

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

BERT W. MEHRER,)	
)	
Appellant,)	Case No. 09R 210
)	
v.)	DECISION AND ORDER
)	REVERSING THE DECISION OF
DOUGLAS COUNTY BOARD OF)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Bert W. Mehrer ("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 June 16, 2010, pursuant to an Order for Hearing and Notice of Hearing issued December 2, 2009 as amended by an Order dated December 18, 2009. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Bert W. Mehrer was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). 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, 2009, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board, determining actual value of the subject property, is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2009.

**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 ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Douglas 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 Block 0, Canyon Hill Road, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$231,500.00	\$200,000.00	\$231,500.00
Improvement	\$1,188,500.00	\$984,070.00	\$1,188,500.00
Total	\$1,420,000.00	\$1,184,070.00	\$1,420,000.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on December 2, 2009, as amended by an Order issued on December 18, 2009, set a hearing of the appeal for June 16, 2010, at 3:00 p.m. CDST.
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. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 231,500.00
Improvement value \$ 908,458.00
Total value \$1,139,958.00.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
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 2009).
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 2009).
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 2009).

6. 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) (Reissue 2009).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. 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).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Reissue 2009).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. *See, e.g., Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
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. 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).
14. 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).
15. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. 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, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the 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).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved parcel. The improvement on the parcel is a 1½ story single family residence built in 2000. (E3:1). The residence contains 7,486 square feet of above ground living space, a 5,093 square foot basement, some of which is finished, and a 1,416 square foot built in garage. (E3:1).

A contract for purchase of the subject property was entered into on November 8, 2006, by the Taxpayer as purchaser. (E7). The property purchased included all fixtures, components and equipment attached to the structure and various items described as personal property. (E7:1). Total consideration stated was \$1,420,000.00. (E7:1). The Seller paid \$7,500.00 of the Purchaser's financing costs. (E7:2). Performance of the contract by the purchaser was contingent on an appraisal of the property at a market value of not less than \$1,420,000. (E7:2). The Seller placed \$5,000 of the sales proceeds in escrow to defray the cost of repairs and remediation of items identified in Appendix II of Addendum E to the contract. (E7:4). The contract did not allocate the sale and purchase price between those items the parties considered real property and those they considered personal property. The sale and purchase of the subject property closed on February 26, 2007. (E8:1). On February 26, 2007, the Seller executed a bill of sale conveying listed items for a stated consideration of \$223,430.00. (E6:1).

The County Board determined that actual value of the subject property for the tax year 2007 was \$1,420,000. (E3:5). Actual value for the year 2007, is equal to the unadjusted consideration stated in the contract for sale and purchase of the subject property. For tax year 2009 the County Board again determined that actual value of the subject property was

\$1,420,000.00. The Taxpayer contends that actual value of the subject property for the tax year 2009 was \$1,184,080.00, the total consideration stated in the contract reduced by the consideration stated in the bill of sale, the repair and remediation costs born by the Seller and the Buyer's financing costs paid by the Seller ($\$1,420,000 - \$223,420 - \$7,500 - \$5,000 = \$1,184,050$). In effect both parties' position is that actual value of the subject property for tax year 2009 is equal to the 2007 purchase price; they simply have different views of the purchase price.

Nebraska's Supreme Court has not adopted the position that actual value of a parcel can always be determined by its purchase price. The Court has adopted the position that the sale price can be considered with other evidence.

“Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, . . . , the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.” *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 181 (1982) (quoting *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 419, 138 N.W.2d 641, 644 (1965)).

The Commission in this appeal does not, however, need to reach a consideration of the sale as an arm's length transaction or whether the sale and purchase of the subject property in February of 2007, represents its actual value as of January 1, 2009.

The County Board adopted the gross sales price stated in the contract as its determination of actual value of real property. (E5:2). The Taxpayer contends that the gross sales price includes consideration paid for items of personal property. Personal property is all property other than real property and franchises. Neb. Rev. Stat. §77-104 (Reissue 2009). Tangible personal property is all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased. Neb. Rev. Stat. §77-105 (2009). The subject property is used as personal residence. It is therefore unnecessary to determine whether any of the items described in the bill of sale are trade fixtures.

