

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

KENT & BURKE COMPANY,)	
A Nebraska Corporation,)	
)	CASE NO. 04A-111
Appellant,)	04A-112
)	04A-113
vs.)	
)	FINDINGS AND FINAL ORDER
MERRICK COUNTY BOARD OF)	AFFIRMING DECISION OF THE
EQUALIZATION,)	COUNTY BOARD OF EQUALIZATION
)	
Appellee.)	

SUMMARY

Kent & Burke Company ("the Corporation") owns three tracts of agricultural land in Merrick County, Nebraska. The Corporation protested the Merrick County Assessor's ("the Assessor's") proposed 2004 values for each tract of land to the Merrick County Board of Equalization ("the Board"). The Board denied each of the Corporation's protests, and the Corporation appealed.

**I.
ISSUES**

The issues before the Commission are (1) whether the Board's decisions to deny the Corporation's valuation protests were incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determinations of values were unreasonable.

**II.
STATEMENT OF THE CASE**

The Corporation owns three tracts of agricultural land in Merrick County, Nebraska. The Corporation, in Case Number 04A-111, owns a 616.16 acre tract of land legally described as the E $\frac{1}{2}$ & NW $\frac{1}{4}$ & SW $\frac{1}{4}$ of Section 2, Township 16, Range 3, Merrick County, Nebraska. (E4:11). The Corporation, in Case Number 04A-112, owns a 615.36 acre tract of land legally described as All of Section 4, Township 16, Range 3, in Merrick County, Nebraska. (E4:12). The Corporation, in Case Number 04A-113, owns a 615.74 acre tract of land legally described as All of Section 3, Township 16, Range 3, in Merrick County, Nebraska. (E4:13).

The Assessor's determination of 80% of actual or fair market value as of the January 1, 2004 assessment date, the Corporation's requested value and the Board's determination of 80% of actual or fair market value for each tract of land is set forth below.

Case No.	# of Acres	Assessor's Value (at 80%)	Corp.'s Request (at 80%)	Board's Value (at 80%)	Exhibit
04A-111	616.16	\$265,700	\$204,085	\$265,700	E1
04A-112	615.30	\$262,360	\$206,725	\$262,360	E2
04A-113	615.74	\$270,440	\$209,065	\$270,440	E3
Total	1,847.20	\$798,500	\$619,875	\$798,500	
\$/acre		\$432	\$336	\$432	

The Corporation appealed each of the Board's decisions on August 24, 2004. The Commission served a Notice in Lieu of Summons on the Board which the Board answered. The Commission consolidated each of the pending appeals for purposes of hearing, and issued an Order for Hearing, Notice of Hearing and Amended Orders and Notices. An Affidavit of Service in the Commission's records establishes that a copy of each Order and Notice was served on each of the Parties.

The Commission, pursuant to the Fourth Amended Order for Hearing and Notice of Hearing, called the consolidated case for a hearing on the merits of the appeals on August 18, 2005. That hearing was recessed, and reconvened in the City of Lincoln, Lancaster County, Nebraska, on November 17, 2005. The Corporation appeared at each hearing through counsel, Robert Sullivan, Esq., and through Edward L. Burke, III, the Corporation's President. The Board appeared at each hearing through Steven M. Curry, Esq., the Merrick County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Wickersham served as the presiding officer.

III. APPLICABLE LAW

The Corporation is required to demonstrate by clear and convincing evidence (1) that the Board's decisions were incorrect and (2) that the Board's decisions were either unreasonable or

arbitrary. (Neb. Rev. Stat. §77-5016(7) (Supp. 2005). 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 Corporation, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board’s values were 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 Appraisal offered on behalf of the Corporation was not clear and convincing evidence of actual or fair market value of the subject property as of the January 1, 2004, assessment date.
2. The opinion of value offered by the President and sole shareholder of the Corporation was not clear and convincing evidence of 80% of actual or fair market value for the subject property as of the assessment date.

V.
ANALYSIS

The only issue before the Commission as stated by counsel for the Corporation is the actual or fair market value of the subject property as of the January 1, 2004, assessment date.

