

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

D & D INVESTMENT CO. INC.,)	
)	
Appellant,)	CASE NO. 05C-008
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
DODGE COUNTY BOARD OF)	DODGE COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by D & D Investment Co. Inc., 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 February 22, 2006, pursuant to a Notice and Order for Hearing issued December 7, 2005. Commissioners Wickersham, Warnes, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

Don Hinds, President of D & D Investment Co. Inc., appeared at the hearing on behalf of D & D Investment Co. Inc. ("the Taxpayer") without counsel.

The Dodge County Board of Equalization ("the County Board") appeared through counsel, Stacey Hulquist, Esq., a Deputy County Attorney for Dodge 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. 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 OT N23'S½ Lots 1 & 2, Blk 183, Dodge 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 Dodge County Assessor was:

Land value	\$ 8,410.00
Improvement value	<u>\$60,580.00</u>
Total value	<u>\$68,990.00.</u> (E1:1)

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

Land value	\$ 8,410.00
Improvement value	<u>\$38,090.00</u>
Total value	<u>\$46,500.00.</u> (E1:2)

- 4. The County Board denied the protest. (E1:1)
- 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 December 7, 2005, set a hearing of the Taxpayer's appeal for February 22, 2006, at 11:00 am. 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 not adduced sufficient, clear and convincing evidence that the decision of the County Board was unreasonable or arbitrary.
- 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 is:

Land value	\$ 8,410.00
Improvement value	<u>\$60,580.00</u>
Total value	<u><u>\$68,990.00.</u></u>

11. The decision of the County Board was neither arbitrary nor unreasonable.
12. 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 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. 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).
9. 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).
10. 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).

11. 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).
12. 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).
13. 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).

14. "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).
15. "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).
16. 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).
17. 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).
18. 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 a 2,875 square foot improved parcel. (E12:2). The improvement is a 2,369 square foot office building with a partial second story and an unfinished basement. (E12:2). The partial second story is not used.

The Taxpayer's representative testified that in his opinion actual value of the subject property as of the assessment date was \$48,000. That opinion was based on rents and expenses as shown in Exhibit 10 at page 2. The rent shown in Exhibit 10 page 2 does not include rent attributable to the Taxpayer's use of a portion of the subject property. Use of the income approach requires a determination of potential gross income for the property being valued. *The Appraisal of Real Estate*, 12th Edition, The Appraisal Institute, 2001. The Taxpayer's evidence of actual value based on its representative's use of the income approach is not clear and convincing evidence of value as of the assessment date.

The Taxpayer's representative testified that his opinion of value was also based on his knowledge of the market for real property in downtown Fremont. The Taxpayer's representative did not identify any sales of comparable properties. The unsupported opinion of the Taxpayer's representative is not clear and convincing evidence of actual value.

The Taxpayer did produce evidence of the assessment of properties he considered to be comparable and testified that he believed they were assessed at actual value. The Taxpayer presented the property record file for 240 North Main in Fremont. (E9). The comparable has been assigned a 50% functional depreciation for a 2,200 square foot section of the property, effectively halving it. (9:3). The indication is that only the first floor is being valued. The comparable is an office building built in 1910 containing 1,954 square feet of assessed office space, with a 1,954 square foot "comm finish" basement and an attached garage of 312 square

feet. (E9:3). The subject property was also built in 1910. The subject property contains 2,392 square feet office space and has a minimum finish basement of 400 square feet. Differences between the comparable and the subject are the number of square feet of office space, the basement and basement finish and a garage. It is to be expected that those differences would produce different values. The Taxpayer's representative noted that interior finishes for the two properties were different and furnishings are different. Furnishings are not subject to valuation with the building and interior finish does not seem to be accounted for in the cost approach as employed by the County Assessor.

The value determination of the County Board was based on use of the cost approach. (E5:5 and 6). Use of the Cost Approach includes six steps: "(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. In this case the Taxpayer has not disputed site value. (E1:2). The Taxpayer did present three cost approach calculations

made by the county in Exhibit 5. The first calculation in Exhibit 5 is at pages 3 and 4. The County Appraiser testified that the calculation on those pages was used for assessment in the year 2004 and prior years. The County Appraiser testified that: The calculation on pages 3 and 4 of Exhibit 5 was inaccurate because it valued the building as two one story buildings one with 2,392 square feet and another with 1,150 square feet; The calculations shown on pages 5 and 6 of Exhibit 5 support the 2005 valuation of the subject property and were the result of a reappraisal and inspection of the subject property; and that he did not have first hand knowledge of the calculations on pages 7 and 8 of Exhibit 5 but believed they were used for assessment for tax year 2006. The County Appraiser also testified that legal description changed between tax years 2005 and 2006. The County Appraiser testified that the 40% functional depreciation assigned to the 2300 square feet of office space was intended to create a deduction taking into account the fact the partial second story could not be used. In other words that attempt was made to value only 1,150 square feet. The RCN for 2,033 square feet was \$156,377. (E5:6). One half of that amount is \$78,189. If that amount is multiplied by physical depreciation of 68% and that result is subtracted the resulting value for only the first floor is \$25,020. The value assigned by the assessor was \$30,025. Some value, \$5,005, was left for a second floor with four walls and a roof. The Commission is unable to determine that is unreasonable. The valuation for 2006 does not include any assessment of the second floor. The Commission has no evidence with which to determine whether the 2005 process or the 2006 process for determination of value is unreasonable.

The County Appraiser testified that use of the cost approach for older buildings is not desirable and that the income approach is favored for income producing property such as the

subject property. The County Appraiser also testified that he has attempted to use the income approach for valuation of property in downtown Fremont but was unable to do so because of limited information concerning expenses.

The Commission cannot determine from the evidence that the decision of the County Board was unreasonable or arbitrary.

**V.
ORDER**

IT IS THEREFORE ORDERED:

1. 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	\$ 8,410.00
Improvement value	<u>\$60,580.00</u>
Total value	<u><u>\$68,990.00</u></u>

is affirmed.

2. This decision, if no appeal is timely filed, shall be certified to the Dodge County Treasurer, and the Dodge County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2005).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this matter.
5. This decision shall only be applicable to tax year 2005.

6. This order is effective for purposes of appeal March 10, 2006.

Signed and Sealed. March 10, 2006.

Wm. R. Wickersham, Commissioner

Susan S. Lore, 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.