

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

SHANE A. JENSEN,	)	
	)	
Appellant,	)	Case No 06R-390
	)	
v.	)	DECISION AND ORDER AFFIRMING
	)	THE DECISION OF THE KEARNEY
KEARNEY COUNTY BOARD OF	)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,	)	
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Shane A. Jensen ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Holiday Inn Express, 508 2nd Avenue, Kearney, Nebraska, on August 14, 2007, pursuant to an Order for Hearing and Notice of Hearing issued January 19, 2007. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Wickersham presided at the hearing.

Shane A. Jensen, was present at the hearing. Daniel L. Lindstrom and Justin Hermann appeared as legal counsel for the Taxpayer.

David G. Wondra, County Attorney for Kearney County, Nebraska, appeared as legal counsel for the Kearney County Board of Equalization ("the County Board").

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

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) 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 taxable value of the subject property as of January 1, 2006, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2006.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lot 1, Brandt's Lakewood Estates, Kearney County, Nebraska ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2006, ("the assessment date") by the Kearney 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, Brandt's Lakewood Estates, Kearney County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$272,345.00	\$ 40,000.00	\$272,345.00
Improvement	\$353,560.00	\$323,857.00	\$353,560.00
Total	\$625,905.00	\$363,857.00	\$625,905.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Amended Order for Hearing and Notice of Hearing issued on January 19, 2007, set a hearing of the appeal for August 14, 2007, at 1:00 p.m. CST.
7. 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.
8. Taxable value of the subject property as of the assessment date for the tax year 2006 is:

Land value	\$ 272,345.00
Improvement value	<u>\$353,560.00</u>
Total value	<u>\$625,905.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over 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. “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).
3. 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).
4. 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).
5. “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).
6. 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).

7. 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. 2006).
8. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, art. VIII, §1.
9. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).
10. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
11. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
12. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
13. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire

property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).

14. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
15. 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).
16. 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).
17. 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).

18. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
19. "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).
20. 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).
21. 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).
22. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).
23. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of

property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

#### **IV. ANALYSIS**

The subject property is an improved residential parcel. The residence, built in 1998 is 1½ stories with 3,190 square feet. (E15:2). The residence has two attached garages (E17). An additional detached garage and shed are also on the parcel. (E16:1). The parcel contains 429,937 square feet or 9.87 acres of land. (E15:2 and 14:1).

The Taxpayer presented an equalization study prepared by an appraiser. (E3:1). The Taxpayer's Appraiser testified that some parcels offered as comparables were included in the study to derive an estimate for the equalized value of the land component and others to determine the equalized value of the improvements. The Taxpayer's Appraiser acknowledged that no parcels were presented with which to determine the equalized value of the outbuildings, a detached garage with an outdoor kitchen and a shed. The Taxpayer's Appraiser added the equalized value of the land, improvement, and outbuilding components of the subject property to arrive at an equalized value for the subject property.

A Taxpayer is entitled to have a parcel valued so that if the method of valuation used for that parcel, differs from the method used to value another parcel the resulting taxable value is correlated to a common standard i.e. actual value. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

The cost approach was used to determine value of the subject property. (E15). 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; (5) 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*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 128 - 129.

In this case the land component of the subject property, was valued based on the number of square feet in the parcel at two different rates. (E15:2). A rate of \$1.50 per square foot was used to determine value of the 20,000 square feet of the subject property's considered to be the home site and a rate of \$.52 per square foot was used to value the 409,937 square feet balance of the land. (E15:2). Total value of the 9.87 acre land component of the subject property based on those rates and with application of a 1.12 market adj. factor, is \$272,345.00 as determined by the County Board. (E15:2).

