

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

MICHAEL S. KRENISKY,)	
)	
Appellant,)	CASE NO. 03R-88
)	
vs.)	
)	
DOUGLAS COUNTY BOARD OF)	FINDINGS AND
EQUALIZATION,)	FINAL ORDER
)	
Appellee.)	

Appearances:

For the Appellant: Michael S. Krenisky
4835 Lockwood
Omaha, NE 68152

For the Appellee: Erik C. Booth, Esq.
Deputy Douglas County Attorney
909 Civic Center
Omaha, NE 68183

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

**I.
STATEMENT OF THE CASE**

Michael S. Krenisky ("the Taxpayer") owns a tract of land legally described as Lot 4, Yorkshire Hills Third Addition, City of Omaha, Douglas County, Nebraska. (E29:2). The Taxpayer, an ex-broker and an engineer, purchased the tract of land on July 30, 1992, for \$15,000. The Taxpayer, serving as his own general contractor, started construction of a raised-ranch, single-family residence on the property in 1996 or 1997. Construction was not completed until 2002. The Assessor's records indicate the house has 2,395 square feet of above-grade finished living area, and a

three-car basement garage. The rest of the basement is unfinished. (E29:1).

The Douglas County Assessor ("the Assessor") determined that the actual or fair market value of the Taxpayer's real property was \$247,900 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and alleged that the equalized value of the property was \$162,500. (E33:1). The Douglas County Board of Equalization ("the Board") granted the protest in part and determined that the equalized value of the subject property was \$220,000 as of the assessment date. (E33:1).

The Taxpayer filed an appeal of the Board's decision on August 19, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 8, 2003, which the Board answered on September 17, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on December 12, 2003. 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 4, 2003.

The Taxpayer appeared personally at the hearing. The Board appeared through Erik C. Booth, Deputy Douglas County Attorney.

Commissioner Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Wickersham served as the presiding officer. The Board moved to dismiss the appeal at the close of the Taxpayer's case-in-chief. The Commission denied the motion. The Board then rested without adducing any evidence.

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 subject property's 2002 assessed value was a "partial construction value" reflecting the fact that construction of the improvements was incomplete.
2. The subject property's 2003 assessed value was the first assessment reflecting completed construction and actual or fair market of the property as a completed single-family residence.

**V.
ANALYSIS**

The Taxpayer alleged that his property was the only property in his neighborhood to receive an increase in assessed value for tax year 2003. (E33:1). The uncontroverted evidence establishes that the Taxpayer's 2002 assessed value was a "partial value," that is, an assessed value indicating that as of the January 1, 2002, assessment date, the Taxpayer's home was still under construction. The Taxpayer's 2003 assessed value represented actual or fair market value of the property reflecting use as a

completed, single-family residence. The Taxpayer's allegation that his assessed value was improperly increased for tax year 2003 has no merit.

The Taxpayer also alleged that the 2003 assessed value was not equalized with comparable properties. The Taxpayer offered thirteen "comparable" properties in support of his allegation that the assessed value of the subject property was not equalized with "comparable" properties. (E11 - E27). The Commission's Order for Hearing compels a party utilizing comparable properties as evidence to provide complete and legible copies of the County's Property Record File for the tax year at issue for those comparable properties. (*Order for Hearing*, ¶2, p. 3). The Taxpayer failed to provide the required documentation for the properties offered as "comparables."

"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. When using "comparable" properties to establish valuation or a lack of equalization, the "comparable" 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). If there are differences between the subject property and the "comparable" properties, then the differences must be accounted

for. "The adjustment process is an analysis designed to show what the comparable property would have sold for if these differences were eliminated. The sale price of the comparable property is adjusted to account for as many of its differences from the subject property as possible. In adjusting the sale price of the comparable, lump sum dollar amounts or percentages are customarily employed. Adjustments are always applied to the sale price of the comparable property, not to the subject property. If the sold property is inferior in some respect to the subject property, the sale price is increased by a dollar amount or percentage. If the sold property is superior in some respect, the sale price is decreased. Applying the adjustments to the sale price of the comparable property provides a value indication for the subject property." *Property Assessment Valuation*, 2nd Ed., IAAO, 1996, p. 76. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . ." *Property Assessment Valuation*, 2nd Ed., 1996, p. 98.

The Taxpayer's "comparable properties" vary in terms of age, style, size, quality of construction, condition, and amenities. The Taxpayer adduced no evidence of the adjustments necessary to render the "comparables" truly comparable to the subject property using physical characteristics.

A Taxpayer in an equalization appeal is required to adduce clear and convincing evidence that the assessed value of his property is grossly excessive when compared with assessed values of other comparable properties. *Cabela's, Inc., v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). The first issue is, therefore, the level of assessment for the subject property.

The Taxpayer testified that he served as the General Contractor for construction of the subject property's improvements. The Taxpayer testified that there were features of the home which could result in a reduction in actual or fair market value: the Taxpayer testified that the external dimensions of the house (2,395 square feet) was incorrect; there was only one bedroom; etc. The Taxpayer was unable to testify concerning the total costs of the improvements. The Taxpayer testified that in his opinion the actual or fair market value of the subject property was \$190,000 as of the assessment date. The Taxpayer testified, however, that he had not researched the residential real estate market in his neighborhood.

