

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

JOHN J. RICKETTS,)	
Appellant,)	CASE NO. OOR-89
vs.)	
)	FINDINGS AND ORDERS
DOUGLAS COUNTY BOARD OF)	
EQUALIZATION,)	
Appellee.)	

Filed May 15, 2003

Appearances:

For the Appellant:	Robert J. Huck, Esq. James F. Kasher, Esq. John M. Prososki, Esq. Crocker, Huck, Kasher, P.C. 2120 South 72 nd Street, Suite 1250 Omaha, NE 68124
For the Appellee:	James R. Thibodeau, Esq. Deputy Douglas County Attorney Douglas County Attorney's Office 909 Civic Center Omaha, NE 68183

Before: Commissioners Hans, Lore, Wickersham and Reynolds.
Reynolds, Chairman, for the Commission.

SUMMARY OF DECISION

The Commission vacates and reverses the decision of the Douglas County Board of Equalization which denied Taxpayer's equalization protest, and grants Taxpayer's request for a reduction in the assessed value of the subject property for tax year 2000.

NATURE OF THE CASE

John J. Ricketts ("the Taxpayer") owns certain residential real property located in Douglas County, Nebraska ("the subject property"). The Taxpayer filed a protest with the Douglas County Board of Equalization ("the Board") alleging that the actual or fair market value of the subject property as determined by the Douglas County Assessor was not equalized with comparable property. By way of relief, Taxpayer requested that the proposed 2000 value be reduced. The Board denied the protest, from which decision Taxpayer appeals.

I.

EVIDENCE BEFORE THE COMMISSION

The Commission took notice of the following documents as authorized by Neb. Rev. Stat. X77-5016(5) (Cum. Supp. 2002) without objection: the Commission's case file for Case No. OOR-89; the Tax Equalization and Review Commission's Brochure; the Nebraska Constitution; the Nebraska State Statutes and the amendments to those statutes; *Title 442, Nebraska Administrative Code* (the Tax Equalization and Review Commission's Rules and Regulations); *Title 298, Nebraska Administrative Code* (the Real Estate Appraiser Board's Rules and Regulations); the *2000 Reports and Opinion* of the *Property Tax Administrator for Douglas County*; the *2000 Statewide Equalization Proceedings*; the Nebraska Real

Estate Appraiser Board Certification Requirements; the Nebraska Real Estate Appraiser Board Education Core Curriculum; the *Marshall Swift Residential Cost Handbook*; the *Marshall Swift Residential Cost Handbook* Historical Information; the *Nebraska Assessor's Reference Manual* (Reissue 2000); four standard reference works published by the International Association of Assessing Officers: *Property Assessment Valuation, Second Edition* (1996); *Property Appraisal and Assessment Administration* (1990); *Glossary for Property Appraisal and Assessment* (1997); and *Mass Appraisal of Real Property* (1999); two standard reference works published by the Appraisal Institute: *The Dictionary of Real Estate Appraisal, 3rd Ed.*, Appraisal Institute (1993); and *The Appraisal of Real Estate*, Twelfth Edition (2001); the *Uniform Standards of Professional Appraisal Practice* (2000); *Black's Law Dictionary, Sixth Ed.*, West Publishing Co. (1990); and *Webster's Third New International Dictionary*, Merriam-Webster, Inc. (1993).

The Commission also received certain exhibits and testimony during the course of the hearing.

II. ISSUES BEFORE THE COMMISSION

Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002) provides that the Commission's jurisdiction is limited to those questions raised before the County Board of Equalization and to those

issues sufficiently related in content and context to be deemed the same question at both levels. *Arcadian Fertilizer v. Sarpy County Bd. of Equal.*, 7 Neb. App. 499, 505, 583 N.W.2d 353, 357 (1998).

The Taxpayer did not protest the value of the land component of the subject property as determined by the Assessor. (E6:1). The value of that component of the subject property is therefore not properly before the Commission. See, e.g., *Bethesda Foundation v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 458, 640 N.W.2d 398, 402 (2002). The only issue before the Commission is the Taxpayer's allegation that the value as determined by the Board for the subject property is not equalized with comparable property.

