

**NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

| | | |
|-----------------------|---|--------------------|
| HAROLD E. KNAPP, |) | |
| |) | |
| Appellant, |) | CASE NO 09SV 025 |
| |) | |
| v. |) | DECISION AND ORDER |
| |) | |
| SARPY COUNTY BOARD OF |) | |
| EQUALIZATION, |) | |
| |) | |
| Appellee. |) | |
| |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Harold E. Knapp ("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 January 10, 2011, pursuant to a Notice and Order for Hearing issued October 29, 2010. Commissioner Wickersham, Chairperson of the Commission was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham as Chairperson designated Commissioners Wickersham, 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.

The Taxpayer did not appear as directed by the Commission's order for hearing. No one appeared as legal counsel for the Taxpayer.

Kerry A. Schmid, a Deputy County Attorney for Sarpy County, Nebraska appeared as legal counsel for the Sarpy County Board of Equalization ("the County Board").

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

The County Board moved for a default judgment.

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2009) to state its final decision 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 is as follows.

**I.
FINDINGS**

The Commission finds and determines that:

1. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
2. Taxable 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 by the Taxpayer in a timely protest, and taxable value as determined by the County Board is shown in the following table:

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Description: E½NW¼ & NE¼SW¼ Section 4, Township 12, Range 11, Sarpy County, Nebraska.

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------------------|-----------------------|------------------------|------------------------|
| Agricultural Land | \$199,086.00 | \$200,000.00 | \$199,086.00 |
| Home Site | \$64,000.00 | In Ag Land | \$47,000.00 |
| Residence | \$78,546.00 | Unknown | \$78,546.00 |
| Farm Site | \$18,000.00 | In Ag land | \$24,000.00 |
| Outbuilding | \$36,417.00 | Unknown | \$36,417.00 |
| Total | \$396,049.00 | Unknown | \$385,049.00 |

3. An appeal of the County Board's decision was filed with the Commission.
4. An Order for Hearing and Notice of Hearing issued on October 29, 2010, set a hearing of the Taxpayer's appeal for January 10, 2011, at 1:00 p.m. CST.
5. 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. (Case File).
6. Each of the parties has been afforded an opportunity to present evidence and argument as provided by Neb. Rev. Stat. §77-5015 (Reissue 2009).
7. The Taxpayer failed to file any exhibits with the Commission excepting the County's final determination which was filed with the Appeal Form.
8. The Taxpayer failed to appear at the hearing.
9. The Order for Hearing and Notice of Hearing issued by the Commission states in Paragraph 2 that if a party fails to appear at the hearing, the Commission may enter an order in favor of an opposing party.
10. The County Board moved for an order of default judgment.
11. The Commission cannot grant relief without the concurrence of a majority of the panel that heard an appeal. Neb. Rev. Stat. §77-5016(12) (Reissue 2009).

II. ANALYSIS

The Commission entered an Order for Hearing and Notice of Hearing on October 29, 2010. (Case File). The Order for Hearing and Notice of Hearing set January 10, 2011, at 1:00 p.m. CST as the date and time for hearing the Taxpayer's appeal. (Case File). The appeal was

to be heard in the Commission's hearing room on the 6th floor of the Nebraska State Office Building in Lincoln, Nebraska. (Case File). The Taxpayer did not appear at the time and place set by the Commission's Order for Hearing and Notice of Hearing. Paragraph 2 of the Commission's Order for Hearing and Notice of Hearing advises the parties that the Commission may enter an order in favor of an opposing party if a party fails to appear at a hearing within 15 minutes of the scheduled time. (Case File). The County Board did appear at the time and place specified in the Commission's Order for Hearing and Notice of Hearing and offered Exhibits, all of which were received.

