find that the County Board’s determination of actual value for the portion of the subject property found in Tax Lot A was unreasonable or arbitrary.

Case No 06A-038

**TAX LOT 4B, SECTION 20, TOWNSHIP 14, RANGE 12, SARPY COUNTY,
NEBRASKA**

The County Board acted on one parcel of the Taxpayer's real property Tax Lot A. (E1:1). The protest filed by the taxpayer concerned two parcels of real property. (E1:2). The statute governing the filing of protests requires a separate protest for each parcel. Neb. Rev. Stat. 77-1502 (Cum. Supp. 2006). The protest as filed could only be considered as a protest of one parcel. A protest is necessary to originate County Board consideration. The statutory requirement is jurisdictional. If the County Board did not have jurisdiction to consider the actual value of the parcel in Tax Lot B, the Commission is without jurisdiction. See, e.g. *Lane v. Burt County Rural Public Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956). The appeal in Case No. 06A-038 must be dismissed for want of jurisdiction.

**V.
CONCLUSIONS OF LAW**

- 1 The Commission has subject matter jurisdiction over the appeal in Case No. 06A-037.
2. The Commission does not have subject matter jurisdiction over the appeal in Case No. 06A-038.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board in Case No 06A-037 is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining recapture value that portion of the subject property found in Tax Lot 4A, Section 20, Township 14, Range 12, Sarpy County, Nebraska, of the subject property as of the assessment date, January 1, 2006, is affirmed.
2. Recapture value of the eligible portion of Tax Lot 4A Section 20, Township 14, Range 12, Sarpy County, Nebraska of the subject property for the tax year 2006 is:

Recapture Value	\$3,100,829.00
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Total	<u>\$3,100,829.00.</u>
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3. The appeal in Case No 06A-038 is dismissed for want of jurisdiction.
4. 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 (Cum. Supp. 2006).
5. Any request for relief, by any party, which is not specifically provided for by this order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision shall only be applicable to tax year 2006.

8. This order is effective for purposes of appeal February 5, 2007.

Signed and Sealed. February 5, 2007.

Wm. R. Wickersham, Commissioner

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

William C. Warnes, 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 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.