III. 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 either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002). The Supreme Court has determined that in order to meet the "unreasonable or arbitrary" burden of persuasion the Taxpayer must adduce 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. of Equal.*, 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 Board was unreasonable. *Garvey Elevators v. Adams County Bd. of Equal.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV. FINDINGS OF FACT

The Commission, in determining cases, is bound to consider only that evidence which has been made a part of the record before it. No other information or evidence may be considered. Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2002). The Commission may, however, evaluate the evidence presented utilizing its experience, technical competence, and specialized knowledge. Neb. Rev. Stat. §77-5016(5) (Cum. Supp. 2002).

From the pleadings and the evidence contained in the record before it, the Commission finds and determines as follows:

A. PROCEDURAL FINDINGS

1. The subject property consists of a tract of land legally described as "LT 25 & IRR N 81 FT LT 26 & -EX E 30 S 320 FT & IRR S 280 W 220 FT -" in the City of Omaha, Douglas

County, Nebraska. (E1:1). The property is improved with a single-family residence which is 17,284 square feet in size. (E2:3). The residence has a pool, hot tub, storage shed, and 6-car attached garage. (E19; E20). The improvements were built in 1935, and completely remodeled in 1995. (E37:8).

2. The Taxpayer is the owner of record of the subject property. (E1; E2).
3. The Douglas County Assessor ("the Assessor") determined that the actual or fair market value of the subject property was \$6,175,000 as of the assessment date. (E1). The Assessor further determined that the actual or fair market value of the land component was \$580,300, and that the actual or fair market value of the improvements was \$5,594,700. (E1).
4. The Taxpayer timely filed a protest of the proposed valuation and requested that the assessed value of the subject property be equalized with comparable property. (E6). The Taxpayer's protest requested that the improvements to the subject property be valued for purposes of equalization at \$2,592,600. (E6:1). The Taxpayer did not protest the value of the land component (\$580,300) as determined by the Board. (E6:1).
5. The Board denied the protest. (E1).

6. The Taxpayer thereafter timely filed an appeal of the Board's decision to the Commission. (Appeal Form).
7. The Commission served the Board with a Notice in Lieu of Summons on September 8, 2000. (*Affidavit of Service*).
8. The Board timely filed an Answer on September 25, 2000.
9. The Commission issued a Fifth Amended Notice of Hearing on November 5, 2002. The Notice of Hearing set the matter for a hearing on the merits of the appeal for the 13th day of February, 2003.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The Parties stipulated and agreed that the actual or fair market value of the subject property was \$6,175,000 as of the assessment date.
2. The equalized value of the subject property as determined by the Board was \$6,175,000.
3. The subject property was therefore assessed at 100% of its actual or fair market value as of the January 1, 2000, assessment date.
4. The subject property is located in a neighborhood of the City of Omaha. The neighborhood is generally defined as North of Dodge Street, South of Cuming Street, East of 69th Street, and West of 62nd Street. (E32; E35). The neighborhood, from the uncontroverted testimony, is an

"Executive Neighborhood." No testimony concerning the number of residential parcels included within the neighborhood appears in the record.

5. The Taxpayer adduced the testimony of a Certified General Appraiser licensed by the State of Nebraska ("the Taxpayer's Appraiser").
6. The testimony of the Taxpayer's Appraiser did not include an opinion of value for the subject property or for any of the other properties offered as "comparables" by the Taxpayer.
7. The testimony adduced did not fall under any of the Standards contained in the Uniform Standards of Professional Appraisal Practice.
8. Although the witness was qualified as an expert, no "expert" testimony was offered by the Taxpayer's Appraiser.
9. The Taxpayer's Appraiser did offer testimony based on records of the Douglas County Assessor's Office. The records included twenty residential properties located in the Fairacres Neighborhood. (E5; E40; E41).
10. The Taxpayer's Appraiser also offered testimony based on twenty houses which are described as either "Preeminent Properties" or which appear on the "Douglas County Mansion List." (E36).
11. The Taxpayer's Appraiser's testimony focused on the size of the above-grade living area improvements for each property,

the assessed value of the improvements, and the assessed value per square foot of the above-grade living area.

(E5:2; E37).