Real property is defined as

“(1) All land; (2) All buildings, improvements, and fixtures, except trade fixtures; (3) Mobile homes, cabin trailers, and similar property, not registered for highway use, which are used, or designed to be used, for residential, office, commercial, agricultural, or other similar purposes, but not including mobile homes, cabin trailers, and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business; (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil or gas leases; and (5) All privileges pertaining to real property

described in subdivisions (1) through (4) of this section.” Neb. Rev. Stat. §77-103 (Reissue 2009).

Whether an item of property is a fixture, and a part of real property may be determined by consideration of three factors: (1) Whether the item is actually annexed to real property or something appurtenant to real property, (2) Appropriation of the item to the use or purposes of that part of the realty with which it is connected, and (3) The intention of the party making the annexation to make the item a permanent accession to the freehold. 350 Neb. Admin. Code, ch 10, §001.01A (03/09). The bill of sale included items such as five garage door openers, a gate opener, a built in music system, built in fire and intrusion security system, decorative rocks, sump pumps, a built in vacuum system, and a septic tank. Those items as described by the Taxpayer are fixtures taxable as real property.

Included in the sale price adopted by the County Board was consideration paid for a John Deere tractor with a snow blade, a five piece patio furniture set, five large indoor tropical potted plants, a marble top coffee table, a leather davenport, a 27" television set, a chain saw, a limb saw, a lawn mower, and a tread mill. (E6:1). Some of the items in the bill of sale are personal property and they had value as of the sale date. The part of the consideration paid for the purchase of personal property cannot be considered part of the real property's purchase price even if the purchase price represented actual value of the subject property as of January 1, 2009. The County Board's reliance on the gross sale price as a basis for its determination of actual value of the subject property was unreasonable or arbitrary.

Once it is determined that the decision of County Board was unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value

presented. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The County Board's determination ignored the fact that some part of the consideration paid by the Taxpayer was paid for the purchase of items that are clearly personal property and may not be relied on.

The Taxpayer relies on an adjusted sale price of the subject property for his opinion of its actual value as of January 1, 2009. One adjustment was for the stated value of items listed in a bill of sale. As noted above, some of the items in the bill of sale are fixtures and are therefore considered part of the real property. Some of the items described in the bill of sale are items of personal property. Because items that are fixtures are part of the real property, their contribution to value should not be deducted in any circumstance. The Taxpayer also deducted from the sale price expense items incurred by the Seller, \$7,500, purchaser's costs, and \$5,000 remediation. Any amounts spent on remediation or repair of the subject property would logically increase value of the property rather than decrease value as is in effect proposed by the Taxpayer. In addition, the value attributed to the various items of property listed in the bill of sale were determined solely by the Taxpayer. The Taxpayer's allocation and use of the adjusted purchase price to determine actual value may not be relied on.

The County Board submitted as Exhibit 2 a document captioned as an Assessment Report. (E2). In the report an assessor's office staff appraiser states that actual value of all residential parcels was determined in Douglas County using either an approach based on a multiple regression analysis or the cost approach. (E2:4). Use of the cost approach is not in evidence. An application of the multiple regression analysis is in evidence. (E3:4). Actual value

as indicated by multiple regression analysis as performed by the county assessor's office is \$1,139,958. (E3:4).

Multiple regression analysis assigns value to characteristics of the property for which value is being indicated. Value as indicated by multiple regression analysis is, therefore, dependent on a correct description of the property being valued. The Taxpayer testified about one-half of the basement in the residence is finished. The basement in the residence is 5,093 square feet. (E3:1). One half of the basement is 2,546.5 square feet ($5,093 \div 2 = 2,546.5$). The assessment records show 1,650 square feet of finished basement. (E3:1). Each square foot of finished basement is assigned a value of \$36 in the county assessor's multiple regression analysis model. (E3:4).

Condition of the subject property is listed as excellent in the assessment records. The county assessor's multiple regression analysis assigns a value of \$90,000 to a condition of excellent. (E3:4). The Taxpayer testified that after purchase, over \$30,000 had been spent to repair a deck attached to the house. The Taxpayer also testified that the roof leaked and that a sum in the five figures would have to be spent to correct design flaws in the roof.