The Taxpayer's Appraiser presented several parcels as comparables for consideration. This discussion will be limited to two of those parcels denominated by the Taxpayer's

Appraiser as Comparable #2 ("Comp #2") and Comparable #3 ("Comp #3"). Comp #2 is a 26.14 acre parcel to the east of the subject property. (E3:11). The land component of Comp #2 includes a home site, sandpit pond, shore line and accretion land. (E3:11 and 12). The property record file for that parcel is contained in Exhibit 26 and page 3 of Exhibit 24. An appraiser for the county testified that the land component of Comp #2 was classified and valued as agricultural land and horticultural land. As agricultural and horticultural land the land component of Comp #2 was valued first as a 2 acre home site and the balance based on the per acre value of its various agricultural land and horticultural land classifications. (E24:3). Comp #3 is a 19.29 acre parcel to the west of the subject property. (E3:13). The land component of Comp #3 includes a home site, sandpit pond, and shore line. (E13:14). Portions of the property record file for Comp #3 are contained in Exhibit 24. An appraiser for the county testified that the land component of Comp #3 was classified as agricultural land and horticultural land. As agricultural land and horticultural land the land component of Comp #3 was valued first as a 1 acre home site and the balance based on the per acre value of its various agricultural land and horticultural land classifications. (E3:13).

Actual value as defined in Nebraska Statutes is not restricted to the value attributable to one use. See, Neb. Rev. Stat. §77-1344 (Cum. Supp. 2006). Agricultural land and horticultural land may have value for uses other than agricultural or horticultural uses. See, Neb. Rev. Stat. §77-112 (Reissue 2003). "Market forces create market value, so the analysis of market forces that have a bearing on the determination of highest and best use is crucial to the valuation process." *The Appraisal of Real Estate*, 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p 305. Highest and best use can be described as the foundation on which market value rests. *Id.* Land

is to be valued at its highest and best use. 350 Neb. Admin. Code, ch. 50, §.00204A (05/05). Highest and best use is defined as the most reasonable and most probable use of the property that will support its highest value. 350 Neb. Admin. Code ch 10 § 001.13 (05/05). An analysis of highest and best use requires consideration of factors which would affect use of the potential use of land. Among the factors to be considered are whether a potential use is; physically possible, lawful, financially feasible, and whether it produces the greatest value. See. *The Appraisal of Real Estate*, 12<sup>th</sup> Edition, The Appraisal Institute, 2001, p 307. The County Appraiser testified that the taxable values of the land component of Comparables #2 and #3 as presented by the Taxpayer's Appraiser were not based on highest and best use of those parcels.

While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity. *County of Sarpy v. State Board of Equalization & Assessment*, 185 Neb. 760, 178 N.W.2d 765 (1970). "The object of the uniformity clause is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value." *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 755, 178 N.W.2d 759, 764 (1970). The evidence in this case is that the subject property was valued for taxation at its actual value based on its highest and best use, while other similarly situated parcels were not.

Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

Parcels are valued proportionately for taxation if the ratios of taxable value to actual value for the subject property and comparable properties are the same or within an acceptable margin of error. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb. App. 582, 597 N.W.2d 623, (1999). Actual value of the subject property as determined by the County Board was not appealed by the Taxpayer. The Commission concludes that actual value of the subject property as determined by the County Board is correct and that the subject property is taxed at 100% of its actual value. The proportion of taxable value to actual value is for the subject property is 1 ( $\$625,905.00 \div \$625,905.00 = 1$ ). The proportion of taxable value to actual value based on the highest and best use for Comparables #2 and #3 as presented by the Taxpayer is unknown because the Commission does not have evidence of actual value for those parcels based on their highest and best use.

The subject property and Comparables #2 and #3 as presented by the Taxpayer's Appraiser were valued using the cost approach. Contributions to value made by improvements were uniformly determined for each parcel. Contributions to value made by the land component were however determined using different methods. The Commission has therefore examined possible adjustments to the contribution to value made by the land component. If an appropriate adjustment can be found actual value of Comparables #2 and #3, as presented by the Taxpayer's Appraiser, could be found and ratios of taxable to actual value determined for them.

It is possible to mathematically adjust the contribution to value of the land component of Comparables #2 and #3 as presented by the Taxpayer's Appraiser so that the contribution to value made by the land component for the comparables is 100% of agricultural land and

horticultural land value. An Appraiser for the County testified however that the highest and best use of the land component of the Comparables #2 and #3 as presented by the Taxpayers Appraiser is not for agricultural purposes. As noted above, actual value must be determined on the basis of the highest and best use of the land component. An adjustment to 100% of actual value as agricultural land and horticultural land is therefore not an indication of the true contribution to value of the land component. And it is not possible to determine from the evidence what the ratio of actual value to taxable value is for either Comparable #2 or #3 as presented by the Taxpayer's Appraiser might be.

