

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

BOONE CORPORATION,)	
)	
Appellant,)	Case No 06C-228
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE SALINE
SALINE 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 Boone Corporation ("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 25, 2007, pursuant to an Order for Hearing and Notice of Hearing issued November 20, 2006. Commissioners Warnes, Lore, and Hans were present. Commissioner Warnes presided at the hearing.

Peter Clarke, President of Boone Corporation ("the Taxpayer"), was present at the hearing. Shaylene Smith appeared as legal counsel for the Taxpayer.

Tad D. Eickman, County Attorney for Saline County, Nebraska, appeared as legal counsel for the Saline County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony. The case file and all Exhibits 1 - 11 were received without objection. Exhibit 12 (Form 521) was marked during the hearing and received without objection.

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 incorrect and if so, was it 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"). Despite the fact he was not the owner of record on January 1, 2006, the Taxpayer was responsible for the payment of the real property taxes and thus had standing to bring this appeal.
2. Actual value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Saline 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: CRETE CITY LOTS 1-2-3-4-7-8-9 and PART OF 4 and E1/2 of ALLEY BLOCK 24 , Saline County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$103,245.00	\$	\$103,245.00
Improvement	\$320,155.00	\$	\$320,155.00
Total	\$423,400.00	\$192,000	\$423,400.00

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 November 20, 2006, set a hearing of the appeal for January 25, 2007, at 9:00 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. The Assessed taxable value of the subject property as of the assessment date for the tax year 2006 is:

Land value	\$103,245.00
Improvement value	<u>\$320,155.00</u>
Total value	<u>\$423,400.00.</u>

**III.
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 decisions of the County Board are unreasonable or arbitrary, and the decisions of the County Board should be affirmed.
5. 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).
6. “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).

7. 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).
8. 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).
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. 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).
11. 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).
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)
16. 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).
17. 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).
18. 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).
19. 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).

20. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb. App. 809, 638 N..2d, 881 (2002).

IV. ANALYSIS

This is an appeal of the taxable valuation of the Taxpayer's commercial property as of January 1, 2006 (tax year 2006). The appeal is brought by the Boone Corporation ("Taxpayer"). The property subject of this appeal is described as a food market consisting of 13,465 square feet, (Exhibit 2:2). In addition, the property consists of concrete paving, loading docks and an attached fast food restaurant, (Exhibit 2:2).

The taxpayer purchased the subject property on February 28, 2006, for a purchase price of \$192,000. No personal property was included in the sale as shown on the Form 521, (Exhibit 12). Prior to the purchase the taxpayer had leased the property since 2001. During the lease period he had operated the property as a food market on a triple net basis, which included his responsibility to pay all property taxes, both real and personal (Article Third of Exhibit 8:18). This lease was in place on January 1, 2006.

The purchase agreement (Exhibit 3:1), refers to the buyer assuming all of seller's obligations as stated in item 2 of the first page of the purchase agreement. Items 7 and 8 of the Purchase Agreement further itemizes financial obligations of the Taxpayer in his purchase of the subject property. In addition to the purchase price, Taxpayer agreed to pay on the unpaid assessments referred to in the title insurance policy, item number 2, on the Special Exceptions,

(Exhibit 4:5). The Taxpayer testified that there were 13 installments remaining to be paid at the time of closing with each installment in the amount of \$453 to \$780. The special assessment was for new sidewalks. The Taxpayer also paid for all closing costs and legal fees as mentioned on Exhibit 3:2. These additional costs to the Taxpayer resulted in the purchase price for the subject property being greater than the sale price of \$192,000.

The principal argument by the Taxpayer is that the taxable valuation for the subject property for the year 2006 should be the purchase price which he paid in February, 2006. He believes this sale represents an arms length transaction and thus proof of the market value of the subject property. The Taxpayer referred to Title 35, Chapter 10, Section 001.15 of the Nebraska Administrative Code, Tax Equalization and Review Commission, Rules and Regulations of the Department of Property Tax Administrator which reads:

"Actual value shall mean the market value or fair market value of real property in the ordinary course of trade. It is the most probable price expressed in terms of money that property will bring if exposed for sale in the open market or in an arms length transaction between a willing seller and a willing buyer, both of whom are knowledgeable concerning all the uses to which the property is adapted and for which it is capable of being used".

The Taxpayer's argument rests solely on the use of sale price for his opinion of taxable value. He did not provide any other evidence of taxable valuation.

The Taxpayer testified that he is knowledgeable about the real estate market in Crete, Nebraska. There was no evidence confirming the knowledge of the seller of the subject property; however, the seller has leased the subject property to the Taxpayer for several years. The seller lives outside the state of Nebraska in Florida.

The sale between the Taxpayer and his lessor was not advertised nor was the subject property placed for sale in the open market or listed with a real estate broker. The Taxpayer testified that at the time of sale there was a lease between his Corporation and the seller. The Taxpayer did not know if anyone else was aware that the subject property was available for sale. The Taxpayer further testified that he had begun to negotiate a purchase price in 1991.

From the evidence adduced, the Commission finds that the sale of the subject property to Taxpayer for \$192,000 on February 28, 2006, was an arms length transaction; however, the sales price of the property is but one indicia of its market value. *Potts v Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982). In the *Potts* case the court ruled "... standing alone (sale price), it is not conclusive of the actual value of property for assessment purposes, and many other matters relevant to the actual value of property appear in the record and must be considered in connection with the purchase price to determine the actual value", supra., p. 7, The *Potts* case further states "The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade", Supra, at p. 7. Thus, the Commission determines that it must look to other indicators of market value besides sale price to determine if the sale price is in fact a valid indicia of market value and if it is not, what is the market value for the subject property.