Value as indicated by the county assessor's multiple regression analysis may be inaccurate because it does not include sufficient finished basement and the condition of the residence may not be excellent. An adjustment for the estimated finished basement could be calculated, however there is no basis for calculating an adjustment based on condition. In addition, the Commission is mindful that the calculations shown on page 4 of Exhibit 3 are the product of a computer program. There is no evidence that adjusting the square footage for

finished basement multiplying by \$36 and inserting the result in the analysis is an appropriate result or a correct application of the factors used to determine value in the model.

An interior inspection of the subject property could resolve doubts concerning the size of the finished basement and the condition of the residence. An interior inspection had been requested by the County Assessor but permission for the inspection was not granted. The Commission has adopted discovery rules which permit a party to seek an inspection of property if necessary. *See* 442 Neb. Admin. Code ch. 12 (06/09). The County Board has not sought a discovery order allowing inspection of the subject property. The failure of the Taxpayer to consent to an inspection is not determinative of this appeal. A failure to consent to an inspection is, like the failure of the County Board to seek a Commission ordered inspection, evidence to be weighed.

In sum, the County Board's determination of actual value may not be adopted. The Taxpayer's evidence of actual value is not persuasive. The estimate of value made by the County Assessor's office may be inexact. I find, however, that the most reasonable estimate of actual value for the subject property as of the assessment date is the value indicated by the County Assessors multiple regression analysis as shown in Exhibit 3 at page 4, \$1,139,958 .

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 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 vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2009, is vacated and reversed.
2. Actual value, for the tax year 2009, of the subject property is:

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Land value	\$ 231,500.00
Improvement value	<u>\$ 908,458.00</u>
Total value	<u>\$1,139,958.00.</u>

3. 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 (Reissue 2009).
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 2009.

7. This order is effective for purposes of appeal on May 25, 2011.

Signed and Sealed. May 25, 2011.

Wm. R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

Commissioner Hotz, concurring in the result,

I concur in the conclusion that actual value of the subject property is \$1,139,958. I write separately to explain my reasoning.

The Taxpayer has asserted that he was the purchaser of the subject property in an arm's length transaction on February 26, 2007. The purchase price was \$1,420,000 per a Purchase Agreement. (E7). The Taxpayer testified that the purchase price included consideration of a Bill of Sale of Personal Property (Bill of Sale) for forty-one listed items, amounting to \$223,430. (E6:2). The Taxpayer admitted that none of the items listed on the Bill of Sale were independently valued or appraised by a third party to the Purchase Agreement or Bill of Sale, nor were individual values otherwise attributed to any of the items listed on the Bill of Sale. The Taxpayer argued that actual value of the subject property should be discounted by subtracting from the purchase price the total value of the items on the Bill of Sale. The Taxpayer asserted that actual value should also be discounted by \$7,500 for loan origination fees and \$5,000 for a home repair escrow, both per the Purchase Agreement. (E5:1, E7). The Taxpayer, therefore, asserts that actual value of the subject property is \$1,184,070.

The Taxpayer testified that the amount he paid in February 2007 is the best evidence of actual value of the subject property, minus the items listed above. It is true that, "[a] single sale

may in some instances provide evidence of market value.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 175, 645 N.W.2d 821, 826 (2002).

However, even if the Commission were to give great weight to the purchase price, there is insufficient evidence of the value of personal property that should be offset in relation to the sale. While “[a]n owner who is familiar with his property and knows its worth is permitted to testify as to its value,” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999), in this case the Taxpayer provided no basis for his opinion of actual value of the subject property other than the purchase price and his opinion regarding the total value of the 41 items listed on the Bill of Sale in the amount of \$223,430, nor did he give an opinion of value for any one of the forty-one items on the Bill of Sale. To identify any of the 41 items as personal property is unnecessary since there was no evidence of value presented by either party for any one of the forty-one items listed.

“[T]here 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 adduced on appeal to the contrary. From that point forward, 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.” *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 283-284, 753

N.W.2d 802, 811 (2008) (quoting *Ideal Basic Indus v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 654-55, 437 N.W.2d 501, 502 (1989)).

I would find that based upon all of the evidence presented in this appeal that the presumption of correctness has been rebutted and the county board's decision was arbitrary or unreasonable. I concur in the conclusion that actual value of the subject property is \$1,139,958.

Robert W. Hotz, Commissioner