

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

CHARLES P. KOKES,)	
Appellant,)	CASE NO. 02R-134
vs.)	DOCKET ENTRY AND ORDER
SARPY COUNTY BOARD OF EQUALIZATION,)	REVERSING THE DECISION OF THE COUNTY
Appellee.)	BOARD OF EQUALIZATION

The Nebraska Tax Equalization and Review Commission ("the Commission") called the above-captioned case for a hearing on the merits of the appeal on the 17th day of June, 2003. The hearing was held in the City of Lincoln, Lancaster County, Nebraska, pursuant to a Notice of Hearing issued March 7, 2003.

Commissioners Hans, Lore, Wickersham, and Reynolds heard the appeal. Commissioner Reynolds, Chair, presided at the hearing.

Charles P. Kokes ("the Taxpayer") appeared personally at the hearing. The Sarpy County Board of Equalization ("the Board") appeared through Gretchen McGill, Esq., Deputy Sarpy County Attorney. The Commission made certain documents a part of the record pursuant to Neb. Rev. Stat. §77-5016(5) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Commission also afforded each of the parties the opportunity to present evidence and argument pursuant to Neb. Rev. Stat. §77-5015(Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §8). Each Party was also afforded the opportunity to cross-examine witnesses of

the opposing party as required by Neb. Rev. Stat. §77-5016 (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).

Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002) requires that every final decision and order entered by the Commission which is adverse to a party be stated in writing or on the record and be accompanied by findings of fact and conclusions of law. The Commission received, heard and considered the exhibits, evidence and argument. Thereafter it entered its Findings of Fact, Conclusions of Law, and a Final Order on the merits of the appeal on the record. Those matters, in substance, are set forth below:

I.
STANDARD OF REVIEW

The Taxpayer, in order to prevail, is required to demonstrate by clear and convincing evidence that (1) the decision of the Board was incorrect, and (2) that the decision of the Board was unreasonable and arbitrary. *Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9)*. The Supreme Court has determined that the "unreasonable or arbitrary" standard requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) that the Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been

satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County was unreasonable.

Garvey Elevators, supra, 136, 523-524 (2001).

**II.
FINDINGS OF FACT**

The Commission, from the record before it, finds and determines as follows:

**A.
PROCEDURAL FINDINGS**

1. The Taxpayer is the owner of record of certain rural residential real property located in Sarpy County, Nebraska ("the subject property").
2. The Sarpy County Assessor ("the Assessor") proposed valuing the subject property in the amount of \$161,666 for purposes of taxation as of January 1, 2002 ("the assessment date") (E1.2).
3. The Taxpayer timely filed a protest of the proposed valuation and requested that the subject property be valued in the amount of \$37,000. (E1).
4. The protest alleged that the actual or fair market value of the subject property was adversely impacted by the presence of toxic mold. (E1:2).

5. The Board granted the protest in part and determined that the actual or fair market value of the subject property as of the assessment date was \$63,110. (E1:2).
6. Thereafter, the Taxpayer timely filed an appeal of the Board's decision to the Commission. (Appeal Form).
7. The Commission served a Notice in Lieu of Summons on the Board on September 16, 2002. The Board timely filed an Answer on September 30, 2002.
8. The Commission issued an Order for Hearing and Notice of Hearing on March 7, 2003. The Notice set the matter for a hearing on the merits of the appeal for June 17, 2003.
9. The Board valued the residential improvements at zero. The Taxpayer testified that the value of the land component of the subject property (\$37,000) was not at issue. The only issues before the Commission are the actual or fair market value of the pole barn (or "slant wall building"), well, septic system, and electrical system, which have an assessed value of \$26,110.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property is a tract of land approximately 2.5 acres in size which is legally described as the W½ of Tax Lot 2A2C, in Section 24, Township 13, Range 12, Sarpy

- County, Nebraska. (E23:1). The tract of land is improved with a single-family residence which was built in 1974.
2. A water valve located in the residence broke in 1998 while the Taxpayer was away from the property for an extended period of time. A significant amount of water built up in the home, and the house suffered extensive water damage. The damage to the structure was not properly repaired, and a toxic mold and fungus problem developed.
 3. The toxic mold and fungus grew in the attic and walls of the structure, which resulted in the house becoming uninhabitable. The Taxpayer testified that he was hospitalized as a result of this environmental contamination.
 4. The house has been uninhabitable, and consequently vacant, since December 10, 1998.
 5. The uncontroverted evidence also establishes that the water backed up into the septic system, and contaminated the top six inches of the soil surrounding the residential improvements, the well, and the "slant wall building."
 6. The uncontroverted evidence establishes that the electric loop is not owned by the Taxpayer.
 7. The uncontroverted evidence establishes that the estimated cost of partial remediation was approximately \$145,000 in 2000. This estimated remediation includes only the

following: the removal of the foundation and footings and turning the soil in order to remove the contaminated items. This cost does not include the costs of remediation for the residential structure. The uncontroverted evidence establishes that the total estimated cost of remediation in 2000 exceeded \$400,000.

