

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

LONNIE MITTEIS and DEBRA R.)	
MITTEIS,)	
)	CASE NO. 02R-55
Appellant,)	
)	DOCKET ENTRY
vs.)	AND ORDER
)	AFFIRMING THE DECISION
SHERMAN COUNTY BOARD OF)	OF THE COUNTY
EQUALIZATION,)	BOARD OF EQUALIZATION
)	
Appellee.)	

The Nebraska Tax Equalization and Review Commission ("the Commission") called the above-captioned case for a hearing on the merits of the appeal on the 11th day of June, 2003. The hearing was held in the City of Kearney, Buffalo County, Nebraska, pursuant to a Notice of Hearing issued the 6th day of March, 2003. Commissioners Hans, Wickersham, and Reynolds heard the appeal. Commissioner Wickersham, Vice-Chair, presided at the hearing.

Lonnie Mitteis and Debra R. Mitteis ("the Taxpayers") appeared personally at the hearing. The Sherman County Board of Equalization ("the Board") appeared through Curtis A. Sikyta, Special Appointed Counsel. The Commission made certain documents a part of the record pursuant to Neb. Rev. Stat. §77-5016(5) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9). The Commission also afforded each of the parties the opportunity to present evidence and argument pursuant to Neb. Rev. Stat. §77-5015 (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §8). Each Party was also afforded the opportunity to cross-

examine witnesses of the opposing party as required by Neb. Rev. Stat. §77-5016 (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).

Neb. Rev. Stat. §77-5018 (Cum. Supp. 2002) requires that every final decision and order entered by the Commission which is adverse to a party be stated in writing or on the record and be accompanied by findings of fact and conclusions of law. The Commission received, heard and considered the exhibits, evidence and argument. Thereafter it entered its Findings of Fact, Conclusions of Law, and a Final Order on the merits of the appeal on the record. Those matters, in substance, are set forth below:

**I.
STANDARD OF REVIEW**

The Taxpayer, in order to prevail, is required to demonstrate by clear and convincing evidence that (1) the decision of the Board was incorrect, and (2) that the decision of the Board was unreasonable and arbitrary. *Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9)*. The Supreme Court has determined that the "unreasonable or arbitrary" standard requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) that the Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators v. Adams County Bd.*, 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 was unreasonable. *Garvey Elevators, supra*, 136, 523-524 (2001).

**II.
FINDINGS OF FACT**

The Commission, from the record before it, finds and determines as follows:

**A.
PROCEDURAL FINDINGS**

1. The Taxpayers are the owners of record of certain residential real property located in the Village of Ashton, Sherman County, Nebraska ("the subject property").
2. The State Assessing Official for Sherman County proposed valuing the subject property in the amount of \$36,590 for purposes of taxation as of January 1, 2002 ("the assessment date"). (E1).
3. The Taxpayers timely filed a protest of the proposed valuation and requested that the proposed value be reduced. (E1).
4. The protest alleged that the quality of construction and condition were arbitrarily determined. (E1:2).
5. The Board denied the protest. (E1).

6. Thereafter, the Taxpayers timely filed an appeal of the Board's decision to the Commission. (Appeal Form).
7. The Commission served a Notice in Lieu of Summons on the Board on September 4, 2002. The Board timely filed an Answer on September 18, 2002.
8. The Commission issued an Order for Hearing and Notice of Hearing on March 6, 2003. The Notice set the matter for a hearing on the merits of the appeal for June 11, 2003.
9. The Taxpayer testified at the hearing before the Commission that the value of the land component of the subject property (\$900) was not at issue.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property is a tract of land approximately 10,500 square feet in size (75 feet by 140 square feet = 10,500 square feet). The tract of land is legally described as the W $\frac{1}{2}$ of Lot 5 and All of Lot 6, Block 2, Taylor's 2nd Addition, Village of Ashton, Sherman County, Nebraska. (E21:8).
2. The tract of land is improved with a single-family residence which was built in 1961. (E21:8). The residence is a bungalow or ranch-style home with 1,315 square feet of above-grade finished living area over a crawl space.

(E21:9). The home has 3 bedrooms, 1 bathroom, and a one-car attached garage. (E21:9).

3. The home was valued using the Cost Approach. (E21:9). The Cost Approach is a professionally accepted mass appraisal methodology specifically authorized by statute. Neb. Rev. Stat. §77-112 (Cum. Supp. 2002).
4. The Cost Approach has 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.

5. The Replacement Cost New of a structure is based on the size of the improvements and the Quality of Construction.
Marshall-Swift Residential Cost Handbook, Marshall & Swift L.L.P., 2001, p. 1. Both facts must be determined before the per square foot Replacement Cost New can be determined.
Supra.
6. The size of the above-grade finished living area (1,315 square feet) is not at issue. The Quality of Construction and the Condition, however, are at issue.
7. "Construction quality refers to the types of materials used and the quality of the workmanship. Structures of better quality cost more to build per unit of measure and command higher prices." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 144.
8. The Taxpayers alleges that the Quality of Construction for the improvements to the subject property is "Fair." (E1:2). The State Assessing Official utilized a Quality of Construction of "Fair +." (E21:8).
9. Replacement Cost New ("RCN") for a Quality of Construction of "Fair Plus" is higher than the Replacement Cost New for a Quality of Construction of "Fair." (Cf. E21:9 and E21:24).

