

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

KENNETH W. SHERWOOD,	)	
	)	
Appellant,	)	CASE NO. 03R-50
	)	
vs.	)	
	)	FINDINGS AND
LANCASTER COUNTY BOARD OF	)	FINAL ORDER
EQUALIZATION,	)	
	)	
Appellee.	)	

Appearances:

For the Appellant: Kenneth W. Sherwood  
2011 West Rokeby Road  
Lincoln, NE 68523

For the Appellee: Michael E. Thew, Esq.  
Chief Deputy, Civil Division  
Lancaster County Attorneys Office  
575 South 10<sup>th</sup> Street  
Lincoln, NE 68508

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

**I.  
STATEMENT OF THE CASE**

Kenneth W. Sherwood ("the Taxpayer") owns a tract of land approximately 2.72 acres in size legally described as Lot 6 I.T., NW¼ of Section 33, Township 9, Range 6, Lancaster County, Nebraska. (E17:1). The land is located in a flood plain and is "unbuildable." (E17:1). The subject property is bordered on the north by West Rokeby Road, on the east and south by an improved 2.33 acre lot which the Taxpayer also owns, and on the west by lot owned by the Taxpayer's brother. (E5; E18:2; E9:9). The

Taxpayer's improved lot includes a single-family residence owned and occupied by the Taxpayer.

The Lancaster County Assessor ("the Assessor") determined that the actual or fair market value of the Taxpayer's real property was \$35,360 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and alleged that the actual or fair market value of the property was \$1,496. (E9:28). The Lancaster County Board of Equalization ("the Board") granted the protest in part and determined that the actual or fair market value of the property was \$8,840 as of the assessment date. (E1).

The Taxpayer filed an appeal of the Board's decision on August 15, 2004. The Commission served a Notice in Lieu of Summons on the Board on August 25, 2003, which the Board answered on September 9, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on January 7, 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 Lincoln, Lancaster County, Nebraska, on March 11, 2004. The Taxpayer appeared personally at the hearing. The Board appeared through Michael E. Thew, Chief Deputy, Civil Division, Lancaster County Attorneys Office.

Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The Commission afforded the Parties the opportunity to present evidence and argument as required by law. The Board, after the Taxpayer rested his case-in-chief, moved to dismiss the appeal for failure to present: (1) any evidence that the Board's decision was incorrect; and (2) any evidence that the Board's decision was unreasonable; and (3) any evidence that the Board's decision was arbitrary.

## **II. ISSUES**

The issues before the Commission are (1) whether the Board's decision was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's value was reasonable.

## **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 Taxpayer offered no opinion of actual or fair market value.
2. The Taxpayer's opinion of "highest and best use" of the subject property is as "treed waste."
3. The Taxpayer alleged that the subject property was adversely impacted by frequent flooding, but adduced no evidence quantifying the impact of frequent flooding on actual or fair market value.

**V.  
ANALYSIS**

The Taxpayer has 19-years of experience as a Right-of-Way Agent and Right-of-Way Manager for Lancaster County, Nebraska. He retired in 1999, and is a right-of-way consultant for property owners. (E3). The Taxpayer requested a value of \$1,496 for tax year 2003. (E9:28). The Taxpayer's requested value is based on

the Taxpayer's opinion of "highest and best use." "Highest and best use" is:

"the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially reasonable, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical probability, financial feasibility, and maximum profitability."

*Dictionary of Real Estate Appraisal, 3<sup>rd</sup> Ed., Appraisal Institute, 1998, p. 171. See also Title 350, Neb. Admin. Code, ch. 10, §001.13. (04/03).*

The Taxpayer's opinion of highest and best use is as "treed wasteland." Wasteland is a subclass of agricultural land. Wasteland "includes those land types that cannot be used economically and are not suitable for recreational or agricultural use or production . . . To qualify for wasteland, the land must be lying in or adjacent to and in common ownership or management with land used for the production of agricultural products." Title 350, Neb. Admin. Code, ch. 14 (07/02).

The subject property can be used economically and is not under common ownership or management for agricultural production. The subject property is therefore ineligible for valuation as wasteland.

The subject property and the adjoining lot owned and occupied by the Taxpayer form a rectangular five-acre lot. (E9:18). The Taxpayer has subdivided the rectangular five-acre lot into two lots, Lots 3 and 6, on two separate occasions: once in 1970, and again in 1985 (E9:14; E9:17). The Taxpayer subdivided the property because "I always have the option, being retired, on Social Security, if I need to find some money, I might get a buck or two for it, . . . ." (E9:17). The Taxpayer also admits that, if combined with his adjoining lot, "then it becomes part of a buildable lot and then the value is going to go up and that is why I would like it remain separate." (E9:17).

The principle of contribution holds that "the value of a particular component is measured in terms of its contribution to the value of the whole property or as the amount that its absence would detract from the value of the whole." *The Appraisal of Real Estate*, 12<sup>th</sup> Ed., The Appraisal Institute, p. 41. The Taxpayer's evidence establishes that the subject property has "contributory value" in relation to the adjoining property which is owned and occupied by the Taxpayer. (E9:24). The Taxpayer failed to adduce any evidence quantifying the "contributory value" of the subject property. There is, therefore, no evidence that the Board's value of \$8,840 exceeds the contributory value of the property.

Finally, the Taxpayer adduced evidence that the unimproved property is subject to frequent flooding. The Taxpayer, however, adduced no recent evidence quantifying the impact of frequent flooding on the actual or fair market value of the subject property as of the 2003 assessment date.

The Taxpayer has failed to adduce any evidence that the Board's decision was incorrect and either unreasonable or arbitrary. The Board's decision must be affirmed when a taxpayer fails to satisfy his burden of proof. *Garvey Elevators*, supra.

#### 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. 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).
6. The burden of persuasion imposed on the complaining taxpayer, in an appeal from a county board of equalization, is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed on the property when compared with 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 Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 524 (2001).

7. Based upon the applicable law, the 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 incorrect, and either unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).
8. The Taxpayer failed to adduce evidence that the Board's decision was incorrect and either unreasonable or arbitrary. The Board's Motion to Dismiss must therefore be granted.

**VII.  
ORDER**

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

1. The Board's Motion to Dismiss is granted.
2. The Lancaster County Board of Equalization's Order setting the assessed value of the subject property for tax year 2003 is therefore final.
3. The Taxpayer's real property legally described as Lot 6 I.T., NW¼ of Section 33, Township 9, Range 6, Lancaster

County, Nebraska, shall be valued as follows for tax year 2003:

Land	\$8,840
Improvements	\$ -0-
Total	\$8,840

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 Lancaster County Treasurer, and the Lancaster 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.**

I certify that I made and entered the above and foregoing Findings and Orders in this appeal on the 11<sup>th</sup> day of March, 2004. The same were approved and confirmed by Commissioners Hans and Lore and are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Reissue 2003).

Signed and sealed this 11<sup>th</sup> day of March, 2004.

**SEAL**

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*Wm. R. Wickersham, Chair*