8. The Taxpayer testified that in his opinion the subject property had a negative actual or fair market value as of the assessment date.
9. The uncontroverted evidence further establishes that the wood and metal "slant wall building" on the property is contaminated. The Replacement Cost New of this component of the subject property is \$9,000, and the economic depreciation factor is 6%. (E23:4). The Replacement Cost New of the concrete floor is \$2,720 with an economic depreciation factor of 6%.
10. The well/septic/electric service is shown as a "lump sum" on the Assessor's records. (E23:4). The Assessor testified that the Replacement Cost New of the well is \$5,750; the septic system is \$5,000; and the electric service is valued at \$5,250. The physical depreciation attributed to this "lump sum" is 6%.
11. "Actual value shall mean the market value or fair market value of real property in the ordinary course of trade. It

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 seller and willing buyer, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which it is capable of being used." *Title 350, Neb. Admin. Code, Chapter 10, Reg. 001.15.*

12. Neb. Rev. Stat. X76-2,120(2) (Reissue 1996) provides: "On or after January 1, 1995, each seller of residential real property located in Nebraska shall provide the purchaser with a written disclosure statement of the real property's condition." The Taxpayer is therefore required by state law to disclose to any potential purchaser the environmental contamination which existed as of January 1, 2002.
13. This disclosure will adversely impact actual or fair market value.
14. Title 442, Nebr. Admin. Code, Chap. 5, Reg. 035.02 (6/2003), states that pursuant to Neb. Rev. Stat. §77-5016(3), the Commission may consider and utilize a number of documents as part of its decision making process. One of the documents listed is the *Standard on the Valuation of Properties Affected by Environmental Contamination*, International Association of Assessing Officers, 1999. The Standard establishes that the Cost Approach, a professionally

accepted mass appraisal methodology, may be used to value contaminated property. The Standard further establishes that the Cost to Cure is considered as a form of functional or economic obsolescence and is added to the accrued depreciation. (*Standard on the Valuation of Property Affected by Environmental Contamination, IAAO, July, 2001, §6.2.1, p. 15.*)

15. The uncontroverted evidence establishes that the Cost to Cure exceeded the actual or fair market value of the subject property, including all improvements and land.
16. The Taxpayer has adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the County.
17. The Commission, based on the entire record before it, finds and determines that the actual or fair market value of the improvement component of the subject property as of the assessment date was zero.
18. The assessed value of the subject property for tax year 2000 as determined by the County (\$63,110) is not supported by the evidence.
19. The decision of the Board was both unreasonable and arbitrary.
20. That decision must therefore be vacated and reversed.

III.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the action of the County was unreasonable or arbitrary. *Neb. Rev. Stat. §77-5016(7) (Cum. Supp.2002, as amended by 2003 Neb. Laws, L.B. 291, §9)*. The Nebraska Supreme Court, in considering similar language, has held that "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. That 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." *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
3. The Supreme Court has also held that "In an appeal to the county board of equalization or to [the Tax Equalization and

Review Commission] and from the [Commission] 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 Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

4. "It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization." *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58 (Neb. 1991).
5. "It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it

is based." *Bottorf v. Clay Cty. Bd. Of Equal.*, 7 Neb. App. 162, 167, 580 N.W.2d 561, 565 (1998).

6. "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 Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
7. The appraisal of real estate is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N. W. 2d 872, 874 (1977).

**IV.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the Sarpy County Board of Equalization setting the assessed value of the subject property for tax year 2002 is vacated and reversed.
2. That the Taxpayer's residential real property legally described as the W3z of Tax Lot 2A2C, in Section 24, Township 13, Range 12, Sarpy County, Nebraska, shall be valued as follows for tax year 2002:

Land	\$37,000
Improvements	\$ -0-
Total	\$37,000

3. That any request for relief by any party not specifically granted by this order is denied.
4. That this decision, if no appeal is filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).
5. That this decision shall only be applicable to tax year 2002.
6. That each party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Lore made and entered the above and foregoing Findings and Orders in this appeal on the 17th day of June, 2003. The same were approved and confirmed by Commissioners Hans and Wickersham, and are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Cum. Supp. 2002).

Signed and sealed this 18th day of June, 2003.

SEAL





Mark P. Reynolds, Chair