The Board's final determination of value was \$220,000. (E1). The Board's determination of value might have been impacted by "functional obsolescence." "Functional obsolescence" or function utility is the overall usefulness and desirability of a property. "The ultimate criterion is whether the improvement

efficiently satisfies the wants and needs of the market. Functional obsolescence is the loss of value in a property improvement due to changes in style, taste, technology, needs and demands. Functional obsolescence exists where a property suffers from poor or inappropriate architecture, lack of modern equipment, wasteful floor plans, inappropriate room sizes, inadequate heating or cooling capacity, and so on. It is the ability of a structure to perform adequately the function for which it is currently used." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 154 - 155.

The Assessor's Office attempted to inspect the subject property in January, 2003. The Taxpayer refused the Assessor's Office request. The Assessor's Office renewed its request in 2004. The Taxpayer again denied the request. The Assessor has the statutory duty to value residential real property at market value. Neb. Rev. Stat. §77-1311 (2003 Supp.); Neb. Rev. Stat. §77-201 (Cum. Supp. 2002). An accurate description of the following characteristics is critical in order to determine actual or fair market value: quality of construction, style, age, size, amenities, functional utility, and condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. The Assessor, in order to accurately describe these critical characteristics must inspect

the subject property. Failure to do so carries its own penalties. *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966). Given this mandate, where the Taxpayer refuses the County's request to inspect the property, the provisions of the Adverse Inference Rule may be triggered. See *Yarpe v. Lawless Distrib. Co.*, 7 Neb.App. 957, 962 - 963, 587 N.W.2d 417, 421 (1998).

The provisions of this rule as applied to a valuation appeal may be summarized as follows: where a taxpayer refuses to allow the county assessor or his or her designate to inspect the subject property after challenging the assessed value as determined by the county, there is a presumption that the results of the inspection would militate against the taxpayer's interest. The finder of fact is the sole judge of what probative force to give the fact that the taxpayer refused the county assessor's request to inspect the property. The relative convincing powers of the inferences to be drawn from that fact is for the determination of the finder of fact.

The Commission, from the entire record before it, finds and determines that the Taxpayer's refusal to allow an inspection would militate against the Taxpayer's interests: i.e., his request for a reduction in the actual or fair market value of the subject property would be unsuccessful if an inspection were allowed.

The Taxpayer's allegation that his assessed value is not equalized with comparable properties is not supported by clear and convincing evidence.

**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. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
4. 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).

5. "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).
6. 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. *Cabela's, Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).
7. If the taxpayers' property is assessed in excess of the value at which others are taxed, then the taxpayers have a right to relief. However, the burden is on the taxpayers to show by clear and convincing evidence that the valuation

placed upon their 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).

8. When using "comparable" properties to establish value, 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).
9. After the plaintiff has introduced evidence tending to prove his or her 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. 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).
10. The Board need not put on any evidence to support its valuation of the property at issue unless the taxpayers establish the Board's valuation was unreasonable or

- arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).
11. 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).
 12. Title 442, Neb. Admin. Code, ch. 5, §22 provides that once both parties have submitted their evidence and rested their cases, the Commission may consider the credibility of the witnesses and may weigh the evidence. However, when the Commission considers a motion to dismiss at the close of the appellant's evidence, the Commission must assume all relevant evidence presented by the nonmoving party is true, and grant the nonmoving party all favorable and reasonable inferences that may be drawn from the evidence; assessing the credibility of the evidence on such a motion is inappropriate. (See *e.g. Kohl's Department Stores v. Douglas County Board of Equalization*, 10 Neb. App. 809, 638 N.W.2d 877 (2002), *Bottorf v. Clay County Bd. of Equalization*, 7 Neb. App. 162, 580 N.W.2d 561 (1998)).
 13. The Commission, applying this standard, is required to deny the Board's Motion to Dismiss.
 14. The Taxpayer has failed to adduce sufficient clear and convincing evidence that the assessed value of the subject

property is grossly excessive. He has failed to satisfy his burden of proof under *Cabela's, Inc.*

15. The Board's decision must accordingly be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Douglas County Board of Equalization's Order setting the assessed value of the subject property for tax year 2003 is affirmed.
2. The Taxpayer's real property legally described as Lot 4, Yorkshire Hills Third Addition, more commonly known as 4835 Lockwood, City of Omaha, Douglas County, Nebraska, shall be valued as follows for tax year 2003:

Land	\$ 12,800
Improvements	\$207,200
Total	\$220,000
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 Douglas County Treasurer, and the Douglas County Assessor, 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.

I certify that Commissioner Lore made and entered the above and foregoing Findings and Orders in this appeal on the 4th day of March, 2004. The same were approved and confirmed by Commissioners Hans, Reynolds and Wickersham 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 4th day of March, 2004.

SEAL

Wm. R. Wickersham, Chair