12. The uncontroverted evidence establishes that the assessed value of the improvement component of the subject property was \$323.69 per square foot. [$\$5,594,700$ (assessed value of improvements) \div $17,284$ square feet = $\$323.69$]. (E5:2).
13. The next highest assessed value for a home in the Fairacres Neighborhood offered by the Taxpayer was \$130.98 per square foot, or 40% of that of the subject property. (E5:2).
14. The Douglas County Assessor's "Mansion List" or "Preeminent Property" list has two properties which are larger in terms of improvements than the subject property. The improvements to the property at 14243 Hamilton Street were built in 1993, and are 22,916 square feet in size. These improvements have an assessed value of \$120.12 per square foot, or 37% of that of the subject property. (E37:16).
15. The next largest home on the "Mansion List" is located at 9909 Fieldcrest Drive and has 18,488 square feet of improvements. These improvements were built in 1972 and have an assessed value of \$61.01 per square foot, or 19% of that of the subject property. (E37:17).

16. The Board also adduced the testimony of a "Registered" appraiser licensed by the State of Nebraska and employed by the Assessor's Office ("the Board's Appraiser").
17. The Board's Appraiser adduced Exhibit 21. The Taxpayer objected and moved to strike the exhibit. The objection was sustained, and the Motion was granted.

V.
ANALYSIS

This appeal presents issues nearly identical to those decided in *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25 (1999). The subject property in this appeal, like that in the *Scribante* appeal, is located in the Fairacres Neighborhood of the City of Omaha. The issue presented in this appeal, as in the *Scribante* appeal, is whether the assessed value of the subject property is equalized with the assessed values of comparable property.

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 either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002). The Supreme Court has determined that in order to meet the "unreasonable or arbitrary" burden of persuasion the Taxpayer must adduce 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. of Equal.*, 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 Board was unreasonable. *Garvey Elevators v. Adams County Bd. of Equal.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

A.

VALUATION OF THE SUBJECT PROPERTY

The Commission's Order for Hearing in this matter provides:

"In any real property case before the Commission, the County shall provide complete and legible copies of the Property Record File for the subject property The County shall also provide copies of all information used to set the assessed value of the subject property for the tax year at issue." (*Commission Case File, Order for Hearing.*)

The Board, in response to this order, provided Exhibit 16. The four-page document is part of the Assessor's "Cole-Layer-Trumble computer assisted mass appraisal ('CAMA')" system. The information provided includes the following: a one-page computer generated document listing the address, legal description, and owner information for the subject property; a one-page computer

generated document listing the assessed value of the subject property by tax year for the past ten-years; a one-page computer generated document consisting of 21-lines and listing the characteristics of the property necessary for reaching an opinion of value under the Cost Approach; and a one-page, three-line computer generated document showing the two transfers of the subject property: one in 1993, and the second in 1999. Testimony adduced by the Board establishes that page three of the exhibit (the Cost Approach Worksheet) pertains only to the pool (\$32,000), the patio (\$11,600), and the "bathhouse" (referred to as the "storage shed" on Exhibit 19 at page 1) (\$23,440).

The Board during the course of the hearing alleged that the Assessor had obtained a new CAMA system. The Board further alleged that the new CAMA system did not use the Cost Approach to value the subject property for the tax year at issue. The Board, however, adduced no evidence concerning the basis for its determination of value.

The documents adduced by the Board are similar to documents obtained from the Assessor by the Taxpayer. The Taxpayer relied upon these documents at his hearing before the Board, and for his hearing before the Commission. The Board's evidence, however, establishes that these documents, which indicate that the Cost Approach was used to value the subject property, are misleading and incorrect. The Board offered no other evidence concerning

its valuation methodology, and no explanation concerning the failure to adduce the necessary records.

The documents adduced by the Board in compliance with the Commission's Order, when considered in this light, serve little purpose other than to establish that assessed value as determined by the Assessor and the Board, (\$6,175,000) is precisely 95% of the purchase price. (E16:4).

The Board's challenge of the Taxpayer's evidence, obtained as it was from the Assessor's Office, is not credible.

