

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

FRANK J. KILTON, JR.,)	
)	
Appellant,)	CASE NO. 03R-64
)	03R-65
vs.)	
)	FINDINGS AND
CASS COUNTY BOARD OF)	FINAL ORDER
EQUALIZATION,)	
)	
Appellee.)	

Appearances:

For the Appellant: Frank J. Kilton, Jr.
7959 South 45th Avenue
Bellevue, NE 68157

For the Appellee: Nathan B. Cox, Esq.
Cass County Attorney
346 Main Street
Plattsmouth, NE 68048

Before: Commissioners Hans, Reynolds, and Wickersham.

**I.
STATEMENT OF THE CASE**

Frank J. Kilton, Jr, ("the Taxpayer") owns two tracts of recreational property in Cass County, Nebraska. (E1:1; E2:1). The tract of land in Case Number 03R-64 is approximately five acres in size and is legally described as Lot 6 and Accretion Land, SW $\frac{1}{4}$ SW $\frac{1}{4}$, in Section 25, Township 13, Range 12, Cass County, Nebraska. (E1:1). This tract of land is improved with a "movable log cabin," (E3:73); two storage sheds (E3:80), a "yellow cabin," (E3:65) and a "tan cabin." (E3:79). The Cass County Assessor ("the Assessor") determined that the actual or fair market value of this property was \$121,781 as of the January 1, 2003,

assessment date. (E1:1). The Taxpayer timely filed a protest of that determination and alleged that the equalized value of the property was \$63,100. (E1:2). The Cass County Board of Equalization ("the Board") denied the protest. (E1:1). The Taxpayer filed an appeal of the Board's decision on August 18, 2003. (*Appeal Form*).

The tract of land in Case Number 03R-65 is approximately two acres in size and is legally described as Lot 24, NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, Township 13, Range 12, Cass County, Nebraska. (E2:1). This tract of land is improved with a "red cabin," (E3:54); a shed and a garage. (E3:55). The Assessor determined that the actual or fair market value of this property was \$52,626 as of the assessment date. (E2:1). The Taxpayer timely filed a protest of that determination and alleged that the equalized value of the property was \$29,975. (E2:2). The Board denied the protest. (E2:1). The Taxpayer filed an appeal of the Board's decision on August 18, 2003. (*Appeal Form*).

The Commission served a Notice in Lieu of Summons on the Board in each appeal on September 4, 2003. (*Affidavit of Service, p. 3*). The Board answered each Notice on September 12, 2003. The Commission consolidated the appeals for purpose of hearing and issued a consolidated these appeals for purpose of hearing on November 5, 2003. The Commission then issued an Order for Hearing and Notice of Hearing to each of the Parties on

November 5, 2003. The original hearing date was continued at the request of the Board, and an Amended Notice of Hearing was issued on March 24, 2004. Copies of the Amended Notice were served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on March 31, 2004. The Taxpayer appeared personally at the hearing. The Board appeared through Nathan B. Cox, Esq., the Cass County Attorney. Commissioners Hans, Reynolds and Wickersham heard the appeal. Commissioner Lore was excused from the proceedings. Commissioner Wickersham served as the presiding officer.

Each Party was afforded the opportunity to present evidence and argument. The Board rested without adducing any evidence.

II. ISSUES

The issues before the Commission are (1) whether the Board's decisions to deny the Taxpayer's valuation and equalization protests were incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determinations of value and equalized value were unreasonable.

III.
APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7)(Reissue 2003)). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV.
FINDINGS OF FACT

The Commission finds and determines that:

1. The subject properties are used predominantly for recreational purposes. The subject properties' improvements are not capable of year-round human habitation.
2. The owner of the subject properties has 38-years experience in the field of real estate sales and management. The owner's opinion of actual or fair market value for the

subject properties is \$65,000 in Case Number 03R-64 and \$35,000 in Case Number 03R-65.

3. The Board's determinations of value were based on an assessment for tax year 2001. The 2001 values were based on a classification and valuation of the subject properties as "rural residential" properties.

**V.
ANALYSIS**

**A.
ACTUAL OR FAIR MARKET VALUE**

The subject properties are used by the Taxpayer and his wife on three or four weekends each year for recreational purposes. The Taxpayer's family and a retired friend use the property more frequently but for the same recreational purposes. None of the cabins have a heat source which can provide year round living. The plumbing system for each cabin must be drained prior to the onset of winter to prevent freezing. None of the cabins are occupied on a year round basis. The cabins are not habitable on a year round basis.

Administrative rules provide that "Property parcel type shall mean the predominant use of the parcel of real property at the time of assessment regardless of the parcel's legal use or zoning." Title 350, Neb. Admin. Code, Chapter 10, §001.05 (03/04). The administrative rules define "recreational property"

as "all parcels of real property used or intended to be used for diversion, entertainment, and relaxation on an occasional basis. Some of the uses would include fishing, hunting, camping, boating, hiking, picnicking, and the access or view that simply allows relaxation, diversion and entertainment. A building designed for year-round living shall not be categorized as recreational." Title 350 Nebr. Admin. Code, Chapter 10, Section 001.05E (04/03). The subject properties are "recreational properties" as that phrase is defined in applicable rules.

The Board's determinations of value for the subject properties were based on the assessment methodology generally described in Exhibit 4, page 1. This methodology established the 2001 assessed values. The land value component of the subject properties were valued using the methodology specifically described in Exhibit 5, page 5. The resulting values for the land component of the subject properties are shown on the Property Record Files for tax year 2001 and for tax year 2003. (E3:49; E3:59).

