

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

KYLE & NANCY KINYOUN,	)	
	)	
Appellant,	)	Case No. 07R-660
	)	
v.	)	DECISION AND ORDER AFFIRMING
	)	THE DECISION OF THE CLAY
CLAY 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 Kyle & Nancy Kinyoun ("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 July 22, 2008, pursuant to an Order for Hearing and Notice of Hearing issued May 8, 2008. Commissioners Warnes, Salmon, and Hotz were present. Commissioner Wickersham was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code ch.4 §11 (10/07). Commissioner Warnes was the presiding hearing officer.

Kyle & Nancy Kinyoun were present at the hearing without legal counsel.

Ted S. Griess, County Attorney for Clay County, Nebraska, was present as legal counsel for the Clay 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, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2007.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as 23 -07-07 AC: 5.800 NE 1/4 in Clay County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Clay 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: 23 -07-07 AC: 5.800 NE 1/4, Clay County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$24,375.00	INCLUDED IN TOTAL	\$24,375.00
Improvement	\$116,665.00	INCLUDED IN TOTAL	\$104,350.00
Total	\$141,040.00	\$100,000.00	\$128,725.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on May 8, 2008, set a hearing of the appeal for July 22, 2008, at 9:00 a.m. CDST.
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. Actual value of the subject property as of the assessment date for the tax year 2007 is:

Land value	\$24,375.00
Improvement value	<u>\$104,350.00</u>
Total value	<u>\$128,725.00.</u>

### **III. APPLICABLE LAW**

1. The jurisdiction of the Commission is over all issues that affect actual value. Neb. Rev. Stat. 77-5016 (7)(Cum Supp. 2006).
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 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. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
9. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).
10. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

11. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
12. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
13. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
14. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
15. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).

16. 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).
17. The presumption remains until there is competent evidence to the contrary presented at which point the presumption disappears. From that point forward, the reasonableness of the valuation fixed by the County Board becomes one of fact based on all of the evidence presented. *Garvey Elevators, Inc. v. Adams County Bd. Of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).
18. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
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).
23. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561, (1998).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
25. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).



#### **IV. ANALYSIS**

The subject property is a 5.8 acre parcel that has been improved with a one story house built in 1920. (E5:3). The house is of average quality and has 1,782 square feet of gross living area. (E5:3). The parcel has a total of 10 outbuildings consisting of 4 grain bins. (E5:3).

The Taxpayer submitted the letter he attached to the County Board as part of his protest, Form 422. (E9:1) The contents of this letter allege those facts which the Taxpayer presented to the County Board at his protest hearing. The Commission notes that new and different evidence was presented to the Commission as part of the hearing on the Taxpayer's appeal. The letter accompanying the protest alleges that it is his opinion that actual value of the subject property is reflected in the purchase price which he paid in October of 2005. (E9:2).

The purchase of the subject property by the Taxpayer was from his aunt for \$100,000. (9:2). Testimony of the Taxpayer was that the subject property had not been placed on the open market. In addition, he testified that the purchase price included "the right to farm" the half section which remained with the grantee.

Evidence received by the County Assessor was that the sale occurred in 2005, although the real estate transfer statement was not filed until November 30, 2006. (E4:1) The completed County questionnaire received back from the grantee did not mention any agreement to grant farming rights to the Taxpayer. (E7:1-2).

The sale of the subject property to the Taxpayer has two inherent concerns which make the sale suspect of not being indicative of actual or fair market value. First, the sale was not offered for sale upon the open market. Fair market value is the value of the property if offered

for sale upon the open market as between one who is ready and willing to sell but is not compelled to sell, and one who is ready, able and willing to buy but is not required to buy.

*McArthur v. Papiro-Missouri River Natural Resources Dist.*, 250 Neb. 96, 547 N.W.2d 716 (1996).

Second, the sale was between relatives. This fact gives suspicion that the sale is not an arm's length transaction which is a requirement for a sale to be considered as a "qualified sale" and placed into the county's qualified sales roster. A qualified sale is defined as a sale which is an arm's length transaction included in the sales file as determined by the assessor or verification process of the Department. Title 350, Chapter 12, Reg-12.002.11, Nebraska Dept. of Property Assessment and Taxation, January 3, 2007.