The Parties stipulated at the hearing before the Commission that the actual or fair market value of the subject property was \$6,175,000 as of the assessment date. This agreement is subject to the general rule that a stipulation entered by the parties to a proceeding or by their attorneys establishes the fact or facts stipulated and binds the parties. *Ehlers v. Perry*, 242 Neb. 208, 218, 494 N.W.2d 325, 333 (1993) (Citations omitted).

The absence of any credible evidence concerning the methodology used by the Assessor or the Board to set the value of the subject property for tax year 2000 is problematic. The Supreme Court has determined that where a value is arbitrarily determined without explanation of the methods used or the elements considered, there is no presumption that the valuation is correct, and such a valuation is not supported by competent

evidence and is legally erroneous. *Leech, Inc. v. Bd. of Equal.*, 176 Neb. 841, 846, 127 N.W.2d 917, 921 (1964).

B.
EQUALIZATION OF THE ASSESSED VALUE

The subject property consists of a tract of land legally described as "LT 25 & IRR N 81 FT LT 26 & -EX E 30 S 320 FT & IRR S 280 W 220 FT -" in the City of Omaha, Douglas County, Nebraska. (E1). The Board adduced evidence suggesting that the tract of land is 355 feet by 485 feet (E20), or approximately 172,175 square feet in size (approximately 3.95 acres). The Assessor's records suggest that the tract of land is approximately 165,825 square feet *in* size (E2:3) or approximately 3.81 acres *in* size. The tract of land is generally located north of 60th and Dodge Streets in Omaha. The uncontroverted evidence establishes that the lot is located within an exclusive "Executive Neighborhood" known as "Fairacres."

The property is improved with a two-story, single-family residence which is 17,284 square feet in size. (E2:3). The residence has a pool, hot tub, storage shed, and 6-car attached garage. (E19; E20). The improvements were built in 1935, and completely remodeled in 1995. (E37:8). The Assessor's records indicate that the "Quality of Construction" for the improvement is "Excellent" ("Grade Factor X + 25"). (E2:3). The Assessor's

records also indicate that the "Physical Condition" of the improvements is "Good." ["PHYSICAL COND GD" (E2:3)].

The Taxpayer's evidence in this case, as in the *Scribante* appeal, consists of evidence concerning the assessed value of other single-family residential real properties which the Taxpayer contends are "comparable" to the subject. The Taxpayer's Appraiser prepared spreadsheets which are based on the Assessor's records for those "comparable" properties. The Assessor's records contain a value for the land component for those "comparable" properties, a value for the improvement component, and a total value. The records also contain a number, designated as "SQ FT LIVING AREA," which the Taxpayer's Appraiser construed as the "above-grade living area" for each property.

This assumption has a significant impact on the evidence presented. The cost of "above grade living area" is usually substantially more than the cost of "finished basement" area. For example, the *Marshall-Swift Residential Cost Handbook* establishes that the base cost per square foot for a two-story, 3,200 square foot, masonry home of "Excellent Quality" of construction is \$113.76 for "face brick," while the per square foot cost for finished basement area is \$48.92 (Assuming 12-inch concrete walls with partitioned finish. Factors are provided for larger areas). (*Marshall-Swift Residential Cost Handbook*, Marshall & Swift, L.P., 6/2002, page Exc-11 and Exc-15).

Proper application of the Cost Approach requires that the above-grade living area and the basement area are typically calculated separately and then added to determine Replacement Cost New. *Marshall-Swift Valuation Service*, Marshall & Swift, L. P. , 12/2001, p. 6.

The Board's witnesses suggest that using the "SQ FT LIVING AREA" data found on the information obtained from the Assessor's Office is improper, since the factor may include or exclude finished basement living area. The hearing before the Commission was continued on five separate occasions. The Board had actual, personal notice of the Taxpayer's reliance on the data from the Assessor's Office. The Board, in spite of the two-year period between the date of the appeal and the hearing, did not provide the "correct" documentation or other information which might establish the differences, if any, or the resulting impact on the per square foot assessed values presented by the Taxpayer.

The Supreme Court has held that:

. after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters particularly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest . . . in conjunction with the above-quoted proposition of law, the trier of fact is the sole judge

of what probative force to give the fact that a party has failed to call a witness or produce evidence .

