

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

CHANDLER RD. LLC,	)	
	)	
Appellant,	)	Case No. 09C 097
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
SARPY COUNTY BOARD OF	)	THE SARPY COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Chandler Rd. LLC ("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 October 19, 2010, pursuant to an Order for Hearing and Notice of Hearing issued July 28, 2010. Commissioner Warnes, Vice-Chairperson of the Commission, was the presiding hearing officer. Commissioner Wickersham, Chairperson of the Commission, was absent. Commissioner Warnes, as Vice-Chairperson acting in the absence of the Chairperson, designated Commissioners Warnes, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Vernon Dolleck, officer/managing member of Chandler Rd. LLC, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

John Reisz, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy 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 (Reissue 2009). 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, 2009, 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, 2009.

**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, 2009, ("the assessment date") by the Sarpy 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. 09C 097

Description: PARCEL C OF PT OF TAX LOT 581A 15-14-13 (.93 AC) TAX LOTS TO BELLEVUE REFER 10407561, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$80,964.00	\$80,964.00	\$80,964.00
Improvement	\$589,036.00	\$491,842.00	\$589,036.00
Total	\$670,000.00	\$572,806.00	\$670,000.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on July 28, 2010, set a hearing of the appeal for October 19, 2010, at 1:00 p.m. CDST.
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. Actual value of the subject property as of the assessment date for the tax year 2009 is:

Case No. 09C 097

Land value           \$80,964.00

Improvement value \$589,036.00

Total value         \$670,000.00.

**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) (Reissue 2009).

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 2009).
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 2009).
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 2009).
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) (Reissue 2009).

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) (Reissue 2009).
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) (determination of actual value).

#### **IV. ANALYSIS**

The subject property is a commercial parcel improved with a 12,000 square foot Class C Flex commercial building, which contains three (3) sections. (E2:11 and 12). The three sections of the building are classified by the County as a "computer center, office building and warehouse/storage." (E2:12).

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is less than actual value as determined by the County Board.

After reviewing the evidence presented by both parties, the Commission notes that there is a difference of opinion as to whether the improvements contain a "computer data center" with a correspondingly higher actual value rather than a lesser valued "computer storage" area. In addition, the parties differ on their opinion of whether certain tenant improvements should be considered fixtures and treated as real property, rather than as trade fixtures and not treated as real property. Lastly, the parties differed on the amount of depreciation that should be used if using the cost approach to valuation.

The Taxpayer solicited testimony from his appraiser who was limited in presenting his determinations of his appraisal due to the Taxpayer submitting for evidence only nine pages of the appraiser's 33 pages of his appraisal report. (E2:2 & 3 and E11:1 to 5). The objection by the County to the Taxpayer's attempt to offer the additional pages of the appraisal report during the appeal hearing was sustained as not timely filed in accordance with the Commission's Order for Hearing, paragraph 11, which required that all written evidence be submitted to the opposing party 30 days prior to the date of hearing. The failure of the Taxpayer to provide the entire

appraisal report as part of his evidence in a timely manner was without good cause and without explanation.

The appraiser for the Taxpayer testified that it was his opinion that certain items of the subject property were not fixtures, but rather trade fixtures not to be valued as real property. The items which the appraiser for the Taxpayer considered trade fixtures which should not be considered as real property included the heating and air conditioning system (including specialized air cleaners and scrubbers), the finished office, the raised floor, generators, servers, and the sprinkler system.

Both parties determined actual value using the income approach to value and this makes moot the issue of depreciation which is only relevant using the cost approach. (E4:2 and E12:1). The Taxpayer's appraiser gave an opinion of actual value for the subject property for 2009 of \$535,100. (E12:1). The County's opinion of actual value for the subject property for 2009 was \$672,000. The table below shows the parties' calculations of actual value using the income approach.

	County (E4:5)	Taxpayer (E12:1)
Potential Gross Income	\$84,000 (\$7.00/SF)	\$54,000 (\$4.50/SF)
Less Vacancy	\$4,200 (5.00%)	\$2,160 (4%)
Effective Gross Income (EGI)	\$79,800	\$51,840
Expenses	\$15,960 (20% EGI)	\$2,592 (5% EGI)
Net Operating Income (NOI)	\$63,840	\$49,248
Capitalization Rate	9.5%	9.2%
Value by Income Approach	\$672,000	\$535,000

\*SF - Square Foot



A review of the above table shows that the parties differ in the square foot leaseable value of the subject property and the expenses used to determine net operating income.

The Taxpayer's reliance on actual expenses of the subject property is not in accordance with generally accepted appraisal practice. "The income and expenses that are proper and acceptable for income tax purposes are not the same as those that are appropriate for the income approach. Only the reasonable and typical expenses necessary to support and maintain the income-producing capacity of the property should be allowed." *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, 204. That position has also been adopted by Nebraska Courts. See *In re Assessment of OL & B Ry. Co.*, 213 Neb. 71, 327 N.W.2d 108, (1982); and *Spencer Holiday House, Inc., v. Board of Equalization of Hall County*, 220 Neb. 607, 371 N.W.2d 286, (1985).

The actual operating history of a subject property can be considered for appraisal purposes. *The Appraisal of Real Estate 12th Edition*, The Appraisal Institute, 2001, 509 - 511. An analysis using the actual operating expenses of a parcel requires a multi-year analysis that is then used as a basis for comparison only, with comparable properties. *Id.* The Taxpayer did not provide income and expense information for any comparable parcels accompanied by their property record files nor did he provide written income and expense information for the subject property.

The parties' difference in the amount of rent attributable to the subject property relates to their respective opinion of what is being valued. The Taxpayer alleges that the market rent, \$4.50/SF, for the subject property should be less since the subject property should only be valued as a "computer storage" facility due to the expected removal of the tenant improvements

discussed earlier. The appraiser for the County Assessor alleged that the tenant improvements are fixtures since they could not be removed and thus created a higher market rent, \$7.00/SF. Both parties provided alleged comparable parcels in support of their opinion, but only the County provided the property record files for those parcels alleged to be comparable. The Commission's review of the alleged comparable parcels from both parties shows that none of the alleged comparable parcels are comparable to the subject property without adjustments. The Commission finds that the Taxpayer did not provide sufficient competent evidence to show the actual value of the tenant improvements should the Commission have decided to deduct those items from the actual value of the subject property. The Commission finds that the income approach utilized by the County in its determination of actual value comports with accepted professional mass appraisal practices and the Commission gives to it the greater weight over the testimony of the Taxpayer.

The Commission does not find merit to the other allegations testified to by the Taxpayer. 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).

“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. The presumption remains until there is competent evidence to the contrary presented, and

the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, 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. In an appeal ... the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.” *Id.* Taxpayer must introduce competent evidence of actual value of its property in order to successfully claim that a 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).

The Commission finds that the Taxpayer has not provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination.

The Commission finds that the Taxpayer has not provided 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 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, 2009, is affirmed.
2. Actual value, for the tax year 2009, of the subject property is:

Case No. 09C 097

Land value	\$80,964.00
Improvement value	<u>\$589,036.00</u>
Total value	<u>\$670,000.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
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 2009.
7. This order is effective for purposes of appeal on December 15, 2010.

Signed and Sealed. December 15, 2010.

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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 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**