The Corporation's Protests alleged that the "Proposed 30% increase [over the prior year's assessment] is unjustified . . ." (E1 - E3). The market value of real property usually changes from year to year. Changes made to the property since the last assessment will usually affect market value. Occasionally, the prior assessed value may be shown to be incorrect. The prior year's assessed value is therefore not relevant evidence of actual or fair market value in a subsequent year. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988). If the base for calculation of a percentage change is not relevant evidence then any calculation based on it cannot be relevant evidence. The percentage change in assessed value from year to year is therefore not relevant evidence that the current assessed value is incorrect and either unreasonable or arbitrary.

The Corporation also alleged that the proposed values exceeded the assessed values of comparable properties in adjoining counties. (E1 - E3). The only evidence of assessed values of "comparable" properties in adjoining counties appears

in Exhibit 5 at page 17. Under professionally accepted mass appraisal methods, no two sections of land are exactly alike. "They might be identical in size and physical characteristics, but each parcel has a unique location and is likely to differ from other parcels in some way. Typical differences requiring adjustments are in time of sale, location, and physical characteristics." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 76. Nothing in the record establishes whether or not these "comparable" properties in an adjoining county are truly comparable to the subject property. The subject property's actual or fair market value may be established using assessed values of "comparable" properties. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998). This methodology, however, requires a taxpayer to demonstrate by clear and convincing evidence that the properties offered as "comparables" are truly comparable and that the assessed values of the properties represent actual or fair market value. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998); *Westgate Recreation Ass'n v. Papio-Missouri River Natural Resources Dist.*, 250 Neb. 10, 17, 547 N.W.2d 484, 492 (1996). Mere assertions that the assessed value of the subject property is wrong and that

the assessed values of "comparable" properties are right does not satisfy the burden imposed on the complaining taxpayer.

Nothing in the record establishes the relationship of these values to actual or fair market value as of January 1, 2004.

These values do not rise to the level of clear and convincing evidence of the actual or fair market value of the subject property as of the assessment date.

The Corporation's evidence of value also includes opinion testimony from the Corporation's President. The Corporation's President testified that in his opinion the subject property's actual or fair market value was \$330 per acre as of the assessment date for the land in Case Numbers 04A-111 and 04A-113 and \$350 per acre for the land in Case Number 04A-112. A corporate officer or president is not, as such, qualified to testify as to value of corporate property. In order to qualify, he or she must be shown to be familiar with the property and have a knowledge of values generally in the vicinity. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 813 - 814, 638 N.W.2d 877, 881 (2002). The Corporation's President holds 100% of the outstanding shares of the Corporation. The Corporation's President has held these shares since 1988. The Corporation's President was directly involved in the acquisition of some of the subject property. The Corporation acquired the tract of land in Case Number 04A-111 in 1998 for \$292,676, or

approximately \$475 per acre, as part of a federal Internal Revenue Service §1031 exchange. The Corporation's President is, therefore, familiar with the property.

The Corporation's President testified that he has not bought or sold any other agricultural pastureland in Merrick or Platte Counties since 1998. The Corporation's President testified that his opinion of value was in part based on an average of "values" of pastureland. The Corporation's President offered no evidence correlating this "average" value to actual or fair market value or assessed value. Assuming without deciding that this "average" value and the purchase price paid in a Section 1031 Exchange in 1998 constitutes knowledge of the value of the subject properties, this opinion testimony, standing alone, does not establish that the Board's decision was incorrect, or unreasonable or arbitrary, or that the Board's determination of 80% of actual or fair market value was unreasonable.

The Corporation's evidence of value also included opinion testimony from an appraiser credentialed by the State of Nebraska. The Corporation's Appraiser testified that in his opinion the subject property's actual or fair market value was \$471,000 as of October 1, 2004. (E5:3). The Corporation's Appraiser testified that he did not know that his appraisal was to be considered by the Commission. The Commission is not, therefore an "intended user" of the report as defined by *USPAP*.

This lack of knowledge may explain discrepancies in the reporting of the Appraiser's opinion of actual or fair market value.