[T]he relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact."

Yarpe v. Lawless Distrib. Co., 7 Neb.App. 957, 962 - 963, 587 N.W.2d 417, 421 (1998) (Citations omitted). The Board's evidence that the factor may be misleading or erroneous, in light of the adverse inference rule, is not persuasive.

The Taxpayer's Appraiser, as noted above, utilized the Assessor's "SQ FT LIVING AREA" for the improvement component of the subject property, and divided that amount by the size of the improvements contained in the Assessor's records, to yield an assessed value per square foot of improvement. This methodology follows professionally accepted mass appraisal methodologies. "Improved property can be valued using units of comparison. For residential properties, typical units of comparison are: dwelling unit; square foot of building; room; [or] bedroom."

Property Assessment Valuation, 2n^d Ed., International Association of Assessing Officers, 1996, p. 104.

It is important to isolate the value of the improvements from the value of the land component when utilizing "comparable" properties. "[T]he assessor must understand that location is the

single most important factor in establishing property value. two residences may be similar in size, age, quality, and other features, but one will have a lower value because of its proximity to some undesirable feature . . . The other residence may have a higher value because of its proximity to a lake or golf course." *Property Assessment Valuation, 2ⁿd Ed.*, International Association of Assessing Officers, 1996, p. 67 - 68. See, e.g., *Livingston v. Jefferson County Board of Equalization*, 10 Neb. App. 934, 640 N.W.2d 426 (2002). An assessor, based on this principle, typically accounts for the impact of location on actual or fair market value in the value of the land component.

Judicial decisions in Nebraska have also recognized that the assessed value of comparable properties may be used to demonstrate value. See, e.g., *Scribante, supra, DeBruce Grain, Inc. v. Otoe County Board of Equalization*, 7 Neb.App. 688, 584 N.W.2d 837 (1998); *Cabela's, Inc. v. Cheyenne County Board of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999). These decisions uniformly require, however, that the "comparable" properties be truly comparable to the subject property. The Taxpayer's evidence must therefore be reviewed for elements of comparability.

The Taxpayer in this appeal adduced evidence of properties located within the Fairacres Neighborhood of the City of Omaha

and properties which are located outside of that neighborhood. "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.

The Taxpayer's Appraiser prepared a two-page spreadsheet summarizing his analysis of "comparable" properties within the Fairacres neighborhood. (E5:2 - 3). The spreadsheet, however, does not address all of the elements of comparability described above. In fact only two elements are addressed: "building grade" (i.e., quality of construction) and the size of living area. The spreadsheet summarizes fifteen properties in this manner.

The quality of construction for the subject property is "X + 25) (i.e., "excellent") (E2:3). The quality of construction for the "comparable" properties range from a low of "A + 00" or "Average," to "X + 25." Only two of the "comparables" have an "excellent" quality of construction: the property located at 400 N. Elmwood and the property located at 425 Fairacres Road.

The first of these two "comparables" was built in 1930 and remodeled in 1996. (E5:20). This property has 7,770 square feet of improvements, and an assessed value of \$130.98 per square foot of improvements. (E5:20). The improvements are approximately 45% the size of the improvements to the subject property.

The second "comparable" property was built in 1937 and remodeled in 1979. This property has 6,339 square feet of improvements. (E5:13). The improvements are approximately 37% of the size of the improvements to the subject property. These improvements and an assessed value of \$154.09 per square foot of improvements.

The Taxpayer also adduced evidence of residential real property designated by the Assessor as "Mansions" or "Preeminent Properties." (E37). One of the properties is located at 14243 Hamilton. The improvements to this property were built in 1993. This property has 22,916 square feet of improvements. The improvements are approximately one-third larger than the improvements to the subject property. (The improvements have a "Grade Factor" of "X + 50," while the subject property has a "Grade Factor" of "X + 25.") These improvements had an assessed value of \$96.10 per square foot for tax year 2000. [Improvement value of \$2,202,300 for tax year 2000 - 22,916 square feet of improvements = \$96.10 per square foot. (E36:16 - 17).] [The spreadsheet lists a per square foot value of \$120.12, based on an assessed value of \$2,752,600. (E37:1). The assessed value for the improvements as shown on Taxpayer's Exhibit 36, at page 17, is \$2,202,300.]

