

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

|                         |   |                 |
|-------------------------|---|-----------------|
| JEROME D. KOWALSKI and  | ) |                 |
| PATRICIA A. KOWALSKI,   | ) |                 |
|                         | ) | CASE NO. 03R-90 |
| Appellants,             | ) |                 |
|                         | ) |                 |
| vs.                     | ) | FINDINGS AND    |
|                         | ) | FINAL ORDER     |
| SHERMAN COUNTY BOARD OF | ) |                 |
| EQUALIZATION,           | ) |                 |
|                         | ) |                 |
| Appellee.               | ) |                 |

Appearances:

For the Appellant: Jerome D. Kowalski  
R.R. 2, Box 68  
Loup City, NE 68853

For the Appellee: No Appearances by Counsel

Before: Commissioners Hans, Lore, Reynolds, and Wickersham.

**I.  
STATEMENT OF THE CASE**

Jerome D. Kowalski and Patricia A. Kowalski ("the Taxpayers") own a 151-acre tract of land legally described as part of the NE¼ of Section 10, Township 16, Range 15, Sherman County, Nebraska. (E15:1). The tract of land is improved with a single-family residence which was built in 1995. The residence is a one-story home with 1,992 square feet of above-grade finished living area over a full basement. (E15:1). The basement finish consists of 1,152 square feet of "partition finish," and 644 square feet of "recreational finish." (E15:3). There are 196 square feet of unfinished basement. (E14:3). The

home has an attached garage (E25:3) and a number of outbuildings. (E15:5 - 7).

Agricultural and horticultural real property is to be valued at 80% of actual or fair market value. Non-agricultural real property is to be valued at 100% of actual or fair market value. Neb. Rev. Stat. §77-201(Reissue 2003). The actual or fair market value of the non-agricultural real property, together with 80% of the actual or fair market value of the agricultural property, yields the assessed value of the subject property as of the assessment date. The State Assessment Manager for Sherman County determined that the assessed value of the Taxpayers' real property was \$220,275 as of the January 1, 2003, assessment date. (E5:1). The Taxpayers protested that determination of value and alleged that the assessed value of the property was \$151,219. (E5:1). The Sherman County Board of Equalization ("the Board") granted the protest in part and reduced the assessed value of the land component, but increased the assessed value of the improvements based on an inspection of the basement of the subject property. This inspection was made pursuant to the protest and with the Taxpayer's permission. (E5:1).

The Taxpayers appealed the Board's decision on August 19, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 5, 2003, which the Board answered on September 10, 2003. The Commission issued an Order for Hearing and Notice

of Hearing to each of the Parties on April 6, 2004. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Kearney, Buffalo County, Nebraska, on June 28, 2004. The Taxpayer appeared personally at the hearing. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

Special Appointed Counsel for the Sherman County Board of Equalization filed a Motion to Withdraw on June 24, 2003. Mr. Eldon Kieborz, Chair of Sherman County Board of Equalization, attended the hearing before the Commission. Special Appointed Counsel was given leave to withdraw as requested.

## **II. ISSUES**

The issues before the Commission are (1) whether the Board's decision to grant the Taxpayers' protest in part but raise the improvement value was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

**III.**  
**APPLICABLE LAW**

The Taxpayers are 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, as amended by 2003 Neb. Laws, L.B.973, §51)). 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 Taxpayers, 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 State Assessment Manager for Sherman County's determination of value (\$220,275 as shown on Exhibit 5, page 1) had three components:
  - a. Land Value           \$ 50,785
  - b. House Value         \$141,365
  - c. Outbuildings       \$ 28,125

- d. Total \$220,275  
(E10:1 and E5:1).
2. The Board reduced the value of the land component from \$50,785 to \$48,910. (E5:1; E15:7).
  3. The State Assessment Manager for Sherman County's residential improvement value was based on the 1999 *Marshall & Swift Residential Cost Handbook* cost factors. (E10:1).
  4. The State Assessment Manager for Sherman County's residential improvement value included 996 square feet of "partition finish" and 996 square feet of "recreational finish." (E10:1).
  5. The Board's value for the residential improvement component of the subject property is based on the 2002 *Marshall & Swift Residential Cost Handbook* cost factors. (E15:3).
  6. The Board's value for the residential improvement component of the subject property included 1,152 square feet of "partition finish" and 644 square feet of "recreational finish." There are also 196 square feet of unfinished basement area. (E15:3).
  7. The 2002 cost factors are eight percent (8%) higher than the 1999 cost factors. (E15: 1 - 4; Testimony of the State Appraiser for Sherman County).
  8. The new, higher cost factors were used for those properties for which protests were filed, including the subject

property, and also any properties which had improvements added ("pick-up work"). (E15:1 - 2).