The County Board moved for a default judgement. The County Board then called an appraiser employed by the Sarpy County Assessor as a witness. The appraiser testified that in his opinion the taxable value of the subject property as of January 1, 2009 was \$396,049. The County Board's determination was that taxable value of the subject property as of January 1, 2009, was \$385,049. (E1). The basis for the difference between the taxable value as determined by the County Board and the appraiser is the contribution to value of the three acres classified as site. Exhibit 8, page 6 shows a contribution to value of three acres classified as site at 71,000. A value of \$47,000 was assigned to the first acre and \$12,000 assigned to each of the second and third acres. (E8:6). The total contribution to value of the land component was \$270,086. (E8:6). The County Board's determination shows a contribution to value of the land component as \$270,086. (E1). Exhibit 10:5 shows a contribution to value of three acres classified as site at \$82,000. A value of \$64,000 was assigned to the first acre and \$9,000 assigned to each of the second and third acres. (E10:5). The total contribution to value of the land component was \$281,086. (E10:5). The appraiser's opinion of taxable value was based in part on a contribution

to value of the land component at \$281,086 ($\$82,000 + \$199,086 = \$281,086$). (E2). The difference between the taxable value of the subject property as opined by the appraiser and as determined by the County Board is \$11,000 ($\$396,049 - \$385,049 = \$11,000$). Likewise the difference between the contribution to value of the land component is \$11,000 ($\$281,086 - \$270,086 = \$11,000$).

The County Board had submitted and the Commission had received Exhibit 2. Exhibit 2 is signed by the appraiser and advises that the “County” is recommending a new valuation of \$396,049. A taxable value of \$396,049 is as noted above, the original taxable value as determined by the County Assessor and is \$11,000 higher than taxable value as determined by the County Board.

A default judgement is a judgement entered against a defendant who has failed to plead or otherwise defend against the plaintiff’s claim. *Black’s Law Dictionary 7th Edition*, West Group, p. 428 (1999). The Courts of Nebraska are given statutory authority to receive evidence, if necessary to pronounce judgement upon a failure to answer. Neb. Rev. Stat. 77-1308 (Reissue 2008). A judgement judgment is also one entered as a penalty against a party who has failed to comply with an order. *Id.*

The Commission has only the authority granted to it by statute. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The Commission has express statutory authority to enter default judgements. Neb. Rev. Stat. §77-5015 (Reissue 2009). No authority has been conferred by statute on the Commission to take evidence in support of a default judgement. The Commission has authority to promulgate rules and regulations to carry out its constitutional and statutory purposes, powers, or authority and as necessary to

regulate persons and proceedings within the commission's jurisdiction and authority. Neb. Rev. Stat. 77-5021 (Reissue 2009). There are no provisions in the Commission's rules and regulations providing for the taking of evidence necessary to determine relief on a default judgement. Because the Commission is considering an appeal, the only evidence needed is the decision action, order, or determination being appealed from. A default judgement simply results in affirmance. A default judgement by the Commission is affirmance of the decision, action, order, or determination appealed from. The import of the County Board's evidence on its motion for default judgement is that the Commission should enter an order reversing the County Board's determination and increasing taxable value of the subject property. The Commission has no authority to act in the manner requested by the County Board on a motion for default judgement. A default judgement may be entered affirming the decision, action, order, or determination of the County Board on a motion brought by the County Board. A default judgement may not be entered reversing the decision of the County Board when it is the County Board that brought the motion for default judgement.

Whether the order I propose exults form over substance can be left to others. I can observe however that had the Taxpayer dismissed his appeal he would not have been put at risk of a higher value. Differing results based on dismissal of an appeal or a failure to prosecute the appeal seems to exult procedure and penalize those not in the know.

Commissioner Hotz dissents. The Commission cannot grant relief without the concurrence of a majority of the panel that heard an appeal. Neb. Rev. Stat. §77-5016(12) (Reissue 2009).

**III.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. 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).
3. The Commission has jurisdiction over the parties to this appeal.
4. The Commission is authorized to enter default judgments by Neb. Rev. Stat. §77-5015 (Reissue 2009).

