

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

TROY W. STONACEK,)	
)	
Appellant,)	Case No. 08R- 021
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
LANCASTER COUNTY BOARD OF)	THE LANCASTER COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Troy W. Stonacek ("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 May 27, 2009, pursuant to an Order for Hearing and Notice of Hearing issued March 13, 2009. Commissioners Warnes, Hotz and Salmon were present. Commissioner Warnes presided at the hearing. Commissioner Wickersham was excused from participation by the presiding hearing officer.

Troy W. Stonacek, the Taxpayer, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, appeared as legal counsel for the Lancaster County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony. The parties agreed that the determination of the terms of the Order for the 2006 appeal shall apply to this appeal also.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008) 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 are 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:

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, 2006.

**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, 2008, ("the assessment date") by the Lancaster County Assessor, value as proposed in a timely

protest, and actual value as determined by the County Board is shown in the following table:

Case No. 06R-476

Description: CARDWELL WOODS ADD, LOT 29, Lincoln, Lancaster County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$100,000.00	\$0	Included in Total
Improvement	\$446,193.00	\$0	Included in Total
Total	\$546,193.00	\$0	\$546,193.00

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 March 13, 2009, set a hearing of the appeal for May 27, 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 2008 is:

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Total \$442,000.00

**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) (Cum. Supp. 2008).

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. 2008).

7. 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).
8. 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).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. 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).
11. Proof that the order, decision, determination, or action appealed from 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).
12. "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).
13. 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).

14. 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).
15. "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).
16. 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).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the 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).
18. 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 values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).
19. "Without evidence of actual or fair market value other than as determined by the County Board it is not possible to determine that the County Board's value is unreasonable."

Garvey Elevators, Inc. v. Adams County Bd. of Equalization, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV. ANALYSIS

The subject property is an improved residential parcel with a 2-story house with 4,599 square feet of living area built in 1999. (E18:2). The house is rated average for quality and good for condition. (E18:2).

The parties stipulated that the terms of the Commission order for 2006 heard in conjunction with the appeal for 2008 should be the same.

The parties stipulated that the subject property is located in a 10-year flood plain and that its fair market value if it were not located in a 10-year flood plain would be in the amount of \$600,000. The parties further stipulated that the determination made in companion case 06R-476 should apply to this appeal. Both cases were consolidated for purposes of hearing.

The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, 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 what was the actual value of the subject property on January 1, 2006.

“Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. 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.

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 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 consideration of the full description of the physical characteristics of the real property and an identification of property rights being valued." Neb Rev Stat 77-112 (2003).

The primary evidence which the Commission received regarding the actual value of the subject property on January 1, 2006 included:

1. Judgement of the District Court of Lancaster County, CI 05-3597, Dated December 19, 2008. (E8:1 to 10).
2. Taxpayer's Appraisal by John D. Bredemeyer, Dated February 20, 2008. (E20:1 to 36).
3. City of Lincoln's Appraisal used by Lancaster County, Dated December 19, 2007. (E22:1 to 80).
4. The testimony of the Appraiser for the County Board.
5. The testimony of the Taxpayer.

The Taxpayer alleges that the actual value of the subject property should be reduced from that which was assessed, \$546,193, to a lower valuation. The taxpayer testified that a "tort claim liability case" was brought by him against the City of Lincoln in the District Court of Lancaster County which involves the subject property. A judgement in that case has been rendered and an Order issued by the District Court of Lancaster County dated December 19, 2008. (E8:1 to 10).

In that Order, the Plaintiff's uncontested assertion was that "the proper measure of damages is the difference in value of the properties in their undamaged compared to damaged state." (E8:3).

The amount of the Judgement for damages found by the District Court of Lancaster County was \$165,000. (E8:10). Both parties agreed that this order has been appealed by the City of Lincoln and that the order was not final as of the date of the Commission's appeal hearing. However, the Taxpayer testified that it was his choice to delay this hearing on appeal until a decision had been reached by the District Court of Lancaster County regarding its determination of damages. The Taxpayer stated on his Form 422 filed with the County Board that there was yet to be a hearing for the damages on his lawsuit, and that "This will help determine the value of the property based on his settlement." (E2:1). Both parties agreed that if the appeal were to change the amount of damages that this fact would be material to the opinion of fair market value of the subject property. The Commission cannot speculate as to the result of that appeal.