This evidence demonstrates that the 2001 and 2003 values of the subject properties were based on classification of the subject properties as "rural residential" properties. (E5:1; E4:1; E3:63; E3:53). The subject properties are "recreational" properties. The Board's determinations of value are therefore incorrect. The Board's determinations of value are not based on

the sale of comparable recreational properties. The Board's decisions are therefore unreasonable and arbitrary.

The Board called no witnesses. The Taxpayer adduced testimonial and documentary evidence from a Certified General Appraiser licensed by the State of Nebraska. The Taxpayer's Appraiser testified that his evidence was not evidence of actual or fair market value.

The only other evidence of value in the record before the Commission is the Taxpayer's opinion evidence. The Taxpayer's testimonial evidence is the only evidence of value in the record. The Taxpayer purchased the subject properties in 1977. The Taxpayer is now retired. Prior to his retirement the Taxpayer was a licensed Nebraska Real Estate Broker, a licensed Nebraska Real Estate Appraiser, a licensed Nebraska Real Estate Agent, and a property manager. The Taxpayer held such employment for more than 38 years. The Taxpayer is the owner of the subject properties, is familiar with his property and knows its worth. He is therefore 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). The Taxpayer's testimony, based on his experience, is also credible evidence of value. The Commission must therefore conclude that the actual or fair market value of the subject properties was \$100,000 as of the January 1, 2003, assessment date.

B.
EQUALIZATION

The Taxpayer alleged that the value of the subject properties was not equalized with other comparable properties in Cass County. Equalization claims have two components. First, the Taxpayer must show the per cent of its actual or fair value at which his property is assessed. Second, the Taxpayer must then show that other comparable properties are assessed at a lower percentage of actual or fair market value. *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984). If the Taxpayer adduces evidence satisfying each of these components then the Taxpayer is entitled to have his property valued at the same percentage of actual or fair market value as other comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). The Taxpayer must, however, establish each element by clear and convincing evidence. *Cabela's, supra*.

The Taxpayer has demonstrated that his property was incorrectly classified as rural residential property. Incorrect classification of real property may result in a lack of uniformity and proportionality. *Benyon Farm Products Corp. v. Gosper County Board of Equal.*, 313 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

Although the Taxpayer demonstrated incorrect classification, the Taxpayer has failed to demonstrate by clear and convincing evidence the level of assessment of "comparable" recreational properties. The Taxpayer has failed to satisfy the burden of proof imposed on him by law. His equalization claim must therefore be denied.

C.
OTHER ALLEGATIONS

Taxpayer alleged that the actual or fair market value of the subject properties was reduced because the improvements were located in the flood plain, while the improvements on surrounding properties were not. Taxpayer testified that the zoning ordinances which applied to the subject properties would not allow him to rebuild the improvements on the subject property if they were destroyed by flood. (E3:214; E3:222). The Taxpayer failed to adduce any evidence to establish the monetary impact on actual or fair market value of being located in the 100 year flood plain, the zoning regulation or FEMA regulations.

D.
CONCLUSION

The Taxpayer has demonstrated by clear and convincing evidence that the Board's decisions were incorrect and both unreasonable and arbitrary. The Taxpayer has also demonstrated by clear and convincing evidence that the Board's determinations of actual or fair market value were unreasonable. The Taxpayer has, however, failed to adduce sufficient clear and convincing evidence to support his contention that a further reduction in the value of the subject properties is warranted to equalize the assessed value of the subject property with other comparable properties.

VI.
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over 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 Board's action was incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Reissue 2003).
3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its

decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's value becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).

4. "Actual value" is defined as the market value of real property in the ordinary course of trade, or 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 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. Neb. Rev. Stat. §77-112 (Reissue 2003).
5. Recreational properties are parcels of real property used or intended to be used for diversion, entertainment, and relaxation on an occasional basis which are not capable of year round habitation. Title 350 Nebr. Admin. Code, Chapter 10, Section 001.05E (04/03).
6. The subject properties are "recreational properties."

7. An owner of property 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).
8. The right of a taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of value at which others are assessed. This 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).
9. The Taxpayer bears the burden of demonstrating by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuation placed on other similar property is grossly excessive. *Cabela's, Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).
10. Incorrect classification of real property may result in a lack of uniformity and proportionality. *Benyon Farm Products Corp. v. Gosper County Board of Equal.*, 313 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

11. The Taxpayer has adduced clear and convincing evidence establishing the Board's decisions were incorrect, unreasonable and arbitrary. The Board's determinations of actual or fair market value must accordingly be vacated and reversed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Cass County Board of Equalization's Orders setting the assessed value of the subject properties for tax year 2003 are vacated and reversed.
2. The Taxpayer's real property in Case Number 03R-64 legally described as Lot 6 and Accretion Land, SW $\frac{1}{4}$ SW $\frac{1}{4}$, in Section 25, Township 13, Range 12, Cass County, Nebraska , shall be assessed at the property's actual or fair market value of \$65,000 for tax year 2003.
3. The Taxpayer's real property in Case Number 03R-65 legally described as Lot 24, NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, Township 13, Range 12, Cass County, Nebraska, shall be assessed at the property's actual or fair market value of \$35,000 for tax year 2003.
4. Any request for relief by any Party not specifically granted by this order is denied.

5. This decision, if no appeal is filed, shall be certified to the Cass County Treasurer, and the Cass County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003).
6. This decision shall only be applicable to tax year 2003.
7. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 5th day of April, 2004.

Robert L. Hans, Commissioner

Mark P. Reynolds, Vice-Chair

SEAL

Wm. R. Wickersham, Chair