

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

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| SHONA ELLEN HEIM, |) | |
| |) | |
| Appellant, |) | CASE NO. 02R-135 |
| |) | |
| vs. |) | FINDINGS AND ORDER |
| |) | AFFIRMING THE DECISION OF THE |
| CHASE COUNTY BOARD OF |) | CHASE COUNTY BOARD OF |
| EQUALIZATION, |) | EQUALIZATION |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Shona Ellen Heim to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the meeting room of the Hampton Inn, 200 Platte Oasis Parkway, in the City of North Platte, Lincoln County Nebraska. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Shona Ellen Heim ("the Taxpayer") appeared at the hearing. Steven M. Virgil, Esq., appeared as counsel for the Taxpayer.

The Chase County Board of Equalization ("the County Board") appeared through counsel, Arlan G. Wine, Esq., the County Attorney for Chase County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002) 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.
STANDARD OF REVIEW**

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. § 77-5016(7) (Cum. Supp. 2002, as amended Neb. Laws, L.B. 291 § 9). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524, (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc v. Adams County Bd. of Equalization* , 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 Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524, (2001).

**II.
FINDINGS**

The Commission finds and determines that:

**A.
PROCEDURAL FINDINGS**

1. The Taxpayer is the owner of record of certain improved real property described in the appeal as S½ Section 35, Township 6 North, Range 39 West, 6th PM, Chase County, Nebraska ("the subject property").
2. Eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural and horticultural land and improvements which together constitute the subject property, placed on the assessment roll as of January 1, 2002, ("the assessment date") by the Chase County Assessor was:

| | |
|-------------------|----------------------|
| Ag land value | \$ 98,103.00 |
| Farm site value | \$ 1,950.00 |
| Home site value | \$ 2,650.00 |
| Improvement value | <u>\$ 32,148.00</u> |
| Total value | <u>\$134,851.00.</u> |
3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

| | |
|-------------------|----------------------|
| Land value | \$102,703.00 |
| Improvement value | <u>\$ 16,074.00</u> |
| Total value | <u>\$118,777.00.</u> |

4. The County Board denied the protest. (E:1)
5. The Taxpayer timely filed an appeal of that decision to the Commission.
6. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.
7. A Notice and Order for Hearing issued on April 14, 2003, set a hearing of the Taxpayer's appeal for July 30, 2003, at 10:00 am CDST.
8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property consists of 320 acres with a residence and farm outbuildings.
2. The subject property is near two confinement hog feeding facilities; one is one mile southeast of the subject property, and the other is one mile southwest of the subject property.
3. The Taxpayer testified that the subject property is "homestead" property owned by her, her sister, and brother.

The Taxpayer testified that it is the desire of the family to keep the property in the family.

4. Lagoons for storage and degrading effluent are present at each confinement hog feeding facility. Each lagoon is designed to hold 1,000,000 gallons of effluent.
5. Effluent is piped from the lagoons and spread on fields with irrigation equipment.
6. One of the fields on which effluent is sprayed is adjacent to the subject property. Effluent is sprayed on the road adjacent to the subject property and the mail box serving the subject property.
7. The Taxpayer testified that she has been hospitalized with an erysipelas infection. The Taxpayer believes her illness results from the spraying of effluent on the road and her mailbox.
8. The Taxpayer testified that 300 square feet of screened porches on the subject property residence are no longer usable for family picnics or sleeping due to odors from the lagoons and sprayed effluent.
9. The Taxpayer testified that there are four vacant homes within two miles of the confinement hog feeding facilities and to her knowledge no sales of property within that area after the facilities were constructed and began operation in 1998 and 1999.

10. The Taxpayer testified that in her opinion the improvements on the subject property had an actual or fair market value of \$16,074 as of January 1, 2002 a 50% reduction in actual or fair market value compared to the actual or fair market value adopted by the County Board.
11. Exhibit 5 is a letter describing efforts to sell a residence near the subject property and the confinement hog feeding facilities.
12. The Exhibit 5 property was appraised for \$96,000.00. (E5:1). It was listed for \$97,500. (E5:1). An offer of \$82,000 was received and rejected. (E5:1).
13. The offer received for the Exhibit 5 property is 84% of the listing price, a 16% discount. Exhibit 5 does not support the Taxpayer's contention that a 50% discount should be applied to the actual or fair market value of the subject property improvements due to proximity to confinement hog feeding facilities.
14. That "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, p. 98.
15. The property record card for the property described in Exhibit 5 was not furnished to the Commission, making it

- impossible to determine whether the residence on that property is comparable to residence on the subject property.
16. The value of the land component of the subject property at \$102,703 is not disputed.
 17. The Assessor testified that the value of improvements on the subject property was determined through a reappraisal conducted in 2001 by a contract appraiser and implemented in 2002.
 18. The Assessor testified that the contract appraiser had been asked to determine whether any additional depreciation should be deducted from the value of buildings near the confinement hog feeding facilities. The Assessor further testified that additional depreciation was not deducted because without sales of property that might be affected, a deduction could not be quantified.
 19. The Assessor did not inspect the improvements on the subject property as a part of the valuation process for the tax year 2002.
 20. The Taxpayer has adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board due to a failure to inspect. The Taxpayer has not however presented any evidence to quantify a reduction in value.

