

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

BERNARD J. MORELLO,)	
)	
Appellant,)	Case Nos. 09A 122
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISIONS 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 the appeal by Bernard J. Morello ("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 12, 2010, pursuant to an Order for Hearing and Notice of Hearing issued May 12, 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.

Bernard J. Morello 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.

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 is as follows.

I.
ISSUES

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining taxable value of the subject property is unreasonable or arbitrary; and

The taxable value of the subject property on January 1, 2009.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2009, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable 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 them.
2. The parcel of real property to which the above captioned appeal pertains is ("the Subject Property") described in the table below.
3. Taxable value of each parcel 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 timely protests, and taxable value as determined by the County Board is shown in the following table:

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Description: LANDS SEC-TWN-RGE 29-15-10 IRREG W 1841.32 E 1874 32 N 2441.97 FT SE 1/4, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Agricultural Land	\$168,110.00	\$86,900.00	\$168,110.00
Total	\$168,110.00	\$86,900.00	\$168,110.00

4. An Order for Hearing and Notice of Hearing issued on May 12, 2010, set a hearing of the appeal for July 12, 2010, at 1:00 p.m. CDST.
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.
6. Taxable value of each parcel for the tax year 2009 is:

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Agricultural land	\$ 168,110.00
Total	<u>\$ 168,110.00</u>

III.

APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in the above captioned 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. Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009).
8. "Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).
9. "Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:
 - (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land." Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

10. "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution." Neb. Const., Art. VIII, §1.
11. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
12. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
13. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
14. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

15. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
16. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
17. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
18. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
19. 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).

20. 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).
21. The presumption disappears if there is competent evidence to the contrary. *Id.*
22. 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).
23. 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).
24. "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).
25. 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).
26. 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).

27. “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).
28. 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).
29. 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).
30. 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. 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 an unimproved agricultural parcel consisting of 103.19 acres.
(E4:7 and E4:12).

The Taxpayer has asserted that the taxable value of the subject property as of January 1, 2009, is less than taxable value as determined by the County Board and in addition, the Taxpayer has asserted that the taxable value of the subject property as of January 1, 2009, is not equalized with the taxable value of other real property.

The Commission finds that the Taxpayer has not provided evidence to support either of these two allegations and specifically finds that the actual value of the subject property has been correctly determined by the County Board of Equalization and that the subject property has been equalized with the taxable value of the comparable real property within the county.

The Taxpayer alleged two different opinions of actual value for the subject property. The first opinion was that the actual value for the subject property was \$86,900. His basis for this opinion was that there has not been any change in "production" on the subject property since 1999, and therefore, the value of the subject property should be the same as that determined by the County Board of Equalization for 1999, \$86,900. (E4:10).

This method to determine actual value is most similar to the income approach, one of three approaches to valuation authorized by Nebraska law to determine actual value using professionally accepted mass appraisal methods as authorized by Nebraska law. Neb. Rev. Stat. 77-112 (Reissue of 2009). However, the Commission finds that the Taxpayer did not use this method to value the subject property despite his testimony since he did not provide evidence of market or actual income or expenses for the subject property.

Actual value of real property for purposes of taxation may be determined using professionally accepted mass appraisal methods, including, but not limited to, (1) the sales comparison approach, taking into account factors such as location, zoning, and current functional

use;(2) the income approach; and (3) the cost approach. This statute does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine actual value of real estate for tax purposes. *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

The Income Approach can be defined as “a set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value. This conversion can be accomplished in two ways. One year’s income expectancy can be capitalized at a market-derived rate or at a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment. Alternatively, the annual cash flows for the holding period and the reversion can be discounted at a specified yield rate.” *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, (2002) at 143. The steps required for use of the income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value. *The Appraisal of Real Estate* 12th Edition, The Appraisal Institute, 2001 at 493 - 494. A variety of techniques may be used to quantify various components of any application of the approach. *Id.* at chs 20-24.

The Taxpayer did not provide evidence of the needed variables necessary for an income valuation approach of the subject property since he did not provide either the market income or market expenses for the subject property. He also did not provide evidence of the actual income

or expenses for multiple years. In addition, the Taxpayer did not provide or use a capitalization rate to determine actual value using the income approach to valuation.