The Corporation's Appraiser alleged that his appraisal was "made in conformity with and is subject to the requirements of the Code of Professional Ethics and Standards of Professional conduct of licensed appraisers." (E5:33). The Appraiser's Report, however, fails to comply with Standard 2 of the *Uniform Standards of Professional Appraisal Practice* published by the Appraisal Foundation in 2004, pp. 22 - 32. The Appraisal Report fails to establish the type of report (Self-Contained, Summary, or Restricted); fails to disclose the intended user(s); fails to disclose sufficient information to the intended users of the scope of work used to develop the appraisal; and fails to include the required 9-part certification. *USPAP*, pp. 31.

The Appraiser's opinion of value is based on all three approaches to value: the Sales Comparison Approach, the Cost Approach and the Income Approach. The Appraiser's Sales Comparison Approach is based on two sales. (E5:13). One of the sales occurred on March 17, 2004, more than three months after the assessment date. This sale, may or may not, have been an arm's-length transaction. The Corporation's Appraiser admitted that he had not reviewed the Form 521 for the transaction, and further that he had no independent knowledge of whether the transaction was an arm's-length transaction.

The Corporation's Appraiser used one other sale as a "comparable" property. This sale occurred during the month of January, 2003. That sale involved a 228.62 acre tract of land which, according to the Appraisal Report, sold for \$573 per acre. (E4:14; E5:14). The Appraiser reduced the sale price by 21% for size; by \$100 per acre for location; by \$100 per acre for "Land Quality;" and increased the per acre sale price by \$8 per acre for "improvements." (E5:14). The net effect of these adjustments reduced the per acre sale price by 55%.

The subject property's actual or fair market value may be established using prices paid for "comparable" properties. See, e.g., *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998). This methodology, however, requires a taxpayer to demonstrate by clear and convincing evidence that the properties offered as "comparables" are truly comparable to the subject property. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998); *Westgate Recreation Ass'n v. Papio-Missouri River Natural Resources Dist.*, 250 Neb. 10, 17, 547 N.W.2d 484, 492 (1996). The magnitude of the net adjustments to this sale, 55%, establishes that the property which is the subject of the second sale is not truly comparable to the subject property. The Corporation's Appraiser's indicated value derived from the Sales Comparison Approach is not,

therefore, clear and convincing evidence of the subject property's actual or fair market value as of January 1, 2004.

The Appraiser also derived indicated values for the subject property using the Cost Approach and the Income Approach. The appraisal report contain no information establishing the basis for any of the factors used. The Appraiser's opinions of actual or fair market value derived under these approaches do not rise to the level of clear and convincing evidence of the subject property's actual or fair market value as of the January 1, 2004, assessment date.

The Corporation has failed to adduce any clear and convincing evidence that the Board's decisions were either incorrect, or either unreasonable or arbitrary, or that the Board's determination of values were unreasonable. The Board's decisions must accordingly be affirmed. *Garvey Elevator, supra.*

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) (Supp. 2005).

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 Corporation 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 Corporation. *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 opinion of an expert witness is no stronger than the facts upon which it is based. *Bottorf v. Clay County Bd. Of Equal.*, 7 Neb.App. 162, 167, 580 N.W.2d 561, 565 (1998).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Merrick County Board of Equalization's Orders setting the subject property's 2004 assessed values are affirmed.
2. The Corporation's real property in Case Number 04A-111 legally described as the E $\frac{1}{2}$ & NW $\frac{1}{4}$ & SW $\frac{1}{4}$ of Section 2, Township 16, Range 3, Merrick County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board:

Land	\$265,700
Improvements	\$ -0-
Total	\$265,700

3. The Corporation's real property in Case Number 04A-112 legally described as All of Section 4, Township 16, Range 3, Merrick County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board:

Land	\$262,360
Improvements	\$ -0-
Total	\$262,360

4. The Corporation's real property in Case Number 04A-113 legally described as All of Section 3, Township 16, Range 3, Merrick County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Board:

Land	\$270,440
Improvements	\$ -0-
Total	\$270,440

5. Any request for relief by any Party not specifically granted by this Order is denied.
6. This decision, if no appeal is filed, shall be certified to the Merrick County Treasurer, and the Merrick County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Supp. 2005).
7. This decision shall only be applicable to tax year 2004.
8. 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 17th day of November, 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) (Supp. 2005) .

Signed and sealed this 18th day of November, 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 (Supp. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.