

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

L & H INVESTMENTS,)	
)	
Appellant,)	Case No. 08R 771
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
NEMAHA COUNTY BOARD OF)	THE NEMAHA COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by L & H Investments ("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 24, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 19, 2009. Commissioners Warnes and Salmon were present. Commissioner Warnes was the presiding hearing officer. Commissioner Wickersham was excused from participation by the presiding hearing officer. Commissioner Hotz was absent. The appeal was heard by a quorum of a panel of the Commission.

Harry A. Larson, Partner of L & H Investments, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Angelo M. Ligouri, County Attorney for Nemaha County, Nebraska, was present as legal counsel for the Nemaha 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, 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

The actual value of the subject property on January 1, 2008.

**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 Nemaha County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Description: SEC 36-6-15 23.02 AC TRACT 2 WETLANDS ESMNT, Nemaha County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$44,100.00	\$12,600.00	\$44,100.00
Improvement	\$0	\$0	\$0
Total	\$44,100.00	\$12,600.00	\$44,100.00

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 19, 2009, set a hearing of the appeal for July 24, 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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Land value \$44,100.00

Improvement value \$ -0-

Total value \$44,100.00.

**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. 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.W.2d, 881 (2002).
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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property is an unimproved parcel consisting of 23.02 acres. (E3:1). The parcel is part of a tract of land 168.70 acres total. The subject property was enrolled in the Wetlands Reserve Program (WRP) as of January 1, 2008. (E18:1-6). The subject property, along with additional parcels of land totaling 168.70 acres were deeded into the WRP for a total value of \$198,547. (E18:1). This transaction calculates to \$1,177 per acre ($\$198,547 / 168.70$ acres).

“The Wetlands Reserve Program targets farmed or farmable wetlands as designated by the county offices of the Natural Resources Conservation Service (NRCS). The program allows a landowner to sell or gift specific rights to farming, grazing, mining, and developing for residential or commercial uses. These rights are transferred in almost every case through a Conservation (Warranty) Easement Deed (CWED) to the Commodity Credit Corporation (CCC) or directly to the United States Department of Agriculture. Typically the rights are transferred for a period of thirty years or perpetually, depending on the terms of the contract. In return, the landowner receives an amount not to exceed market value of the land transferred.” Nebraska Department of Property Assessment and Taxation, Directive 07-02, dated March 16, 2007. The Commission’s review of the “WRP contract” shows that the subject property has been encumbered in perpetuity. (E18:1).

The controlling feature of the subject property is its enrollment in the WRP since this fact controls how the County Assessor must classify and value the parcel as directed by the Nebraska Department of Property Assessment and Taxation, Directive 07-02, dated March 16, 2007. Land

enrolled in the WRP is to be classified as “recreational” land and “...its value is to be determined by sales of comparable property, but not necessarily the comparison with sales of all recreational property in the county. Id., pages 2 and 3. The Directive specifically prohibits land in the WRP from being classified as agricultural or horticultural. Id. page 1.

The Commission notes that the County Assessor has classified the subject property as “recreational” in accordance with the above directive. (E1:1). The Commission further notes that the County Assessor values the subject property at \$700 per acre which is what she values all recreational land in the county. (E1:1). This valuation approach is contrary to the Directive cited above and in contrast to the evidence provided by the County as summarized on Exhibit 43. Exhibit 43 lists the sales of six alleged comparable parcels all of which were in the WRP at the time of sale. These sales verify to the Commission that there is a market for these parcels in the WRP and that a valuation using the sales comparison approach can be made.

Both the Taxpayer and the County Assessor testified to the six sales of the alleged comparable parcels provided by the County. The Commission finds that sales numbered 1, 5, and 6 were all involving factors that made them suspect of true market value. (E19, 23 and 24). Both the Taxpayer and the County Assessor testified that the parcel shown in sale number 1 had been improved with amenities like electricity, road access and accessories for hunting. (E19). The parcels shown by sales number 5 and 6 were both purchased by the same individual and had similar improvements as for that parcel shown as sale number 1. (E23 and 24).

The Taxpayer testified that he had concerns about the amenities and development potential of the sales provided by the County, but he did not have personal knowledge by having inspected each parcel. The County Assessor testified that she did have personal knowledge of

the sales which the County alleged were comparable and in the case of the alleged comparable sales number 1, 5 and 6 she would not use them as reflecting market value. She testified that those parcels shown in sales 2, 3 and 4 were the most indicative of fair market value. (E20, E21 and E22). The Commission notes from the County's Exhibit 43 that the sale price per acre of these three sales ranged from \$1,046 per acre to \$1,297 per acre. (E43). All three of these sales prices are greater than the \$700 per acre used by the County Assessor to value the subject property as "recreational lands". The Commission finds that the three sales, sales 2-4, are most indicative of the actual value of the subject property. (E43). The County Assessor came to the same conclusion in her testimony as does the Commission in its finding that the subject property has not been valued at its actual value, but rather has been valued too low.

The issue of the market value of Nebraska land having been decided into the WRP was first heard by the Commission in 2006 with its decision in *Pavelka v Adams County BOE*, Case No. 05A-004 followed by its decision in *Hill v Adams County BOE*, Case No. 05 A-057. In both cases cited the Commission found that a market existed for the parcels of land in the WRP which were encumbered by conservation easements.

The Commission will not make a finding of the actual value of the subject property since there has not been a cross appeal filed by the county placing the Taxpayer in jeopardy of a higher valuation.

"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 opinion of market valuation based on the comparison of sales of all recreational property in the county rather than those parcels which are enrolled in the WRP and for which there is a separate and distinct market all in contradiction to the Directive 07-02 of March 16, 2007 cited above.

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 Taxpayer did not provide any sales of comparable property, but testified that he believed the subject property should be classified as "wasteland". The classification of wasteland can only be associated with land used for agricultural or horticultural purposes which is not allowed in accordance with the Directive which the County Assessor must comply.

The Commission finds from a review of all the evidence presented that the reasonableness of the evidence does not provide competent evidence that the Taxpayer should be

granted relief regarding the valuation of the subject property. 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 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 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 actual value of the subject property as of the assessment date, January 1, 2008, is affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

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Land value	\$44,100.00
Improvement value	\$ <u> -0-</u>
Total value	<u>\$44,100.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Nemaha County Treasurer, and the Nemaha 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 3, 2009.

Signed and Sealed. September 3, 2009.

Nancy J. Salmon, 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.