All sales must be analyzed to determine the relationship of buyer and seller. "Any blood or marital relationships between individuals or corporate relationships between businesses must be discovered because sales between related parties may not reflect market value." *Property Appraisal and Assessment Administration*, Joseph K. Eckert, IAAO, 1990, p. 133, also *Mass Appraisal of Real Property*, Robert J. Gloudemans, IAAO, 1999, p.49. The definition of an "arm's length transaction" is sometimes stated as "A transaction between unrelated parties under no duress." *The Appriaisal of Real Estate*, 12<sup>th</sup> Edition, the Appriaisal Institute, p.150 and *The Dictionary of Real Estate Appraisal*, Appraisal Institute, 1993, p. 20.

The County Assessor testified that she did not use the sale of the subject property as evidence of actual value.

The Taxpayer alleges that it is the sale price that is the best indicator of actual or fair market value. "It is true that the purchase price of property may be taken into consideration in

determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value.” *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998).

The allegations testified to by the Taxpayer at this appeal hearing included improper square footage associated with a covered porch, height of one of the outbuildings, the fact that the grain bins were not ventilated, the year the house was built and the depreciation used on the improvements of the subject property. These allegations are not listed on the Form 422 filed by the Taxpayer, Exhibit 9 page 1 or 2 and were not presented to the County Board at the protest hearing; however, the Commission hears appeals de novo and such new information is admissible. Neb. Rev. Stat. S77-5016(7).

Testimony by the Taxpayer was that although the house was built in 1920, remodeling had occurred in 1953. The Taxpayer testified that the gross living area was increased from 1,000 square feet to 1,638 square feet. The Taxpayer did not provide evidence of how he calculated his opinion of fair market value, \$100,000, of the subject property on January 1, 2007. (E9:1). A taxpayer who offers no evidence that the subject property is valued in excess of its actual value and who only produces evidence that is aimed at discrediting the valuation methods utilized by county assessor fails to meet his or her burden of proving that the value of the property was not fairly and proportionately equalized or that valuation placed upon the property for tax purposes

was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

The Commission finds that the Taxpayer presented evidence that an error in assessment had occurred regarding two attributes of the improvements on the parcel. First, the 16 foot x 9 foot porch should not be included in the gross living area, but should only be valued as a covered porch. Second, the testimony of the Taxpayer is not refuted that the grain bins are not ventilated and if valued as non ventilated would be assessed lower than the County did assess for 2007. However, the Commission is unable to establish the fair market value for the non ventilated grain bins without evidence provided by the Taxpayer.

The Taxpayer did provide as evidence two properties alleged to be comparable to the subject property as shown in Exhibits 11 and 12. “Comparable properties” share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, p. 98.

When using “comparables” to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., 1996, p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2<sup>nd</sup> Ed., 1996, p.105. “Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . .” *Property Assessment Valuation*, 2<sup>nd</sup> Ed., 1996, p. 98.

The Taxpayer testified that he was not familiar with either property in that he had not been on that property in Exhibit 11 recently and only viewed that property shown on Exhibit 12

from the road. Exhibits 11 and 12 are the property record cards for these properties and are not sales records. The properties differ enough from the subject property that the Commission finds they are not comparable to the subject property.

The Commission finds that the Taxpayer has not provided competent evidence to meet his burden to rebut the presumption that the County Board failed to faithfully perform its duties or based its decision on sufficient competent evidence. The Commission has reviewed all of the evidence presented and finds that the Taxpayer has not shown by the reasonableness of the evidence a different taxable valuation and has not proven by clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The appeal of the Taxpayer is denied.

**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 not adduced competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination.
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.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value of the subject property for the tax year 2007 is:

Land value	\$ 24,375.00
Improvement value	<u>\$104,350.00</u>
Total value	<u><u>\$128,725.00.</u></u>
3. This decision, if no appeal is timely filed, shall be certified to the Clay County Treasurer, and the Clay 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 2007.
7. This order is effective for purposes of appeal on August 20, 2008.

**Signed and Sealed.** August 20, 2008.

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Nancy J. Salmon, Commissioner

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Robert W. Hotz, Commissioner

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William C. Warnes, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**