

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

MIDWEST HOMESTEAD OF HASTINGS,)		
LLC,)		
)	Case No 05C-224
Appellant,)		
)	DECISION AND ORDER AFFIRMING
v.)		THE DECISION OF THE ADAMS
)	COUNTY BOARD OF EQUALIZATION
ADAMS COUNTY BOARD OF)		
EQUALIZATION,)		
)	
Appellee.)		

The above-captioned case was called for a hearing on the merits of an appeal by Midwest Homestead of Hastings, LLC (“the Taxpayer”) to the Tax Equalization and Review Commission (“the Commission”). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on November 22, 2006, pursuant to an Order for Hearing and Notice of Hearing issued June 16, 2006. Commissioners Wickersham, Warnes, and Hans were present. Commissioner Wickersham presided at the hearing.

Michael D. Tryon, as CFO of the Taxpayer, was present at the hearing without legal counsel.

The Adams County Board of Equalization (“the County Board”) appeared through legal counsel, Charles A. Hamilton, a Deputy County Attorney for Adams County, Nebraska.

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Supp. 2005) to state its final decision and order 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.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2005, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Was the decision of the County Board determining actual value of the subject property unreasonable or arbitrary?

What was actual value of the subject property on January 1, 2005?

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer is the owner of record of certain real property described as Lot 1, Imperial Village 8th Addition, Hastings, Adams County, Nebraska, ("the subject property").
2. Actual value of the subject property placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Adams County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lot 1, Imperial Village 8th Addition , Hastings, Adams County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$ 109,205.00	\$ 109,205.00	\$ 109,205.00
Improvement	\$2,037,795.00	\$1,672,000.00	\$1,940,795.00
Total	\$2,147,000.00	\$1,781,205.00	\$2,050,000.00

3. An appeal of the County Board's decision was filed with the Commission.
4. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
5. An Amended Order for Hearing and Notice of Hearing issued on June 16, 2006, set a hearing of the appeal for November 22, 2006, at 9:00 a.m. CST.
6. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Taxable value of the subject property as of the assessment date for the tax year 2005 is:

Land value	\$ 109,205.00
Improvement value	<u>\$1,940,795.00</u>
Total value	<u>\$2,050,000.00.</u>

**III.
APPLICABLE LAW**

1. “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 (Reissue 2003).

2. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of qualified agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
8. The presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action remains until there is competent evidence to the contrary presented, and

the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

9. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted)
10. The Commission can grant relief only if the Taxpayer establishes by clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See. Neb. Rev. Stat. §77-5016 (7) (Supp. 2005).
11. "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).
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. A decision is unreasonable 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. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb. App. 809, 638 N.W.2d, 881 (2002).

IV. DISCUSSION

The subject property is a 35 unit assisted living facility completed in 1998. (E15 and 16). The subject property was purchased by the Taxpayer in 2001 for \$2,050,000.00. (E17). The Taxpayer and the seller allocated the 2001 selling price between land, building personal property, good will, a covenant not to compete and inventory as shown in Exhibit 3 at page 1. The Taxpayer's CFO testified that the allocation was made taking into account competing income tax considerations of the Taxpayer and the seller. The Taxpayer's CFO also testified that the allocation was made without regard to an appraisal of the subject property at the time of acquisition. Personal property in the amount of \$17,105.75 has been acquired subsequent to the purchase. (E4:6). The estimate of actual value for the subject property given by the Taxpayer's CFO at the hearing was \$1,922,000.00, roughly the 2001 sale price less \$110,000.00 of personal property as allocated by parties at time of purchase and subsequent acquisitions ($\$2,050,000 - \$127,105.75 = \$1,922,895.25$). The Taxpayer's CFO asserted that if personal property was not subtracted out then the result was double taxation. That assertion ignores the fact that the purchase price of personal property may not represent its actual value either on the date of purchase or in this case almost 4 years later. See. *Forney v. Box Butte County Bd. of*

Equalization, 7 Neb.App. 417, 582 N.W.2d 631, (1998). The calculation urged by the Taxpayer's CFO is effectively an abandonment of any argument that the values for land and building as determined by the parties in 2001 have any relevance to their actual value on January 1, 2005. No other evidence of actual value was presented by the Taxpayer.

The County Board like the Taxpayer relied on a transaction that occurred almost 4 years prior to January 1, 2005. As noted that is scant evidence of actual value as of January 1, 2005.

The evidence presented by the Taxpayer is not clear and convincing evidence of actual value as of January 1, 2005. The Commission cannot grant relief. See. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518, (2001).

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. Subject matter jurisdiction of the Commission in this appeal 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).
3. The Commission has jurisdiction over the parties to this appeal.

**VI.
ORDER**

IT IS THEREFORE ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2005, is affirmed.

2. Taxable value of the subject property for the tax year 2005 is:

Land value	\$ 109,205.00
Improvement value	<u>\$1,940,795.00</u>
Total value	<u>\$2,050,000.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Adams County Treasurer, and the Adams County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).

4. Any request for relief, by any party, which is not specifically provided for by this order is denied.

5. Each party is to bear its own costs in this proceeding.

6. This decision shall only be applicable to tax year 2005.

7. This order is effective for purposes of appeal December 4, 2006.

Signed and Sealed. December 4, 2006.

Wm. R. Wickersham, Commissioner

Robert L. Hans, Commissioner

William C. Warnes, 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 CONTAINED IN NEB. REV. STAT. §77-5019 (SUPP. 2005). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.