The Commission finds that it cannot make its determination on the basis of the determination of the Judgement by the District Court of Lancaster County involving the subject property for two reasons. First, the decision of the District Court is not a final order. Second, the decision reached was a determination of damages under a Tort Claims Liability Act case and not a decision as to actual value of the subject property. It is for these reasons that the Commission must reach its own independent decision in this appeal.

The Appraiser for the County Assessor testified that he did not know that the subject property was in a flood plain when he performed the 2006 valuation assessment which resulted in a taxable valuation of \$546,193. He further testified that the location of the subject property in the flood plain was a significant negative factor and that the actual value of the subject property

would be less for 2006 than the valuation he determined. The Appraiser for the County Assessor testified that after learning that the subject property was located in a 10-year flood plain and investigating and inspecting the subject property, he had a new opinion of valuation for the subject property for 2006. He testified that his new opinion of value was \$435,000. Further inquiry by the Commission of the appraiser for the County Assessor confirmed that his basis for his new opinion of value was simply the result of reducing the parties' stipulated fair market value if the subject property were not in a 10-year flood plain, \$600,000, less the judgement of the District Court, \$165,000. The Commission finds that to use this opinion of actual valuation by the appraiser for the County Assessor is tantamount to resting its decision on the judgement for damages of the District Court which the Commission has found it cannot and will not do.

The appraiser for the County Assessor testified that parcels in a 100-year flood plain would have their fair market value reduced by 15 percent, and had he known the subject property was in a flood plain this method would have been used. This reduction was based on a study of comparative sales performed by the County Assessor of parcels located in a 100 year flood plain, but did not include sales of parcels in a 10-year flood plain. Based on this analysis the appraiser for the County Assessor testified that the actual value of the subject property would be \$464,000 to \$465,000 less any effect of the 10-year flood plain location.

"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 by competent evidence and has shown by clear and convincing evidence that the County Board was arbitrary or unreasonable. This finding rests principally on the Commission's finding that the County Board utilized an appraisal for actual value which did not include the fact that the subject property was located in a 10-year flood plain and that such fact is material to a significant reduction in the actual valuation of the subject property.

The Commission having found that the Taxpayer has rebutted the presumption and has shown by clear and convincing evidence that the County Board was arbitrary or unreasonable, must still determine from the reasonableness of the evidence if a new valuation was proven by the Taxpayer. The Commission turns its attention principally to the two appraisals provided by the parties.

The Taxpayer provided an appraisal of the subject property. (E20). Only the appraisal was received into evidence, there being no testimony by the appraiser. The appraisal designated its effective dates as February 17, 2006, June 26, 2007, and February 20, 2008. The appraisal was both a retrospective appraisal as well as a current opinion of value. (E20:3). The date of the appraisal was February 20, 2008. A summary of this appraisal is that the opinion of actual valuation of the subject property is \$630,000 if the property was not in a Flood Hazard area,

reduced by \$300,000 for damages resulting from the subject property being in a Flood Hazard area, for a valuation of market value of \$330,000. (E20:26).

The County Board also provided an appraisal of the subject property. (E22). This appraisal had been completed for the City of Lincoln and its effective date is December 19, 2007. (E22:13). A summary of this appraisal is that the market value of the subject property, if it were not in a flood plain, would be \$600,000. (E22:63). This appraisal would reduce the market value by \$75,000 due to the subject property being in a 100-year flood plain, for an opinion of market value of \$525,000. (E22:63 and 64).