**IV.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2009, is affirmed.
2. Taxable value of the subject property for the tax year 2009 is:

| | |
|-------------------|-----------------------------|
| Agricultural land | \$199,086.00 |
| Farm Site | \$ 47,000.00 |
| Home Site | \$ 24,000.00 |
| Residence | \$ 78,546.00 |
| Outbuildings | <u>\$ 36,417.00</u> |
| Total | <u><u>\$385,049.00.</u></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 (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 2009.
7. This order is effective for purposes of appeal April 13, 2011.

Signed and Sealed. April 13, 2011.

Wm. R. Wickersham, 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.

Commissioner Hotz, dissenting,

I respectfully dissent.

The presiding officer's order, granting a default judgment, and thus affirming the County Board's decision, elevates form over substance.

The Taxpayer did not appear at this hearing. A Deputy County Attorney was present, as counsel for the County Board. After taking notice of the case file, the presiding officer advised counsel that the County Board had previously submitted 27 Exhibits, and counsel answered affirmatively when asked if the County Board wished to offer Exhibits 2 to 28 into evidence.

Upon receipt of these exhibits, the presiding officer advised counsel that Exhibit 1, the County Board's determination of value – evidence of the Commission's subject matter jurisdiction – had been submitted prior to the hearing, and counsel responded in the negative when asked whether she objected to its receipt. It was in this context that counsel made her oral motion for what she termed as "default judgment."

It should be noted that typically when the Taxpayer fails to appear at the hearing, counsel for the County Board will motion for default judgment, and the presiding officer will take the motion under advisement and adjourn the hearing. Procedurally, the logical result is an order of affirmance of the County Board's prior determination.

However, the procedure and the evidence in this appeal were atypical. When asked whether she had a motion, the deputy county attorney for the County Board moved for a "default judgment." However, in this instance, rather than taking that motion under advisement and adjourning the hearing, the presiding officer asked counsel to review Exhibits 1 and 2. Counsel agreed, when asked, that Exhibit 1 indicated the County Board's determination of taxable value as \$385,049. Counsel also agreed, when asked, that Exhibit 2, authored by an appraiser employed by the County Assessor, indicated the County Board's new opinion of value of \$396,049 – the same amount that had been protested to the County Board. Following this exchange, the presiding officer asked counsel if it was the County Board's position that the County Board's determination, as indicated in Exhibit 1, was arbitrary or unreasonable. However, before Counsel answered the question, the presiding officer asked Counsel whether she wished to present evidence in support of the motion and the value to be determined.

Counsel responded affirmatively, and called an appraiser from the County Assessor's office to testify on behalf of the County Board and in support of the evidence that had been received.

The appraiser testified in support of a "new valuation" of \$396,049, which was consistent with the County Assessor's protested valuation. (Exhibits 1-2). By offering the testimony of the appraiser in support of a valuation of \$396,049, counsel demonstrated that her intent was not to pursue a default judgment resulting in affirmance, but rather that the County Board was instead seeking a reversal of its own prior determination. In effect, counsel was offering evidence on behalf of the County Board to prove that the prior determination of the County Board should be reversed. While it is true that counsel initially uttered the words "default judgment" when making her motion, the procedure followed and evidence offered by the County Board was consistent with a desire by the County Board to seek a reversal of its own prior determination.

The Taxpayer was on notice of the County Board's new opinion of value, offered by the appraiser, by virtue of the exchange of exhibits that occurred at least thirty days prior to the scheduled hearing. And by failing to appear at the hearing, the Taxpayer effectively waived his right to rebut the evidence that was timely exchanged prior to the hearing and then offered by the County Board at the hearing. Under these procedural circumstances, to grant a default judgment would exalt form over substance, which I decline to do.

I would conclude that the total taxable value of the parcel is \$396,049, consistent with the un rebutted exhibits and testimony offered by the County Board at the hearing.

Robert Hotz, Commissioner