Another property on the Assessor's "Mansions" list is located at 9909 Fieldcrest Drive. The improvements to this

property were built in 1972. (E37:17). This property has 18,488 square feet of improvements. (E37:17). The improvements are approximately 7% larger than the improvements to the subject property. The improvements to this property appear to be of a better "Quality of Construction" than the subject property. (The improvements have a "Grade Factor" of "X + 50," which is above "Excellent," while the subject property has a "Grade Factor" of "X + 25.") These improvements had an assessed value of \$70.52 per square foot. [Improvement value of \$1,128,000 after Board of Equalization action for tax year 2000 - 18,488 square feet of improvements = \$61.01 per square foot. (E36:13 - 14)].

A summary of the assessed values of the subject property and the comparables, when arrayed by value per square foot, results in the following:

Address	Year Built	Quality	Year Re-modeled	Size	Assessed Value Per Sq. Ft.
Subject	1935	x+25	1995	17,284	\$323.69
425 Fairacres	1937	x+25	1979	6,339	\$154.09
400 N. Elmwood	1930	x+25	1996	7,770	\$130.98
9909 Fieldcrest	1972	x+50	--	18,488	\$61.01
14243 Hamilton	1993	x+50	--	22,916	\$96.10

The array demonstrates that the house with the newest original improvements is assessed at \$96.10 per square foot, or thirty percent the per square foot assessed value of the improvements to the subject property. Houses which, in terms of age, are most comparable to the subject property are valued at \$130.98 and \$154.09 per square foot, respectively. Houses which, in terms of size, are most comparable to the subject property, are valued at \$96.10 and \$61.01 per square foot respectively.

One critical factor which must be considered in evaluating the assessed per square foot values of the Taxpayer's "comparable" properties. That concept concerns "economies of scale." The problem is summarized in *The Appraisal of Real Property*, 12th Ed., The Appraisal Institute, 2001, at page 425:

"It may sometimes be necessary to adjust for differences in economies of scale. Even if all other property characteristics appear similar, a sale property that is substantially larger or smaller than the subject property may not be a particularly meaningful comparable because the per unit price of the larger property may be lowered by economies of scale."

Neither Party offered any evidence of the adjustment necessary to account for the differences in size. Those differences do exist. The *Marshall-Swift Residential Cost Handbook* is a cost manual recognized in the regulations

promulgated by the Property Tax Administrator. *Title 350, Neb. Admin. Code, Ch. 10, X003.04.* The *Handbook* estimates Replacement Cost New based on per square foot construction costs. Those costs are segregated based on the "Quality of Construction." For a construction grade of "Excellent," the per square foot costs are further segregated based on the size of the improvements, and decrease, on a per square foot basis, for every additional 200 square feet in the area of the above-grade living area. *Marshall-Swift Residential Cost Handbook*, Marshall-Swift, L.P., 2000, p. Exc-8.

The *Handbook* estimates, for example, that in June of 2000 the base cost ("Replacement Cost New") for a two-story, 1,600 square foot home of "Excellent" Quality of Construction, and masonry construction is \$133.29 per square foot. The base cost for the same type of home which is 6,000 square feet in size is \$100.56 per square foot, a difference of \$33.29 per square foot. This cost is 25% less than the cost for the same quality home which is one-sixth the size. The principle of "economies of scale" is not correctly reflected in the Board's per square foot assessed value of the improvements. The assessed value per square foot of the subject property's improvements far exceed that of substantially larger properties, for reasons which are not adequately explained in the record.

A second critical factor must be considered in evaluating the assessed per square foot values of the Taxpayer's "comparable" properties. That concept concerns per square foot costs for properties which have a higher quality than the subject. Costs per square foot are higher for higher quality homes. Cf. *Marshall-Swift Residential Cost Handbook*, Marshall & Swift, L.P., 2002, p. Fair-13, Avg-19, Good-15, VG-13, and Exc-9. This fact is not reflected in the Board's assessed value of the subject property. The per square foot assessed value of the subject property exceeds that of higher quality properties, for reasons which are not adequately explained in the record.