21. Based on the entire record before it, the Commission finds and determines that eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural land and horticultural land and improvements which together constitute the subject property for the tax year 2002 is:

| | |
|-------------------|----------------------|
| Ag land value | \$ 98,103.00 |
| Farm site value | \$ 1,950.00 |
| Home site value | \$ 2,650.00 |
| Improvement value | <u>\$ 32,148.00</u> |
| Total value | <u>\$134,851.00.</u> |

22. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.

23. The decision of the County Board was correct and neither arbitrary nor unreasonable.

24. The decision of the County Board should be affirmed.

**III.
CONCLUSIONS OF LAW**

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998)

2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commissions rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).
4. 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) (2002 Cum. Supp.).
5. Agricultural land and horticultural land shall be valued for taxation at eighty percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2002).
6. Agricultural land and horticultural land means land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or management with land used for the production of agricultural or horticultural products. Land retained or protected for future agricultural or horticultural uses under a conservation easement as provided in the Conservation and Preservation Easements Act shall be defined as agricultural land or

horticultural land. 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. Land that is zoned predominantly for purposes other than agricultural or horticultural use shall not be assessed as agricultural land or horticultural land. Neb. Rev. Stat. §77-1359 (1) (2002 Cum. Supp.).

7. Agricultural or horticultural products include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops. Neb. Rev. Stat. §77-1359 (2) (2002 Cum. Supp.).
8. "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 (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 292 §4).

9. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 292 §4).
10. "Actual value, market value, and fair market value mean exactly the same thing." *Richards v. Board of Equalization*, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965).
11. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws 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 Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

12. 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).

13. The term "unreasonable" can be applied to a decision of an administrative agency 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).

14. The 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).
15. "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).
16. "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, (1991).
17. "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).
18. The Nebraska Supreme Court has determined that "(w)here the county assessor does not act upon his own information, or

does not make a personal inspection of the property, any presumption as to the validity of the official assessment does not obtain." *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966).

19. Proximity to confinement hog feeding facilities has an effect on the fair market value. Quantification of the effect is a matter of proof. *Livingston V. Jefferson County Board of Equalization*, 10 Neb.App, 934, 640 N.W.2d 426 (2002).

IV. DISCUSSION

The Taxpayer offered proof of proximity to confinement hog feeding operations, the resulting odors, an illness believed to be a result of spraying effluent, and the lifestyle changes made at the residence on the subject property necessary to compensate for the odors. It is rational to believe odors described by the Taxpayer would have an adverse effect on the actual or fair market value of the subject property as used for residential purposes. There are, however, two requirements before a change in actual or fair market value could be granted. The first requirement is proof that a factor affecting actual or fair market value has occurred. The second requirement is a quantification of the effect of the factor. The Taxpayer's

opinion that a 50% reduction should be made to the actual or fair market value of the residence and farm outbuildings was not supported by analysis of sales of comparable property or the opinions of others. The only other evidence offered by the Taxpayer which could be deemed to quantify a discount to actual or fair market value, Exhibit 5, supported a 16% discount from the seller's asking price. The Taxpayer testified that no sales of residences had occurred within two miles of the confinement hog feeding operations preventing a quantification of the effect of the impact on actual or fair market value of the subject property. A failure of proof for whatever cause has the same effect, no adjustment can be made.

**IV.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the decision of the County Board determining eighty percent of the actual or fair market value of the agricultural land and horticultural land, together with the actual or fair market value of real property other than agricultural land and horticultural land, and improvements which together constitute the subject property as of the assessment date, January 1, 2002 as follows:

| | |
|-------------------|---------------------|
| Ag land value | \$ 98,103.00 |
| Farm site value | \$ 1,950.00 |
| Home site value | \$ 2,650.00 |
| Improvement value | <u>\$ 32,148.00</u> |
| Total value | <u>\$134,851.00</u> |

is affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Chase County Treasurer, and the Chase County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002).
3. That any request for relief, by any party, which is not specifically provided for by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2002.

6. This order is effective for purposes of appeal September 5, 2003.

IT IS SO ORDERED.

Dated September 5, 2003.

Wm. R. Wickersham, Vice-Chair

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

SEAL