

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

TIMOTHY R. ARENDS,)	
)	
Appellant,)	Case No 06R-391
)	
v.)	DECISION AND ORDER REVERSING
)	THE DECISION OF THE MERRICK
MERRICK 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 Timothy R. Arends ("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 February 6, 2007, pursuant to an Order for Hearing and Notice of Hearing issued December 4, 2006. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Timothy R. Arends and Mary C. Arends were present at the hearing. No one appeared as legal counsel for the Taxpayer.

Steven M. Curry, County Attorney for Merrick County, Nebraska, appeared as legal counsel for the Merrick 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 this case is as follows.

**I.
ISSUES**

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

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

What was actual 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 this appeal, in a parcel of real property described below. That parcel is the ("subject property").
2. Taxable value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Merrick County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Tax Lot 1 Section 9, Township 12, Range 8, Merrick County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$ 39,060.00	\$ 14,000.00	\$ 39,060.00
Improvement	\$259,395.00	\$167,980.00	\$259,395.00
Total	\$298,455.00	\$178,620.00	\$298,455.00

3. An appeal of the County Board's decision was filed with the Commission.
4. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
5. An Order for Hearing and Notice of Hearing issued on December 4, 2006, set a hearing of the appeal for February 6, 2007, at 11:00 a.m. CST.
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 as of the assessment date for the tax year 2006 is:

Agricultural Land	\$ 23,970.00
Farm Site	\$ 6,090.00
Home Site	\$ 9,000.00
Outbuildings	\$ 6,470.00
Residence	<u>\$206,190.00</u>
Total value	<u>\$251,720.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over 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. “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. 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).
13. 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).
14. 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)
15. 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).

16. "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).
17. 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).
18. 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).
19. "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

The subject property is a 38.74 acre parcel with improvements. (E7:2). The subject property has mixed uses: 34.26 acres are used for agricultural and horticultural purposes and assessed as agricultural and horticultural land; and 4.48 acres are used for residential and farm building sites. (7:2). Improvements are a residence and outbuildings. (E7:3). The Taxpayer disputed the taxable value determined for the agricultural and horticultural land and the contribution to actual value determined for the residence. (E1).

The Taxpayer contended that the agricultural land and horticultural land should be assessed on a per acre basis equivalent to the per acre assessed value of agricultural land and

horticultural land in a neighboring county. No evidence of the characteristics of the parcel in a neighboring county was produced. If there is no basis for comparison of the parcels, no inference can be drawn from one for the value of the other.

Much of the testimony concerned the contribution to value determined for the residence. That contribution to value was determined based on the cost approach. The cost approach is identified in statute as a permissible approach for a determination of value. Neb. Rev. Stat. §77-112 (Reissue 2003). 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; (4) 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. An accurate description of the improvement to be valued in terms of its quality of construction, condition and attributes is essential to use of the cost approach. A listing of the attributes of the residence on the subject property is found on page 3 of Exhibit 7. There are several listing errors contained in Exhibit 7. There is a failure to account for all of the floor

covering, and the residence does not have a clay tile roof for example. There is no evidence that those errors are material or what the calculated value that would result from corrections would be.

The condition of an improvement that is its state of repair or disrepair can effect a determination of value. ” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 264 - 265. An improvement in “good” condition is likely to have a greater value than an exactly comparable improvement in “poor” condition. *Supra* at 264-267. The County Assessor had determined that condition of the residence as of the assessment date was "good." (E7:3). There was considerable testimony concerning factors that would affect the condition of the subject property as of the date of its purchase in September of 2004. Some of those items were corrected prior to the assessment date relevant to this appeal. There was no evidence however to establish how a change in condition would affect the value determination made for the residence, and the Commission cannot speculate about the effects of a change.

The Taxpayer asserted that the value determined by the County Board was based on the purchase price of the subject property in September 2004. The large percentage increase in valuation for the tax year 2006 over the value determined for the tax year 2005 was cited as evidence of that conclusion. A prior year’s value is not relevant to a determination of value in a subsequent year. *See, 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). If a prior year’s value is not relevant, any calculation of a percentage increase with that value as a base is also not relevant. However, the Taxpayer raises the prior year’s valuation not

to show that the prior year's value was correct but to show that a large difference between the two years valuations is unexplainable. The residence on the subject property was valued for the tax year 2005 using the cost approach. *2005 Reports and Opinions of the Property Tax Administrator* pg 65. The basis for determining cost was a 1997 cost table with 1999 depreciation information. Id. The residence was valued for the tax year 2006 using the cost approach. (E7:3). The basis for determining cost was a 2005 cost table with a 2005 depreciation schedule. *2006 Reports and Opinions of the Property Tax Administrator* pg 61. An examination of the valuation history for the subject property shows that all improvements were determined to have a value of \$123,980 for the tax year 2005. (E7:2). For the tax year 2006 those improvements minus a barn were determined to have a value of \$265,866 (residence \$252,925 + outbuildings \$12,940). The valuation increase for the improvements from one year to the next was \$141,886 (\$265,866-\$123,980). Any explanation of the change in value based on the Assessor's evaluation of the attributes of the property would necessarily fail because the Assessor's office did not inspect the subject property until after a protest of the value ultimately adopted by the County Board was filed and well after this value had been determined. A change in value because of a change in cost tables or a change in the depreciation schedule would account for some change but could not account for the change as calculated. The remaining explanation is one proposed by the Taxpayer. The Taxpayer asserted that the value was changed simply to approximate the September 2004 purchase price of the subject property. Actual value implicit in the County Board's determination is \$328,417 (actual value agricultural land and horticultural land $\$23,970 \div .8 = \$29,962.5$ + farm site \$6,090 + Home

site \$9,000 + residence \$252,925 + outbuildings \$6,470). That value is higher than the net purchase price of \$295,000.