9. The actual or fair market value of the residential improvement component of the subject property, including the corrected basement dimensions and using the 1999 cost factors is \$140,544.

#### **V. ANALYSIS**

The Taxpayers presented five issues presented to the Board: (1) a request for additional physical depreciation for the residence; (2) a request for a 15% economic depreciation for the residence; (3) a request for a reduction in the assessed value of "waste land" from \$20 per acre (after Board action, see E15:7) to zero; (4) an allegation that one of the outbuildings was valued twice and that all of the outbuildings were overvalued; and (5) an allegation that the improvement component of the subject property was overvalued. The Taxpayers adduced no evidence concerning physical depreciation. The Taxpayers' evidence demonstrates that economic depreciation is specific to locales within Sherman County. Those economic depreciation factors ranged from 15% to 40% for tax year 2003. The Taxpayers failed to adduce any evidence quantifying the appropriate economic depreciation factor applicable to the location of their property.

The Taxpayer also requested that the assessed value of the 25-acres designated as "waste" with an assessed value of \$20 per acre after Board action should be reduced to zero. The Taxpayer testified that these 25-acres of canal had no value. An owner of property who knows the property and is familiar with its worth is competent to testify as to value. *U.S. Ecology v. Boyd County Bd. Of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999). The evidence establishes that the canals have no more value than roads, which are valued at zero. The Board adduced no evidence in support of its \$20 per acre value for canals. The Taxpayer's request for relief for the "waste" land component of the subject property must be granted.

The Taxpayers also alleged that the outbuildings were overvalued and that one of the outbuildings was valued twice. The inventory of outbuildings and their values were described as a "work in progress" by the State Appraiser for Sherman County when asked about the discrepancies between Exhibit 15, pages 5 and 6, and Exhibit 6, page 3. The Taxpayers adduced no evidence that the inventory and values as shown on the exhibits were incorrect.

The Taxpayers also failed to adduce any evidence of actual or fair market value for the outbuilding component of the subject property.

The State Assessment Manager for Sherman County valued the subject property's improvements using the Cost Approach.

(E10:1). The Cost Approach includes six steps: "(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (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*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. The only steps at issue in this appeal is the determination of Replacement Cost New ("RCN") and Replacement Cost New Less Depreciation ("RCNLD").



The Board changed the square footage for the basement finish for the residential improvement in reaching its determination of value. (Cf. E10:1 and E15:3). The Taxpayers adduced no evidence concerning the correct measurements of the basement finish. The Commission must accordingly conclude that the 1,152 square feet of "partition finish" and the 644 square feet of "recreational finish" are the correct dimensions for the basement finish. (E15:3).

The State Assessment Manager for Sherman County used the 1999 *Marshall Swift Residential Cost Handbook* cost factors to value the subject property's improvements for tax year 2003. The Board, after the Taxpayers' protest, used the 2002 *Marshall Swift Residential Cost Handbook* cost factors to value the subject property's improvements. The 2002 cost factors are 8% higher than the 1999 cost factors. The State Appraiser for Sherman County testified that the Board increased the physical depreciation factor for the properties whose values were changed to the 2002 cost factors. The subject property's physical depreciation factor was 6% both before and after Board action. (E10:1; E15:3).

Taxes must be levied uniformly and proportionately on all real property. Art. VIII, Neb. Const., §1(1). While it is permissible to reasonably classify property for tax purposes and to use different methods to determine assessed values for

different classifications of property, the results obtained by such permissible different methods must be some way correlated so that the results reached shall be uniform and proportionate.

*Natural Gas Pipeline Co. of America v. State Bd. of Equalization and Assessment*, 237 Neb. 357, 373, 466 N.W.2d 461, 471 (1991).