The exact amount of the difference cannot be calculated from the record before the Commission, since the computer "tables" which contain the RCN per square foot by size of the improvements for each Quality of Construction were not made a part of the record. Furthermore, the *Marshall-Swift Residential Handbook* differs from the *Marshall & Swift Computer Assisted Mass Appraisal ("CAMA") System* utilized by the State Assessing Official. The Cost Manual lists the Quality of Construction as Low, Fair, Average, Good, Very Good, and Excellent. The CAMA System further refines the Quality of Construction by adding a "Plus" and a "Minus" intermediate grade to each Quality of Construction. (E.g., "Average Minus," Average, "Average Plus.").

10. The Quality of Construction is the most difficult criterion to apply. "Base specifications should clearly identify the characteristics that distinguish each quality class, and assessors who assign construction quality ratings should be thoroughly familiar with these characteristics." *Property Assessment and Valuation*, 2nd Ed., International Association of Assessing Officials, 1996, p. 144.
11. The State Appraiser for Sherman County testified that the State Assessing Official's Office for Sherman County has adopted as its criteria for Quality of Construction those

standards contained in the *Marshall-Swift Residential Cost Handbook*.

12. The State Appraiser testified that the roof pitch and the size of the eaves assisted her in determining that the appropriate "Quality of Construction" was "Fair +."
13. The Taxpayer failed to adduce sufficient clear and convincing evidence to establish that the determination of the Quality of Construction ("Fair +") under the facts and circumstances of this case was unreasonable or arbitrary.
14. The Taxpayer's allegation that the Condition of the property was "Fair" and not "Average" is also important in determining the value of the subject property. Depreciation under the Cost Approach may be calculated in a number of different ways. One method is the economic age-life method. "The economic age-life method is also known as the straight-line depreciation method and is a mechanical method of handling depreciation. . . In dealing with the economic age-life method, the following terms are important: *Effective Age*- Effective age is the number of years of age of the improvement as indicated by its **condition**. If an improvement has had better-than-average maintenance, its effective age may be less than the actual age; if there has been inadequate maintenance, it may be greater. A fifty-year-old improvement may have an effective age of twenty-

- five years due to rehabilitation or modernization. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 160 - 161 (Emphasis added).
15. The Taxpayer failed to adduce sufficient clear and convincing evidence to establish that the determination of the Quality of Construction ("Fair +") under the facts and circumstances of this case was unreasonable or arbitrary.
 16. The Taxpayer offered seven single-family residential properties as "comparables" for the subject property. (E14 - E20).
 17. "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98.
 18. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105.
 19. The seven properties offered as "comparables" by the Taxpayer vary in terms of age, quality of construction, condition, size, and amenities.

20. The Taxpayer testified that the property shown in Exhibit 16 is the most comparable to the subject property. This home is of "Fair" Quality of Construction, "Average" Condition, was built in 1960. (E16:4). The home has 1,064 square feet of above-grade finished living area, a full basement, and a two-car attached garage. (E16:5). This property is not "truly" comparable to the subject property.
21. The Taxpayer adduced no evidence of the adjustments necessary to compensate for the differences between the subject property and the "comparables." Without this evidence the Commission cannot conclude that the "comparable" properties are truly comparable to the subject property.
22. The Taxpayer has not adduced sufficient clear and convincing evidence to overcome the statutory presumption in favor of the Board.
23. Therefore the decision of the Board must be affirmed.

**III.
CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the action of the County was unreasonable or arbitrary. *Neb.*

Rev. Stat. §77-5016(7) (Cum. Supp.2002, as amended by 2003 Neb. Laws, L.B. 291, §9). 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 Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

3. The Supreme 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).

4. "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 Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
5. 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).
6. "Comparing assessed values of other properties with the subject property to determine actual value has the same inherent weakness as comparing sales of other properties with the subject property. The properties must be truly comparable." *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998).
7. 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.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the order of the Sherman County Board of Equalization setting the assessed value of the subject property for tax year 2002 is affirmed.
2. That the Taxpayer's residential real property legally described as W½ Lot 5 and All of Lot 6, Block 2, Taylors Second Addition, Village of Ashton, Sherman County, Nebraska, shall be valued as follows for tax year 2002:

Land	\$	900
Improvements	\$	35,690
Total	\$	36,590
3. That any request for relief by any party not specifically granted by this order is denied.
4. That this decision, if no appeal is filed, shall be certified to the Sherman County Treasurer, and the Sherman County State Assessing Official, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §9).
5. That this decision shall only be applicable to tax year 2002.

6. That each party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Reynolds made and entered the above and foregoing Findings and Orders in this appeal on the 11th day of June, 2003. Commissioner Hans dissented. The Findings and Orders were approved and confirmed by Commissioner Wickersham, and are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Cum. Supp. 2002, as amended by 2003 Neb. Laws, L.B. 291, §6).

Signed and sealed this 19th day of June, 2003.

Mark P. Reynolds, Chair