

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

ANTHONY L. KAUTH,)	
)	
Appellant,)	Case No. 09R 120
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
KNOX COUNTY BOARD OF)	THE KNOX COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Anthony L. Kauth ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 920 S. 20th St., Norfolk, Nebraska, on August 17, 2010, pursuant to an Order for Hearing and Notice of Hearing issued June 14, 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 Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Anthony L. Kauth was present at the hearing. No one appeared as legal counsel for the Taxpayer.

John Thomas, County Attorney for Knox County, Nebraska, was present as legal counsel for the Knox 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 Knox 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: 2-31-3 TR N2SW 11.99 AC, Knox County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$22,095.00	\$12,920.00	\$22,095.00
Improvement	\$57,350.00	\$44,348.00	\$55,450.00
Total	\$79,445.00	\$57,268.00	\$77,545.00

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 June 14, 2010, set a hearing of the appeal for August 17, 2010, at 3:00 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:

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Land value \$22,095.00

Improvement value \$55,450.00

Total value \$77,545.00.

**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. “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 taxable value); *Josten-Wilbert Vault Co. Board of Equalization of Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an 11.99 acre rural residential parcel improved with a 1 ½ story house with 1,508 square feet of living area built in 1916. (E3:3). The house is rated average for both quality and condition. (E3:3).

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 Taxpayer testified that windmills located near to the subject property are a negative factor that reduces the market value of the subject property. The Taxpayer testified that the type of windmill affecting the subject property was a 3 megawatt windmill. One of the windmills he estimated was located 1,000 feet from his property line. He estimated that the windmill is 240 feet to 260 feet high with blades 130 feet in length.

The Taxpayer testified that there were noises and effects unique to the 3 megawatt windmill. In particular, the blades of the windmill create a “chop” sound which is not the same as other types of windmills and can be heard for 2/3 mile. In addition, the turning of the blades during the daylight hours with the sunlight streaming through creates a “strobe” effect. Both the noise and the strobe effect are considered by the Taxpayer as being negative to the peace and enjoyment of the subject property and diminish its market value. The map shown as Exhibit 6 page 5 has the location of the windmills shown by green dots. The Taxpayer testified that windmill towers 1, 2 and 3 were “sunrise towers” and towers 6, 7 and 8 were “sunset towers”, referring to the time of the day when they affected the subject property with the strobe effect.

The Taxpayer testified that there were no sales of any comparable parcels to the subject property. He testified that there were four parcels in the county which were located near windmills and whose owners were not financially benefitted by them, but none of these four parcels had sold. One parcel had been abandoned by the owner and that property had been “gutted out.” The Taxpayer testified that he believed the subject property should be valued the same as this abandoned property because it represented the market value of a parcel negatively affected by the windmills. The Commission does not find merit to this approach to valuation.

The Taxpayer testified that it was his belief that the subject property should be valued 15% less than the 2009 taxable value due to the negative effect the windmills have on the market value. The Commission finds that this opinion of value is without supporting evidence.

The County Assessor testified that she had inspected the subject property in 1997 and she and the County Board of Equalization visited the subject property and verified the location of the adjacent windmills in June 2009. She testified that the County used the cost approach to value the subject property giving a total depreciation of 71%, 30 % for economic depreciation alone. She testified that there had not been any sales of parcels comparable to the subject property from which to determine a negative financial impact of the windmills on market value.

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 did have 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:

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Land value	\$22,095.00
Improvement value	<u>\$55,450.00</u>
Total value	<u>\$77,545.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Knox County Treasurer, and the Knox 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 September 29, 2010.

Signed and Sealed. September 29, 2010.

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