The same reference to the Department of Property Tax Administration definition of "Actual Value" also recites that "Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, (2) income approach, and (3) cost approach, Title 35, Chapter 10, Section 001.15 of the Nebraska

Administrative Code, The Rules and Regulations of the Department of Property Tax Administrator .

The Commission must look to the County's exhibits of comparable properties to further evaluate the market values for similar properties because the Taxpayer did not provide any other evidence of market value other than the sale price he paid for the property in February of 2006.

The County's comparable sales are divided into sales of comparable grocery stores, (Exhibits 9:1 to 9:18), and secondly, into sales of unimproved land, (Exhibits 10:1 to 10:7).

A review of comparable sales of grocery stores show that a store in Dakota County (South Sioux City, NE) sold November 12, 2003, for \$16.78/SF (Sale Price of \$590,000 less value of the land of \$170,600/24,998 SF), (Exhibits 9:2 and 9:3). A store in Plattsmouth, NE, sold on January 29, 2002 for \$19.38/SF (\$600,000 less value of land of \$183,388 /21,500 SF), (Exhibit 9:6). A store in the city of Wilber (Saline County) sold for \$29.98/SF on July 26, 2006 for (\$200,000 less value of land \$11,155/6,300 SF), (Exhibits 9:9 and 9:10). A store in Crete (Saline County) sold for \$31.42/SF on October 29, 2005 (\$200,000 less value of land \$39,640)(Exhibits 9:15 to 9:19). The Commission is aware that the two sales of properties in other Counties reflect market realities different than those present in Crete; however, the County testified that there was a need to examine sales outside of Saline County due to there not being sufficient sales of comparable properties in Saline County.

The Commission reviewed all of the County's comparable sales to see if the sales price paid by the Taxpayer for the subject property reflected market value of comparable property in

the area.. The Commission finds that the sales price does not reflect the market value for the reasons set forth below.

The subject property's improvements are assessed for 2006 for \$23.78/SF (\$320,155/13,465 SF), Exhibit 2:1. The Commission finds that the comparable property in Crete, Ne., Exhibit 9:15-19 is not a good comparison since its use changed after its sale.

Land values per square foot (SF) range from \$2.39/SF, (Exhibit 10:4 and 5) for the property next door to the subject property (Sun Mart) to \$7.36 for another property located in Crete, (Exhibits 10:6 and 7). Exhibit 2:1 shows that the subject property is being assessed at \$2.19SF (\$103,245/47,077 SF), (Exhibit 2:1 and 2).

The sales price of the subject property further stands out as not being reflective of market value when the sale price (\$192,000.00) is reduced by the assessed value of the land for 2006 (\$103,245.00). This leaves a taxable valuation for improvements for the subject property of \$6.59/SF (\$192,000.00 less \$103,245.00 = \$88,755/13,465 SF) which is significantly outside the range of values for improvements shown by the comparable sales. The comparable sales showed valuations for improvements ranging from \$16.48/SF in Dakota County (Exhibit 9:2 and 3), to \$31.42/SF in Crete (Exhibit 9:15-19).

The Commission finds that the County's assessed value is supported by sales of like properties. The Commission finds that the sale price paid by Taxpayer for the subject property is not the market value for said property.

Without any evidence of value provided by the Taxpayer (other than the sales price of the subject property) the Commission finds that the Taxpayer failed to show that the County

Boards decision was incorrect or that it was unreasonable or arbitrary. The appeal of Taxpayer is denied.

**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, 2006, is affirmed.

2. Actual value of the subject property for the tax year 2006 is:

Land value \$103,245.00

Improvement value \$320,155.00

Total value \$423,400.00.

3. This decision, if no appeal is timely filed, shall be certified to the Saline County Treasurer, and the Saline 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 March 7, 2007.

Signed and Sealed. March 7, 2007.

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.

Commissioner Hans, Dissenting:

Under Nebraska law actual value may be established by 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. *See*, Neb. Rev. Stat. §77-112 (Reissue 2003). Both buyer and seller were willing and knowledgeable parties in this transaction. The uncontroverted testimony was that the seller is a professional property manager and the buyer had been leasing the property prior to the sale. The Commission should not give much weight to the County's Exhibits because two of the sales were from different counties, with different size communities, different markets and different levels of competition (E9:2-3, E9:6). The county's comparable sale in Crete is even discounted by the County (E9:15-19), leaving only the Wilbur sale as a comparable and that store had a superior

location. (E9:9-10). In short the only evidence of value in the record before the Commission which should be given any weight is the sale price of the subject property two months from the assessment date. The Nebraska Supreme Court has held that a single sale may in some instances provide evidence of market value. See, *Firethorn Invest. v. Lancaster Cty. Bd. of Equal.*, 261 Neb. 231, 622 N.W.2d 605 (2001). The sale price of the subject property is the best indication of the fair market price, i.e. the Actual Value. Therefore I would vacate and reverse the decision of the County Board and find that the assessed value for the subject property as of the assessment date is \$192,000.00.

Robert L. Hans, Commissioner