The State Appraiser for Sherman County testified that the new cost factors were selectively applied in her absence. The Board failed to offer any correlation justifying disparate treatment of properties for which protests were filed versus properties for which no protests were filed. Further, the Board offered no evidence reconciling the results of the disparate treatment to actual or fair market value.

The results of the disparate treatment in fact cannot be reconciled. Using the corrected basement finish dimensions results in the following the indication of value under the Cost Approach:

|                                   | <i>RCN Using 1999 Cost<br/>Factors (E10:1)</i> | <i>RCN Using 2002 Cost<br/>Factor (E15:3)</i> |
|-----------------------------------|------------------------------------------------|-----------------------------------------------|
| Base Costs                        | \$ 93,106                                      | \$ 101,512                                    |
| Adjustments:                      |                                                |                                               |
| Heating etc.                      | \$ 2,729                                       | \$ 3,008                                      |
| Basement Cost                     | \$ 19,741                                      | \$ 19,300                                     |
| Partition                         | \$18,225*                                      | \$ 19,100                                     |
| Recreational                      | \$6,139**                                      | \$ 7,715                                      |
| Attached Garage                   | \$ 9,575                                       | \$ 10,495                                     |
| Total                             | \$ 149,515                                     | \$ 161,130                                    |
| Less: 6% Physical<br>Depreciation | \$ (8,971)                                     | \$ (9,668)                                    |
| RCNLD                             | \$ 140,544                                     | \$ 151,462                                    |
| Outbuildings                      | \$ 28,125                                      | \$ 28,125                                     |
| Land                              | \$ 48,410                                      | \$ 50,785                                     |
| Total                             | \$ 217,079                                     | \$ 230,372                                    |

\* 1,152 sq. ft. x \$15.82 = \$18,225

\*\* 644 sq. ft. x \$9.52 = \$6,139

The Board's decision to use the 2002 cost factors to value the subject property's residential improvements without reconciling the results to values obtained using 1999 cost factors used for other properties was incorrect, and both unreasonable and arbitrary. The Board's ultimate determination of value for the improvements was also unreasonable. The Board's decision concerning the value of the residential improvements must accordingly be vacated and reversed.

The Board's decision to value land burdened by an easement for a canal at \$20 per acre was also unreasonable when land used

for roads was assigned no value. (E15:7). That decision must also be vacated and reversed.

**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. Taxes must be levied uniformly and proportionately on all real property. Art. VIII, Neb. Const., §1(1). While it is permissible to reasonably classify property for tax purposes and to use different methods to determine assessed values for different classifications of property, the results obtained by such permissible different methods must be some way correlated so that the results reached shall be uniform and proportionate. *Natural Gas Pipeline Co. of America v. State Bd. of Equalization and Assessment*, 237 Neb. 357, 373, 466 N.W.2d 461, 471 (1991).
6. The Taxpayers have adduced clear and convincing evidence that the Board's decision was incorrect and both unreasonable or arbitrary. The Taxpayers have also adduced clear and convincing evidence that the Board's determination of value was unreasonable.
7. The Board's decision must accordingly be vacated and reversed.

**VII.  
ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:**

1. The Sherman County Board of Equalization's Order setting the assessed value of the subject property for tax year 2003 is vacated and reversed.
2. The Taxpayer's real property legally described as the NE $\frac{1}{4}$  of Section 10, Township 16, Range 15, Sherman County, Nebraska, shall be valued as follows for tax year 2003:

|              |           |                                     |
|--------------|-----------|-------------------------------------|
| Land         | \$ 48,410 | (valuing 25 acres of waste at zero) |
| House        | \$140,544 |                                     |
| Outbuildings | \$ 28,125 |                                     |
| Total        | \$217,079 |                                     |
3. Any request for relief by any Party not specifically granted by this order is denied.
4. This decision, if no appeal is filed, shall be certified to the Sherman County Treasurer, and the State Assessment Manager for Sherman County pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003).

5. This decision shall only be applicable to tax year 2003.
6. Each Party is to bear its own costs in this matter.

**IT IS SO ORDERED.**

Dated this 9<sup>th</sup> day of July, 2004.

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*Robert L. Hans, Commissioner*

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*Susan S. Lore, Commissioner*

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*Mark P. Reynolds, Vice-Chair*

**SEAL**

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*Wm. R. Wickersham, Chair*