

Decision withdrawn for reconsideration by order dated February 9, 2011.

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

DAVID J. BALDWIN,)	
)	
Appellant,)	Case No. 09R 095
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
DOUGLAS COUNTY BOARD OF)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by David J. Baldwin ("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 June 25, 2010, pursuant to an Order for Hearing and Notice of Hearing issued March 25, 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.

David J. Baldwin was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

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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 Douglas County Assessor, value as proposed in a timely

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

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Description: Lot 5 Block 0 West Fairacres Village, Omaha, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$66,200.00	\$12,000.00	\$66,200.00
Improvement	\$213,300.00	\$180,000.00	\$213,300.00
Total	\$279,500.00	\$192,000.00	\$279,500.00

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 March 25, 2010, set a hearing of the appeal for June 25, 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:

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Total value \$210,000.00.

**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

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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).

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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).

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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. (actual value) *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 improved parcel. The improvement on the parcel is an 1,800 square foot townhouse with a full basement, 1,167 square feet of which is finished, and a 422 square foot attached garage.

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The Taxpayer asserts that the subject property is overvalued and assigns as a cause the contribution to value of the land component as determined by the County Board. For reasons that follow the Commission need not make a determination of the value contributed by the land component.

Both the Taxpayer and the County Board submitted assessment and sale information for parcels they considered comparable to the subject property. The physical characteristics, attributes, and amenities of the subject property and the most comparable parcels based on style, size, quality, and condition presented for tax year 2009, by the County for validation of its valuation, and the Taxpayer's appraiser with assessment and sale information, are summarized in the following table.

Descriptor	Subject	County 1	County 2	Appraiser 2
Exhibit	E2:7-14	E2:15-21	E2:22- 28	E10:46-52
Location	12705 Davenport PLZ	1005 Harney PW- S	10013 PW-S	1645 S 113 PA
Lot Size	5,877 Sq Ft	5,488 Sq Ft	5,488 Sq Ft	
Condition	Average	Good	Average	Fair
Quality	Good	Good	Good	Very Good
Yr Built	1988	1972	1972	1981
Exterior Walls	Frame Vinyl	Frame Siding	Frame Siding	Masonry Front Brick
Style	Townhouse 1 Story	Townhouse 1 Story	Townhouse 1 Story	Townhouse 1 Story ¹
Area Above Ground	1800 Sq Ft	2,056 Sq Ft	1,986 Sq Ft	1,754 Sq Ft
Roof Cover	Wood Shake	Wood Shingle	Wood Shingle	Wood Shake

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Descriptor	Subject	County 1	County 2	Appraiser 2
HVAC	Central Air	Central Air	Central Air	Central Air
Basement	1800 Sq Ft	2,056 Sq Ft	1,986 Sq Ft	1,708 Sq Ft
Finished	1,167 Sq Ft	1,800 Sq Ft	1,800 Sq Ft	528 Sq Ft
Walkout				
Bedrooms	3	2	3	2
Bathrooms	3	2	2	2
Garage Type	Attached	Attached	Attached	Attached
Garage Area	422 Sq Ft	484 Sq Ft	484	528
Misc Imp	Covered Wood Deck, Metal Fireplace	Radio Intercom, Masonry Fireplace, Security System, Sprinkler System	Radio Intercom, Masonry Fireplace, Security System, Sprinkler System	Metal Fireplace
Lot Value	\$66,200	\$40,000	\$40,000	\$24,600
Imp Value	\$213,300	\$264,541	\$234,938	\$180,000
Taxable Value	\$279,500	\$304,541	\$274,938	\$204,600
Sale Date		7/11/07	9/12/06	10/31/08
Sale Price		\$280,000	\$275,000	\$200,000

1. The County Assessor’s records indicate that the residence is a 3 story condo. E10:47. A photo of the residence shows it to be a one story structure. E10:49.

Comparable properties share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, (1996) at 98. When using “comparables” to determine value, similarities and differences between the subject property and the comparables must be recognized. *Id.* at 103.

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The County Board relied on 3 comparables to support its determination of value. One of the parcels shown on Exhibit 2 page 5, Comp 3, is a 1½ story townhouse while the subject property is a 1 story townhouse. Because of the difference in style comp 3 won't be considered further. Comps 1 and 2 shown on page 5 of Exhibit 2 are described in the table above as ("County 1") and ("County 2"). The residences on County 1 and County 2 were built in 1972 and are larger than the subject property. The residences on County 1 and County 2 have larger basements with more finish than the subject property. The unadjusted sales of County 1 and County 2 do not support actual value as determined.