There was testimony indicating that the sale and purchase of the subject property in 2004 may not have been an arms length transaction but it is unnecessary to make that determination. The 2004 purchase price does not represent actual value of the subject property as of the assessment date.

The Taxpayer asserted that the contribution to value of the residence should be determined with reference to the per square foot values determined for other residences. There are two difficulties with that approach. First assessed value of a parcel without evidence that taxable value is actual value or 80% of actual value is not clear and convincing evidence of the actual or fair market value for any other property. 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. Secondly use of that approach assumes that the other properties are properly assessed. As we shall see that is an assumption that should not be made.

The Commission examined the property record files for a number of properties as presented by both the Taxpayer and the County Board. From those files information concerning eight parcels has been extracted for the purpose of analyzing the physical depreciation factor utilized in the County Assessor's valuation process.

DEPRECIATION ANALYSIS TABLE

Factor Ex	7:3 Subject	6:8	6:11	24:6	24:9	24:16	24:19	24:25
Quality	Good	Good	Good	Very Good	Good	Good	Average Good	Good
Condition	Good	Good	Good	Good	Good	Good	Good	Good
Style	1 Story	1 Story	1½ Story	1 Story	1 Story	1 Story	1 Story	1 Story
Square Feet	2324	3268	2231	2817	2032	3268	1912	1926
Year Built	1990	2004	2001	1996	2001	2004	2005	1997
Effective Age	5	1	5	1	5	1	0	1
Depreciation	8%	2%	15%	23%	25%	2%	7%	20%

“Physical deterioration is the loss in value due to wear and tear in service and the disintegration of an improvement from the forces of nature. All man made objects begin a slow process of deterioration as soon as they are created. . . Among the most common causes of physical deterioration are wear and tear through use, breakage, negligent care, infestation of termites, dry rot, moisture, and the elements.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 154. Depreciation tables can be developed to assign depreciation to an improvement based on its structure type construction quality, condition and its effective age. *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, p. 155. Depreciation is measured over time typically based on effective age. *Supra* at 124. Effective age is the number of years of age of the improvement as indicated by its condition. If an improvement has had better-than-average maintenance, its effective age may be less than the actual age; if there has been inadequate maintenance, it may be greater. A fifty-year-old improvement may have an effective age of

twenty-five years due to rehabilitation or modernization. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 160 - 161. The evidence is that the County Assessor used market derived depreciation. *2006 Reports and Opinions of the Property Tax Administrator* pg 78. That may indicate a number of factors were considered in the development of a depreciation table but it doesn't mean there should not be a perceivable rhyme or reason to the amount of the depreciation factor. The table above shows that the depreciation factor for the subject at 8% is far below that assigned to two other residences with good condition and good quality of construction. The two residences had depreciation factors of 23% and 25%. (6:11 and 24:9). While there are differences one residence is 1½ story and the other is larger, both have significantly more depreciation than could be accounted for based on those differences. It is also noteworthy that a one story residence smaller than the subject with good quality, good condition, an effective age of one year and an actual age of nine years has 20% depreciation factor while the one story subject with good quality, good condition, an actual age of sixteen years and an effective age of five years has a depreciation factor of 8%. Clearly there is no rhyme or reason to the depreciation assigned to the subject property when compared with other properties.

The evidence before the Commission is sufficient to make a determination of taxable value different than the determination by the County Board. The Commission finds that the residential improvement should have a depreciation factor of 25%. The resulting value for that component is \$206,190 ($(\$274,920 \times .25 = \$68,731.25)$, $(\$274,925 - \$68,731.25 = \$206,193.75)$). Actual value of the other improvements as determined by the cost approach is not affected by the Commission's determination. Taxable value of the agricultural land and

horticultural land is not affected by the Commission's determination. Actual value of the home site or the farm site is not affected by the Commission's determination. When all components are again aggregated, as required by use of the cost approach, taxable value of the subject property for the tax year 2006 is \$251,720.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has 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 reversed.

**VI.
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, 2006, is reversed.
2. Taxable value of the subject property for the tax year 2006 is:

Agricultural Land	\$ 23,970.00
Farm Site	\$ 6,090.00
Home Site	\$ 9,000.00
Outbuildings	\$ 6,470.00
Residence	<u>\$206,190.00</u>
Total value	<u>\$251,720.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Merrick County Treasurer, and the Merrick County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2006.
7. This order is effective for purposes of appeal February 22, 2007.

Signed and Sealed. February 22, 2007.

Wm. R. Wickersham, Commissioner

Susan S. Lore, Commissioner

Robert L. Hans, 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.