

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

JOHN E. BOSTIC,)	
)	
Appellant,)	CASE NO. 04R-99
)	
vs.)	FINDINGS AND ORDER AFFIRMING
)	THE DECISION OF THE PHELPS
PHELPS COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by John E. Bostic to the Tax Equalization and Review Commission ("the Commission"). The hearing was held at the Holiday Inn Express, 508 S. 2nd Street in the City of Kearney, Buffalo County Nebraska on July 28, 2005 pursuant to a Notice and Order for Hearing issued May 10, 2005. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

John E. Bostic ("the Taxpayer") appeared at the hearing. The Phelps County Board of Equalization ("the County Board") appeared through counsel, Timothy E. Hoeft, the County Attorney for Phelps County Nebraska. The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2003) to state its final decision concerning an appeal, with findings of fact and 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 appellant, in order to prevail, is required to demonstrate by clear and convincing evidence that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. 77-5016(8)(Cum. Supp. 2004). The presumption created by the statute can be overcome if the appellant 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).

II. FINDINGS

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain residential real property described in the appeal as Lot 3 Block 4, Bertrand Second Addition, Phelps County, Nebraska ("the subject property").
2. The actual or fair market value as of January 1, 2004, ("the assessment date") placed on the assessment roll for the subject property by the Phelps County Assessor was:

Land value	\$ 7,840.00
Improvement value	<u>\$28,930.00</u>
Total value	<u>\$36,770.00.</u>

3. The Taxpayer timely protested that value to the County Board. The taxpayer proposed the following value:

Total value	<u>\$14,000.00.</u>
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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 Summons.
7. A Notice and Order for Hearing was issued on May 10, 2005, which set a hearing of the Taxpayer's appeal for July 28, 2005, at 3:00 p.m. 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.
9. That the subject property, described in the appeal as Lot 3, Block 4, Bertrand Second Addition, Phelps County, Nebraska, is owned by the Taxpayer.
10. The Taxpayer left the hearing after the Commission received Exhibits.
11. The County Board moved to dismiss for failure to overcome the statutory presumption in favor of the County.
12. That the Taxpayer has not adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the County.

13. The assessed or taxable value of the subject property as of the assessment date determined by the County is supported by the evidence.
14. The decision of the County Board was correct and neither arbitrary nor unreasonable.
15. 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 Board 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. 2004).
4. The taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8)(Cum. Supp. 2004). 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).

5. 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 County Bd. of Equalization v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
6. 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 County Bd. of Equalization.*, 258 Neb 390, 603 N.W.2d 447, (1999).
7. 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 Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).
8. "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).

9. “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).

IV. ANALYSIS

The only Exhibit received in support of the Taxpayer's appeal was the form for protest to the County Board, Form 422. (E:1). The Taxpayer objected to the Commission's adherence to the presumption in favor of the County Board's decision and left the hearing without producing testimony in support of his appeal. Allegations on the Form 422 and the appeal form are an insufficient basis for the Commission to determine that the County Board's decision was incorrect and unreasonable or arbitrary.

V. ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the County Board determining actual value for the subject property as of the assessment date, January 1, 2004, is affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Phelps County Treasurer, and the Phelps County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2003).
3. That any request for relief by any party not specifically granted 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 2004.
6. This order is effective for purposes of appeal August 3, 2005.

IT IS SO ORDERED.

Dated August 3, 2005.

Wm. R. Wickersham, Chairperson

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

SEAL

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW IN NEBRASKA REVISED STATUTE §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS L.B. 15 §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.