An appraisal commissioned by the Taxpayer was received as Exhibit 8 pages 16-28. The opinion of value stated in the appraisal as of January 1, 2009 was \$210,000. (E8:17). The only 1 story townhouse in the array of comparables presented in the appraisal is described in the table above as ("Appraiser 2"). The Appraiser 2 parcel is in fair condition with a quality of very good and was built in 1981. The subject property is in average condition with good quality and was built in 1988. The residence on Appraiser 2 parcel contains 1,754 square feet above ground, with 1,708 of basement 528 of which are finished and a 528 square foot garage. The residence on the subject property contains 1800 square feet above ground with 1,800 square feet of basement 1,167 square feet of which are finished and a 422 square foot garage. The Taxpayer's appraiser adjusted the sale of Appraiser parcel 2 for differences between the subject property and Appraiser parcel 2 and arrived at an indication of value for the subject property of \$210,000. (E8:21).

In addition the townhouse adjacent to the subject property sold in 2009. Actual value is a matter of opinion. A sale of the property of property after the valuation date in question may be considered. The weight to be given to the sale is for the trier of fact. *See H/K Company v. Board*

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of Equalization of the County of Lancaster, 175 Neb. 268, 121 N.W.2d 382 (1963). The physical characteristics, attributes and amenities of the subject property and the adjoining parcel is summarized in the following table.

Descriptor	Subject	Adjoining Parcel
Exhibit	E2:7-14	E10:13-18
Location	12705 Davenport PLZ	206 N 127 PA
Lot Size	5,877 Sq Ft	5,890 Sq Ft
Condition	Average	Good
Quality	Good	Good
Yr Built	1988	1985
Exterior Walls	Frame Vinyl	Frame Siding
Style	Townhouse 1 Story	Townhouse 1 Story
Area Above Ground	1800 Sq Ft	1,780 Sq Ft
Roof Cover	Wood Shake	Wood Shingle
HVAC	Central Air	Central Air
Basement	1800 Sq Ft	1,780 Sq Ft
Finished	1,167 Sq Ft	1,000 Sq Ft
Bedrooms	3	2
Bathrooms	3	2
Garage Type	Attached	Attached
Garage Area	422 Sq Ft	440 Sq Ft
Misc Imp	Covered Wood Deck, Metal Fireplace	2 Covered Wood Decks. Wood Deck, Masonry Fireplace, Brick Veneer
Lot Value	\$66,200	\$66,200
Imp Value	\$213,300	\$227,500

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Descriptor	Subject	Adjoining Parcel
Taxable Value	\$279,500	\$293,700
Sale Date		11/17/09
Sale Price		\$210,000

The adjoining parcel as noted sold on November 17, 2009. Actual value is a matter of opinion. A sale of the property of property after the valuation date in question may be considered. The weight to be given to the sale is for the trier of fact. *See H/K Company v. Board of Equalization of the County of Lancaster*, 175 Neb. 268, 121 N.W.2d 382 (1963). Grantor of the sale of the adjoining parcel was Peter C. Kinnick PR. PR is a common abbreviation for Personal Representative. In Nebraska a Personal Representative is appointed to administer the estate of a decedent. *See Neb. Rev. Stat. §30-2462 et. seq. (Reissue 2008)*. The sale may not be an arms-length transaction. “Sales in which the buyer is an executor or trustee are usually nonmarket sales at nominal consideration. Sales from an estate made be made to satisfy the debts of the deceased or the wishes of an heir; otherwise, the sales in which and estate is the seller may well be valid arms-length sales”. *Mass Appraisal of Real Property*, International Association of Assessing Officers, (1999) at 54. The sale of the adjacent property, while it may not indicate actual value of the subject property, does support the opinion of value offered by the Taxpayer’s appraiser.

The difference between the County Board’s determination of actual value and the opinion of value given by the Taxpayer’s appraiser, supported by the sale of an adjacent parcel is clear and convincing evidence that the County Board’s determination was arbitrary or unreasonable. Once it is determined that the decision of County Board was unreasonable or arbitrary, the

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Commission must review the evidence and adopt the most reasonable estimate of actual value presented. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The determination of the County Board is unsupported.

The opinion of value given by the Taxpayer's appraiser in his appraisal is the most reasonable estimate of actual value before the Commission.

**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 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 vacated and 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, 2009, is vacated and reversed.
2. Actual value, for the tax year 2009, of the subject property is:

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Total value \$210,000.00.

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3. The County Assessor may make such allocation of the total value as may be appropriate for purposes of complying with section 77-1303 of Nebraska Statutes..
4. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
5. Any request for relief, by any party, which is not specifically provided for by this order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This decision shall only be applicable to tax year 2009.
8. This order is effective for purposes of appeal on February 2, 2011.

Signed and Sealed. February 2, 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, concurring.

I concur in the result only. I would find that the Taxpayer's appraisal of \$210,000 is the actual value of the subject property for the tax year 2009.

Robert W. Hotz, Commissioner