The Commission must note for the record that the Taxpayer's Appraiser adduced no evidence concerning the adjustments necessary to account for the differences between the Taxpayer's "comparables" and the subject property. Typically the lack of such evidence is fatal to the taxpayer's cause of action. However, as the Court of Appeals has noted, given the magnitude of the differences in assessed values, "If the properties [the Taxpayer] selects are comparable to, or within the same class as, the subject property, there is obviously a serious problem in the assessments." *Cabela's, Inc. v. Cheyenne County Board of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

The per square foot assessed value of the subject property (\$323.69) is almost four times the per square foot assessed value

of a newer, larger home of better quality within the same class (i.e., the Mansions or "Preeminent Properties" listed in Exhibit 39). The subject property is assessed at more than four times the rate at which the only property comparable in size (but which is of better quality) is assessed. The Board offered no clear or convincing evidence explaining the dramatic differences in assessed value between the subject property and the comparable properties.

The subject property is valued at \$323.69 per square foot. If the subject property is valued at actual or fair market value, and the Board has stipulated that it is, then the only possible conclusion that can be drawn from this evidence is that the other properties in the same class as the subject property are grossly undervalued.

The courts have defined "equalization" and the remedy for a violation of the constitutional mandate of uniform and proportionate assessments. "Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to pay a disproportionate share of the tax. Where it is impossible to secure both the standards of the true value of a property for

taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief." *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).

That relief is also specified by judicial mandate. "Where the discrepancy was not the result of an error of judgment but was a deliberate and intentional discrimination systematically applied" the Taxpayer's right to relief is clear. The right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment *reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement* of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984) (Emphasis added).

C.
CONCLUSION

The evidence before the Commission establishes that newer, or larger, or better quality "comparable" homes are assessed at between \$61.01 and \$96.10 per square foot. The Taxpayer's Petition alleges that comparable property is assessed at an average of \$125.04 per square foot. (*Commission Case File, Reasons for Appeal attached to Appeal Form*, ¶2). The record supports this allegation. Given this record, the equalized value of the subject property for tax year 2000 is \$2,741,490. [17,284 square feet x \$125.04 = \$2,161,191 for improvements plus value of land component as determined by Board (\$580,300) = \$2,741,491. Neb. Rev. Stat. §77-1311.01 (Reissue 1996) authorizes the rounding of assessed values to either zero or five. The value is therefore rounded to \$2,741,490).] The decision of the Board is incorrect, unreasonable and arbitrary. The final value as determined by the Board is also unreasonable. The decision of the Board must be vacated and reversed, and the value of the improvement component of the subject property equalized for tax year 2000 as set forth above.

VI.
CONCLUSIONS OF LAW

A.
JURISDICTION

Jurisdiction of the Tax Equalization and Review Commission is set forth in Neb. Rev. Stat. §77-5007 (Cum. Supp. 2002).

B.
STANDARD OF REVIEW

The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the Board's decision was incorrect and further that the decision was either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002). 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 Equal., 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

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).

**VIII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the decision of the Douglas County Board of Equalization which denied Taxpayer's protest is vacated and reversed.
2. That Taxpayer's residential real property commonly known as 412 North Elmwood Road, in the City of Omaha, Douglas County, Nebraska, shall be valued as follows for tax year 2000:

Land	\$ 580,300
Improvements	\$2,161,190
Total	\$2,741,490

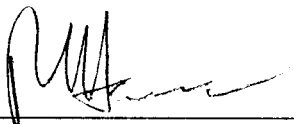
3. That any request for relief by any Party not specifically granted by this order is denied.
4. That this decision, if no appeal is filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2002).
5. That this decision shall only be applicable to tax year 2000.
6. That each party is to bear its own costs in this matter

IT IS SO ORDERED.

Dated this 15th day of May, 2003.



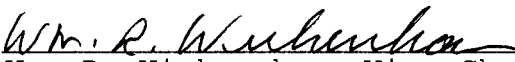
Seal




Robert L. Hans, Commissioner



Susan S. Lore, Commissioner



Wm. R. Wickersham, Vice-Chair



Mark P. Reynolds, Chair