Rather, the Taxpayer testified that it was his opinion that "there had not been any change to production on the subject property" since 1999 and therefore the valuation determined by the County Board for 1999 should be the same as the taxable value determined for 2009. The Commission gives little weight to the Taxpayer's conclusion that the agricultural market valuation had not changed between the years 1999 and 2009. The Commission gives little weight to the allegations of the Taxpayer regarding his first opinion of actual value of the subject property.

The Taxpayer's second opinion of value for the subject property was that its actual value is \$124,800. This opinion is based on the Taxpayer's different opinion of the areas comprising the different land uses. He alleged that the valuation for each land use determined by the County should be used, but that his opinion of the acreage for each land use should be used rather than that used by the County. His allegation was as follows:

65 acres of row crops at \$1,800 per acre, \$117,000 (65 x \$1,800) = \$117,000

21 acres of wasteland at \$50 per acre, \$1,050 (21 x \$50 = \$1,050)

18 acres of pastureland at \$375, \$6,750 (18 x \$375 = \$6,750).

The Taxpayer's second opinion of value of the subject property is \$124,800 ($\$117,000 + \$1,050 + \$6,750 = \$124,800$). The County's land use values shows that the value of pastureland varies depending on whether there is timber mixed with the pastureland, \$375, or if not, \$900 per acre. (E4:7). The testimony of the appraiser for the County Assessor stated that an error had occurred in the County's determination of value of the pastureland in that it had valued the

pastureland of the subject property at \$375 per acre when it was his opinion it should be valued at \$900 per acre since it did not have sufficient timber to receive the lower value. The Commission finds that the \$900 per acre value should apply to the pastureland from its review of the evidence, the testimony of the Taxpayer and the appraiser for the County Assessor and its review of the aerial map provided. (E4:11). The higher valuation per acre for pastureland at \$900 per acre would increase the Taxpayer's second opinion of valuation \$525 higher per acre for the 18 acres of pastureland, or a total increase of \$9,450. The second opinion of valuation when adjusted for the increase value per acre for pastureland is \$134,250 ($\$124,800 + \$9,450 = \$134,250$).

The Taxpayer did not provide evidence itemizing the size of the acreage for each land use, but rather testified to his opinion of such sizes from his personal knowledge having owned the farm for 24 years. The Commission gives little weight to the second opinion of actual value opined by the Taxpayer. The Commission notes the disparity between the Taxpayer's two opinions of actual value of the subject property for 2009.

The appraiser for the County Assessor testified that he developed two models to value agricultural and horticultural land receiving special valuation in Douglas County. The first model he developed was not used since all of the agricultural parcels were from Douglas County and their sales prices were influenced by factors other than agriculture or horticulture. He gave greater weight to the second of his two models which was developed from the sales of agricultural and horticultural parcels from five other counties, not including Douglas County. He testified that in developing his second model he used some 563 sales from other counties similar to Douglas County to determine a model of the uninfluenced value of comparable parcels

to the subject property. (E4:5) He chose the counties for the second model of uninfluenced sales because they were "along the Missouri River and had rolling topography of the land". A table of their uninfluenced value, reduced to 75% of the market value, shows special valuation. (E4:3). The subject property has been given special valuation. An itemization of the land uses and soil types by acreage for the subject property was obtained from GIS survey maps is shown on Exhibit 4:7. The appraiser for the County Assessor testified that the valuation approach used to value the subject property was the sales comparison approach using the sales file provided by the Nebraska Property Assessment Division of the Department of Revenue. The Commission finds that the assessment practices of the appraiser for the County Assessor comports with the accepted valuation and professional mass appraisal standards and gives great weight to the testimony of the appraiser for the County Assessor and his opinion of taxable valuation of the subject property for 2009, \$168,110. The Taxpayer did not provide evidence of sales of alleged comparable parcels.

“ 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 to the county board of equalization or to the district court, and from the district court to this court, 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.” *Garvey Elevators, Inc. v. Adams County Bd. of Equal.*, 261 Neb. 130 (2001). 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 decisions of the County Board are unreasonable or arbitrary and the decisions of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decisions of the County Board determining taxable values of the parcels comprising subject property as of the assessment date, January 1, 2009, are affirmed.
2. Taxable value, for the tax year 2009, of each parcel described in an appeal as referenced by the Case No. is:

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Agricultural land \$ 168,110.00

Total \$ 168,110.00

3. 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).
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 March 2, 2011.

Signed and Sealed. March 2, 2011.

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.