

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

NORHI INVESTMENT CORP.,)	
)	
Appellant,)	CASE NO. 05R-013
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
DOUGLAS COUNTY BOARD OF)	DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Norhi Investment Corp., 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 January 5, 2006, pursuant to a Notice and Order for Hearing issued October 27, 2005, amended December 23, 2005. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Mr. Thomas Hilt, a Vice President of Norhi Investment Corp., appeared at the hearing on behalf of Norhi Investment Corp. ("the Taxpayer") without counsel.

The Douglas County Board of Equalization ("the County Board") appeared through counsel, James R. Thibodeau, Esq., a Deputy County Attorney for Douglas 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 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(8)(Supp. 2005). 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:

1. The Taxpayer is the owner of record of certain real property described in the appeal as Lot 111, Block O Irreg., Linden Estates, Omaha, Douglas County, Nebraska ("the subject property").

2. The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Douglas County Assessor was:

Land value	\$110,500.00
Improvement value	<u>\$ 76,100.00</u>
Total value	<u>\$186,600.00.</u>

3. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

Total value	<u>\$150,000.00.</u> (E4:4)
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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 Notice.
- 7. An Order for Hearing and Notice of Hearing issued on October 27, 2005, and amended December 23, 2005, set a hearing of the Taxpayer's appeal for January 5, 2006, at 9:00 a.m. CST.
- 8. 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.
- 9. The Taxpayer has adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
- 10. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for the tax year 2005 as determined by the County Board as:

Land value	\$110,500.00
Improvement value	<u>\$76,100.00</u>
Total value	<u>\$186,600.00.</u>

represents the only probative evidence of taxable value before the Commission

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 Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016 (3) (Supp 2005).
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) (Cum. Supp. 2004).
5. “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).

6. 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 (Reissue 2003).
7. “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).
8. 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) (Supp 2005). 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).
9. 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).

10. 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).
11. 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).
12. "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).
13. "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).

14. “It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based.” *Bottorf v. Clay County Bd. Of Equalization*, 7 Neb. App. 162, 167, 580 N.W.2d 561, 565, (1998).
15. “The Nebraska Supreme Court in *US Ecology v. Boyd Cty. Bd. of Equal.* held that an owner may testify to the worth of his or her property if the owner is familiar with the property and knows the worth. 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) (Citations omitted).
16. The appraisal of real estate is not an exact science. *Matter of Bock’s Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874, (1977).
17. The prior year’s assessment is not relevant to the subsequent year’s valuation. *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).

IV. DISCUSSION

The subject property is residential property, in the Linden Estates subdivision of Omaha, Nebraska, which was acquired by the Taxpayer in 1997 for \$350,000.00. (E5:4). Significant cracks in the basement walls, in the exterior brick walls, and in the interior drywall walls of the residence were shown in undated photographs. (E3). An officer of the Taxpayer testified that the cracks are the result of settling or shifting caused by underground waters beneath the

structure. A sump pump has been installed and operates continuously. An officer of the Taxpayer and an Appraiser for the County testified that no other residential lots in Linden Estates have improvements with the structural problems present in the residence on the subject property.

The Taxpayer called as a witness an Appraiser employed by the Douglas County Assessor's office ("Appraiser"). The Appraiser testified that the County Board's determination of value was based on his analysis. (E4:13). A portion of that report is contained in the Taxpayer's Exhibit 4. After an interior and exterior inspection on November 18, 2005, an assessor's report was prepared for presentation to the Commission and received as Exhibit 5. The comparables shown in photographs contained in Exhibits 4 and 5 are identical and the exhibits contain identical value conclusions. Actual value may be determined using professionally accepted mass appraisal methods including but not limited to, the (1) sales comparison approach, (2) income approach and (3) cost approach. Neb. Rev. Stat. 77-112 (Reissue 2003). The basis stated for the value determination in Exhibit 5 is the sales comparison approach. (E5:4). Three comparable properties are presented in the report. There are a variety of differences between the subject property and the comparables, a major difference is the condition of the properties. The Appraiser testified the condition of the subject property was poor while the condition of the comparables was either good or excellent. The Appraiser testified however that the value of the subject property was not determined based on sales of comparables but various factors derived from the market and shown in a screen shot of a computer program shown in Exhibit 6 at page 7. The numbers on page 7 of Exhibit 6 as shown in the "market calculation detail" window sum to \$76,138.00. That amount is the value attributed to the residence on the subject property. (E1:1). One of the factors shown on Exhibit

6 page 7 is an adjustment in the amount of \$115,000.00 for COND_PR.. (E6:7). The Appraiser testified that the amount of that adjustment and others were determined by a computer program based on an analysis of the market. It is apparent that the sales comparison approach utilizing sales of comparable properties was not used by the Appraiser to make a determination of actual or fair market value. There is no evidence that the cost approach or the income approach were used by the Appraiser to determine actual or fair market value. As noted the sales comparison approach, the cost approach and the income approach are not the exclusive methods which may be used to determine value. The value presented by the County was produced by a computer program which utilized information from sales to derive adjustments for various attributes of the subject property. Computer Assisted Mass Appraisal programs are recognized as a tool for mass appraisal of property. *Mass Appraisal of Real Property*, International Association of Assessing Officers, 24, (1999).

Actual or fair market value of property subject to defects can be estimated by subtracting the cost to cure defects from actual or fair market value of the property as estimated without defects although a resulting value of zero or less than zero is suspect. *See Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001). An officer of the Taxpayer testified that it would cost \$200,000.00 or more to cure the defects. She further testified that the estimate was based on an engineer's analysis performed several years prior to the assessment date. The estimate was not offered as evidence and no estimate of the cost to cure the residence or the lot as of January 1, 2005, was provided. Evidence of the cost to cure was not clear and convincing. An officer of the Taxpayer testified that, in her opinion, the actual or fair market value of the subject property with defects as of January 1, 2005, was

\$150,000.00. That value was however the taxable value for the prior year. (E6:1). No explanation or basis for that opinion was offered. A prior years taxable valuation is not relevant to the determination of taxable 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). The Taxpayer did not offer any other opinion of actual or fair market value as of January 1, 2005.

No probative evidence of actual or fair market value as of the assessment date was presented by the Taxpayer. Without evidence of actual or fair market value other than as determined by the County Board it is not possible to determine that the County Board's value is unreasonable. The County Board's determination should be affirmed. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

V. ORDER

IT IS THEREFORE ORDERED:

1. That the decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2005, as follows:

Land value	\$110,500.00
Improvement value	<u>\$76,100.00</u>
Total value	<u><u>\$186,600.00</u></u>

is affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
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 2005.
6. This order is effective for purposes of appeal January 12, 2006.

Signed and Sealed. January 12, 2006.

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