

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

FREDRICK P. SIMON, TRUSTEE, FRED)
AND KATHLEEN SIMON REVOCABLE)
TRUST,)
)
Appellant,)
)
v.)
)
DOUGLAS COUNTY BOARD OF)
EQUALIZATION,)

Case No. 07R-653

DECISION AND ORDER
REVERSING THE DECISION OF
THE DOUGLAS COUNTY BOARD OF
EQUALIZATION

Appellee.

The above-captioned case was called for a hearing on the merits of an appeal by Fredrick P. Simon, Trustee, Fred and Kathleen Simon Revocable Trust ("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 April 10, 2009, pursuant to an Order for Hearing and Notice of Hearing issued November 19, 2008 as amended by an Order dated January 26, 2009. Commissioners Warnes and Hotz were present. Commissioner Warnes was the presiding hearing officer. Commissioner Wickersham was excused from participation by the presiding hearing officer. Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

Fredrick P. Simon, Trustee of Fred and Kathleen Simon Revocable Trust, was present at the hearing. Thomas H. Penke appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008). 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 ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Douglas 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: MISSION PINES LOT 15 BLOCK 0 60 x 130, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$28,500.00	\$Included in Total	\$28,500.00
Improvement	\$221,100.00	\$Included in Total	\$221,100.00
Total	\$249,600.00	\$208,840.00	\$249,600.00

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 November 19, 2008, as amended by an Order issued on January 26, 2009, set a hearing of the appeal for April 10, 2009, 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:

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Land value	\$28,500.00
Improvement value	<u>\$188,081</u>
Total value	<u>\$216,581</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Supp. 2007).
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. “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 agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. “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.
8. 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).
9. 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).
10. 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).
 11. 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).
 12. 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).
 13. 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).

14. 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).
15. 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).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, 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 the county assessor, failed to meet the 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. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved residential parcel with a 1 ½ story house of 1,694 square feet built in 2000. (E2:2). The house is of good quality and condition. (E3:1).

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 Taxpayer testified that he purchased the subject property on July 1, 2004, for \$227,000. He alleged in his testimony that the purchase price should be the sole criteria for the determination of the market value.

Nebraska Statute §77-112 (2003) 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.” The Taxpayer’s use of the sale price alone is not one of the professionally approved appraisal methods.

“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 appraiser for the County Assessor testified that the County had calculated the valuation of the subject property for 2007 using both the cost and sales comparison approaches, but had only used the sales comparison approach for his recommendation. The cost detail sheet

showing the County's calculation of the cost approach is shown on Exhibit 3 page 5. The Commission's review of this cost detail sheet shows that the total replacement cost new (RCN) without add-ons is \$165,029. (E3:5). No add ons were shown on this exhibit. This figure includes a "neighborhood" factor, as testified to by the appraiser for the County Assessor, since the individual items do not add up to this amount, but rather to \$170,801. Exhibit 3 page 5 shows that a depreciation factor of 4%, \$5,941, was deducted, leaving a replacement cost new less depreciation (RCNLD) of \$159,088. To the RCNLD is added the valuation of the land component of \$28,500, for a total valuation using the cost approach of \$187,588.

The appraiser for the County Assessor testified that the 2007 valuation of the subject property was not made using the cost approach, but rather the sales comparison approach; however, the only evidence of such was the information shown on Exhibit 2 page 5. Further testimony of the appraiser was that the comparables shown were of the same style as the subject property, but each was larger in size and there were other differences for which adjustments would have to be made which were not shown on Exhibit 2 page 5. In addition, the Commission notes that there was no revaluation of the subject property since 2003. (E3:6). The appraiser testified that the sales comparison approach was used to determine the valuation of the subject property in 2003, but no evidence of the 2003 calculation/determination was provided.

The Commission's Order for Hearing, item 14 (b), requires that "Copies of all document(s), including attachments, submitted to the Douglas County Board of Equalization as a protest or other basis for initiation of deliberations which lead to the decision, order, determination, or action of the Douglas County Board of Equalization from which the appeal in this case is taken be provided to the Commission."

But the Commission notes that its decision in this matter is not as simple as only choosing between the cost or market approach used by the County. The appraiser for the County Assessor testified that an exterior inspection was made by the County on May 16, 2008. (E2:3). In that inspection, several adjustments were noted and their accuracy was agreed to by testimony of the Taxpayer.

The appraiser for the County Assessor testified as to the value of only two of these adjustments, the walk-out basement and the security system, but provided no opinion of added value for the remaining items :

walk out basement - \$15,000,
security system - \$3,000,
stone trim -
sprinkler system -
180 square feet of open slab in rear yard.
Total adjustments = \$18,000
Less 4% depreciation = \$720
Net total = \$17,280

There was no evidence offered that the stone trim, sprinkler system, or open slab added any contributory value to the property.

The Commission finds that the best evidence of 2007 value for the subject property is the valuation calculated using the County's cost approach, including the contributory value of the add-ons, in the amount of \$216,581 (\$170,801 + \$17,280 + \$28,500).

The Taxpayer did not provide evidence of sales of comparable parcels from which the Commission could find that equalization was an issue.

"There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its

action. That presumption 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. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board." *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb.App. 688, 696, 584 N.W.2d 837, 842 - 843 (1998).

The Commission finds that the Taxpayer has rebutted the presumption that the County Board of Equalization faithfully performed its duties and had sufficient competent evidence for its decision both as to its decision as to valuation and equalization. The Commission has reviewed all of the evidence presented and further finds that the Taxpayer has shown by clear and convincing evidence that the County Board's decision was either arbitrary or unreasonable and has shown by the reasonableness of the evidence a new valuation. The appeal of the Taxpayer is granted and the assessed valuation for 2007 for the subject property is \$216,581.

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 produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.

4. 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 vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

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

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Land value \$ 28,500.00

Improvement value \$188,081.00

Total value \$216,581.00.

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
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 November 24, 2009.

Signed and Sealed. November 24, 2009.

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.