The Commission gives the most weight to the Taxpayer's appraisal for the reason that the Commission agrees with the analysis used. (E20). However, the Commission also gives probative value to the County's appraisal. (E22). The appraiser for the County Assessor testified that the real estate market was relatively stable between January 1, 2006 and December 19, 2007, however, he agreed that an appraisal should be done so that its effective date comes as close as possible to matching the effective date. As noted above, the parties stipulated to the fair market value of the subject property, if it were not located in a 10-year flood plain, at \$600,000

In reviewing both appraisals, the Commission notes some common factors found in both reports. First, the appraisers determined what the market value of the subject property was if it were not in the flood plain. The appraisal method used by both appraisers was the sales comparison approach. Both found that the highest and best use of the subject property is for a single -family dwelling with AGR zoning. (E20:6 and E22:48).

A second common factor was the need to reduce the market value of the subject property due to its location in a flood plain. The first aspect of this reduction involves the basement. The basement of the subject property is 4.3 feet below the base flood elevation. (E20:7). The subject property has a further increased chance of flooding due to its location in the 10-year flood plain - a 96% chance of flooding every 30 years, according to the study from the University of Nebraska at Lincoln . (E20:8) The Commission finds that the value of the basement must be deducted from the unaffected market value in the amount of 18% in accordance with the study from the University of Nebraska at Omaha which showed this reduction in market value for multi-story homes without basements in Lincoln, Nebraska. (E20:21). Since the parties stipulated to a value of \$600,000 if the property were not in a 10-year flood plain, this amounts to a \$108,000 reduction to the unaffected market value of the subject property ($\$600,000 \times 18\%$). This reduction is different from the \$150,000 reduction found in the appraisal of the Taxpayer since the parties stipulated to an unaffected market value of the subject property of \$600,000 instead of the \$630,000 used by the appraiser for the Taxpayer. The Commission does not further reduce the valuation of the basement by an additional \$10,000 representing the finish to the basement, as suggested in Exhibit 20, page 21, since the Commission's objective is determining actual value of the subject property and not damages.

The Commission also finds that the location of the subject property being in a Flood Hazard area has a negative impact on the value of the property. The Commission has reviewed the results of the Shultz and Shilling studies and finds that the appropriate further reduction in the unaffected market valuation of the subject property due to its location in a Flood Hazard area is in the amount of \$50,000. (E20:22-23). The County Board's appraisal uses a 12.5% of the

unaffected market value due to the location in the flood plain resulting in a reduction in market value of \$75,000 ($\$600,000 \times 12.5\%$). (E22:61). This method is not adopted by the Commission since the Commission believes that the basement and its valuation should have first been deducted before further reduction for the negative influences of location.

The Commission finds from the reasonableness of all of the evidence received that the market value of the subject property if it were not in a 10-year flood plain of \$600,000, as was stipulated to by the parties, should be adjusted to reflect a negative influence of the lose of use of the basement in the amount of \$108,000 and further adjustment for the negative location of being in a 10-year flood plain in the amount of \$50,000, for a total market value of \$442,000 ($\$600,000 - \$108,000 - \$50,000$).

The Commission granted leave to the County Board to offer to confess judgment pursuant to Neb. Rev. Stat. S77-1510.01 (Cum. Supp. 2008). The County Board made an offer to confess judgment of \$435,000, which offer was not accepted by the Taxpayer at the start of the appeal hearing. In support of its motion for costs, the County Board certified that its costs were \$838.50 said costs were principally costs for copying. Since the Taxpayer refused to accept said confession, and at the hearing did not obtain more relief than was offered, the Commission is obligated to grant the County Board's motion for costs pursuant to Neb. Rev. Stat. S77-1510.01. The Commission further orders that the Taxpayer shall pay said costs in the amount of \$838.50 to the County Board which said costs were ordered to be paid in Case Number 06R- 476. The Commission finds that those costs are not to be duplicated in this appeal.

The Commission grants relief to the Taxpayer and finds that the market value of the subject property for 2006 is in the amount of \$442,000, and that the Taxpayer shall pay costs to the County Board in the amount of \$838.50, in accordance with Case Number 06R-476.

**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 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, 2008, is reversed.
2. Actual value, for the tax year 2008, of the subject property is:

Case No. 08R- 021

Total	<u>\$442,000.00</u>
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3. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster 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 2008.
7. This order is effective for purposes of appeal on September 4, 2009.

Signed and Sealed. September 4, 2009.

Nancy J. Salmon, Commissioner

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. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.