It is also possible to calculate the contribution made by the land component of Comparables #2 and #3 as presented by the Taxpayer's Appraiser using the per square foot values assigned to the subject property. The County Appraiser testified, however that if the contribution to value of the land component was determined by the square foot that the value of each additional square foot would be expected to decline as the size of a parcel grew. The parcels presented as comparable #2 and #3 by the Taxpayer's Appraiser are considerably larger than the subject property. There is no evidence that estimating the contribution to value of the land components of the two comparables on the same per square foot basis used for the subject property would allow a determination of their actual value. Without a determination of actual value it is not possible to derive a ratio of taxable value to actual value that could be applied to the subject property.

In this appeal evidence of a subsequent year's determination of actual value for the subject property was received without objection. Presentation of evidence without objection does not make the evidence relevant. A prior year's assessment is not admissible as relevant

evidence of 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). In *Affiliated Foods*, the Court ruled that a prior year's determination of value by a District Court was not binding on a County Board in a subsequent year recognizing that the valuation of property as provided by statute could change each year due to circumstances. The rationale of the *Affiliated Foods* Court is not less compelling when applied to a subsequent year's valuation. Evidence of actual value of the subject property as determined by the County Board for a subsequent year was not considered by the Commission.

The Taxpayer suggests that the holdings of the Court in *Scibante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 588 N.W.2d 190 (1999) should guide the Commission's decision in this case. In *Scibante*, the Court approved an equalized taxable value calculated as the sum of the contribution to value of the land component and the contribution to value of the improvements. See, *Scibante* Supra. The contribution to value of the land component was based on the county's records. The contribution to value of the improvements was derived from the square footage of the residence, 7528 square feet, multiplied by a factor of \$87.16. The factor of \$87.16 was the median assessed value per square foot of improvements on three comparable parcels. Two possible basis for the Court's decision in *Scibante* were stated in the opinion. Neb. Rev. Stat §77-1504 (Reissue) in effect at all times pertinent to the decision in *Scibante* stated in part the "For purposes of equalization of the valuation of any protested property, the county board of equalization shall make its adjustments so that the value of the protested property compares to the average level of value of the class of subclass of property in which the protested property is categorized." *Scibante*, Supra 30, 194. The provision of statute

noted by the Court has been repealed. See, 1997 Neb. Laws, L.B. 270 §88. The Court also cited *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984). *Kearney Convention Center*, was cited for the Court's finding that disproportionate valuation based on the comparison of the ratios of actual value to assessed value was a sufficient basis for relief on a claim that assessed value of a parcel was not equalized with the assessed value of other parcels. *Scibante*, Supra 40, 199.

As noted the one basis for the Court's decision in *Scibante* has been repealed. There is no evidence of the actual value of Comparbles #2 and #3 as presented by the Taxpayer's Appraiser so that a ratio of taxable to actual value for those parcels can be determined and that ratio applied to the subject property. The factual test prescribed by *Kearney Convention Center v. Board of Equal*, 216 Neb 292, 344 N.W.2d 620 (1984) has not been meet. Further it is the ratio of taxable to actual value of the parcel with all of its components which must be considered. The evidence establishes only that Taxpayer's land, without improvements, was valued at a different price per acre than some other lands allegedly comparable. That evidence is not a sufficient basis for relief. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).

## V. CONCLUSIONS OF LAW

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

3. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2006, is affirmed.
2. Taxable value of the subject property for the tax year 2006 is:

Land value	\$ 272,345.00
Improvement value	<u>\$353,560.00</u>
Total value	<u>\$625,905.00.</u>
3. This decision, if no appeal is timely filed, shall be certified to the Kearney County Treasurer, and the Kearney County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
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 2006.

7. This order is effective for purposes of appeal on October 2, 2007.

**Signed and Sealed.** October 2, 2007.

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Wm. R. Wickersham, Commissioner

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Nancy J. Salmon, Commissioner

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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 (CUM. SUPP. 2006). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.**