

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

JAMES H. DUNKER,)	
)	
Appellant,)	CASE NO. 04R-75
)	
vs.)	
)	
BROWN COUNTY BOARD OF)	FINDINGS AND FINAL ORDER
EQUALIZATION,)	DISMISSING APPEAL
)	AT THE CLOSE OF THE
)	TAXPAYER'S CASE-IN-CHIEF
Appellee.)	

SUMMARY OF DECISION

James H. Dunker appeals the Brown County Board of Equalization's order denying the Taxpayer's 2004 valuation protest alleging improper classification as non-agricultural property. The Board moved to dismiss the Taxpayer's appeal for failure to adduce any evidence that the Board's decision was incorrect, and either unreasonable or arbitrary.

**I.
ISSUES**

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's valuation protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

**II.
STATEMENT OF THE CASE**

The Taxpayer owns a 76.63 acre tract of land legally described as Part of the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 6, Township 29, Range

20, Brown County, Nebraska. (E7:1). The tract of land is unimproved. (E7:1).

The Assessor determined that the subject property's actual or fair market value was \$53,310 as of the January 1, 2004, assessment date. (E1). The Taxpayer timely protested that determination and alleged that the subject property was agricultural land which should be valued at 77% of the subject property's actual or fair market value (\$41,049). (E1). The Brown County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayer appealed the Board's decision on August 20, 2004. The Commission served a Notice in Lieu of Summons on the Board on August 30, 2004, which the Board answered on September 23, 2004. The Commission issued an Order for Hearing and Notice of Hearing on February 2, 2005. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Norfolk, Brown County, Nebraska, on May 24, 2005. The Taxpayer appeared personally at the hearing. The Board appeared through David M. Streich, the Brown County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Wickersham served as the presiding officer.

III.
APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV.
FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer purchased the subject property in 2002 primarily for recreational purposes, and only later considered possible agricultural uses.
2. The subject property's only agricultural use was one cutting of hay on approximately 30% of the property in 2003.

V.
ANALYSIS

Non-agricultural real property must be valued for purposes of real property taxation at actual or fair market value. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004). Agricultural real property is defined as:

(1) Agricultural land and horticultural land shall mean 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; (2) Agricultural or horticultural products shall 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. §77-201(2) (Cum. Supp. 2004); Neb. Rev. Stat. §77-1359 (Reissue 2003). Agricultural real property must be valued at 80% of actual or fair market value. Neb. Rev. Stat. §77-201 (Cum. Supp. 2004).

The Board determined that the subject property is "recreational" property. Recreational property is defined as:

". . . all parcels of real property predominately used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. Some of the uses would include fishing, hunting, camping, boating, hiking, picnicking, and the access or view that simply allows relaxation, diversion and entertainment."

Title 350, Neb. Admin. Code, ch. 10, §001.05E (03/2004).

The threshold question presented is whether the subject property was used for agricultural or horticultural uses as of the January 1, 2004, assessment date. The Taxpayer contends that the property was "hayed" once in 2003. The Taxpayer testified that no one could be found to hay the property in 2004. The Taxpayer alleges that this use is a qualifying agricultural use.

The Taxpayer admits that the property was purchased primarily for recreational purposes. The Taxpayer testified that for 75 to 80% of the 15 to 20 days he is in the area each year he uses the property for hunting; fishing; hiking; that a "trailer" was placed on the property but was removed after being infested with rodents, and that the co-owners have camped on the property. (E5:2; E8:2). From this record the Taxpayer's predominant use of the subject property is for recreational purposes. The Taxpayer has failed to adduce any evidence that the Board's decision was incorrect and either unreasonable or arbitrary.

The Board, based upon the applicable law, need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was [incorrect and either] unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998); Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004).

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over 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 Board's action was incorrect and either unreasonable or

arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).

3. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted upon sufficient competent evidence to justify its decisions. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's value becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
4. "Actual value" is defined as the market value of real property in the ordinary course of trade, or 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 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. Neb. Rev. Stat. §77-112 (Reissue 2003).
5. The Taxpayer has failed to adduce any evidence that the Board's decision was incorrect and either unreasonable or

arbitrary. The Board's Motion to Dismiss must accordingly be granted.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Board's Motion to Dismiss is granted.
2. The Brown County Board of Equalization's Order setting the subject property's 2004 assessed value is therefore final.
3. The Taxpayer's real property legally described as Part of the W $\frac{1}{2}$ NE $\frac{1}{4}$, Section 6, Township 29, Range 20, Brown County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board:

Land	\$53,310
Improvements	\$ -0-
Total	\$53,310

4. Any request for relief by any Party not specifically granted by this Order is denied.
5. This decision, if no appeal is filed, shall be certified to the Brown County Treasurer, and the Brown County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
6. This decision shall only be applicable to tax year 2004.
7. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Hans made and entered the above and foregoing Findings and Orders in this appeal on the 24th day of May, 2005. The same were approved and confirmed by Commissioners Lore, Reynolds and Wickersham and are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §7).

Signed and sealed this 25th day of May, 2005.

SEAL

Wm. R. Wickersham, Chair

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 APPEAL 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.

PLEASE NOTE: You will only be notified of a change in assessed value for your property for tax year 2005 if the 2005 assessed value differs from the 2004 assessed value as determined by your Assessor or County Board of Equalization. The Commission's decision has no impact on that determination. You should contact your Assessor's Office after March 19, 2005, to determine your property's assessed value for 2005. If you are unsatisfied with that value, you must file a protest on or after June 1, and before July 1, 2005. If you fail to file a protest, there can be no change to the Assessor's determination of the 2005 assessed value for your property.