

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

JAMES M. OCHSNER,

)

Appellant,

)

CASE NO. 03R-129

vs.

KEITH COUNTY BOARD OF
EQUALIZATION,

)

FINDINGS AND FINAL ORDER
DENYING RELIEF

Appellee.

Filed October 13, 2004

Appearances:

For the Appellant: James M. Ochsner
818 West "D" Street
Ogallala, NE 69153

For the Appellee: Jeffrey M. Eastman, Esq.
Keith County Attorney
P.O. Box 29
Ogallala, NE 69153

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

I.

STATEMENT OF THE CASE

James M. Ochsner ("the Taxpayer") owns a tract of land legally described as Lots 1 and 2, Block 5, Searle's 2nd Addition to the City of Ogallala, Keith County, Nebraska. (E18:1). The tract of land is improved with a one-story, single-family residence with 2,166 square feet of above-grade finished living area built in 1994. (E29:1). The house has an unfinished basement approximately 1,926 square feet in size, an attached two-car garage, two wood decks and a concrete drive. (E29:2).

The State Assessing Official for Keith County determined that the subject property's actual or fair market value was \$137,730 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and requested that the proposed value be reduced. (E1). The Keith County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayer appealed the Board's decision on August 21, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 10, 2003, which the Board answered on October 1, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on June 3, 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 North Platte, Lincoln County, Nebraska, on October 7, 2004. The Taxpayer appeared personally at the hearing. The Board appeared through Jeff Eastman, Esq., the Keith County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The Commission afforded each of the Parties the opportunity to present evidence and argument. The Taxpayer testified during the course of the hearing that the value of the land component is

not at issue. The Commission took the matter under advisement at the conclusion of the hearing. The matter now comes on for decision.

II. ISSUES

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's valuation and equalization protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was 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. X77-5016(7) (Reissue 2003, as amended by 2004 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 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's opinion of actual or fair market value for the improvement component was \$110,030 as of the assessment date.
2. The Taxpayer's evidence does not include complete copies of the Property Record Files for properties offered as "comparables." Complete copies are required by the Commission's Rules and Regulations [Title 442, Neb. Admin. Code, ch. 5, §020.06 (12/03)] and by the Order for Hearing, p. 1, ¶3(a).

**V.
ANALYSIS**

The Taxpayer testified that in his opinion the actual or fair market value of the subject property was \$110,030 as of the assessment date. An owner who is familiar with his property and knows its worth is permitted to testify as to its value. *US Ecology v. Boyd County Bd. Of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999). The Taxpayer testified that there were no houses in Ogallala that were truly comparable to the subject

property, but that the value should be reduced to \$100,000. The Taxpayer could not recall how he arrived at that opinion of value.

The Taxpayer further alleges that the assessed value of his property is not equalized with comparable property. Equalization is defined as the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of 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. However, the burden is on the taxpayer to show 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). The Court has further held that where the discrepancy is a deliberate and intentional discrimination systematically applied and not the result of an error of judgment

the Taxpayer has the right to have his assessed value reduced to the percentage of that value at which others are taxed. *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

These decisions establish that the Taxpayer must adduce clear and convincing evidence concerning the level of assessment of his property and the level of assessment of truly comparable property. The Taxpayer's evidence establishes that his property is assessed at 100% of actual or fair market value.

The Taxpayer offered evidence concerning the assessed values of ten properties. (E9:3 - 12). The evidence offered is the first page of the Property Record File. The second page, which contains the inventory of physical characteristics for the improvement component of each property (see, e.g., E29:2), is not a part of the record.

Evidence of actual or fair market of comparable properties and the assessed value of those properties is critical in establishing the level of assessment. *Cabela's Inc., supra*. The properties, however, must be truly comparable to the subject property. See, e.g., *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998). "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2n^d Ed.,

International Association of Assessing Officers, 1996, p. 98. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. The Commission cannot presume facts from a silent record, but must base its decision on the record before it. Neb. Rev. Stat. §77-5016(3) (Reissue 2003, as amended by 2004 Neb. Law, L.B. 973, §51). There is no evidence of the physical characteristics of any of the properties offered as "comparables." The Taxpayer has also failed to adduce evidence of the actual or fair market value of the properties offered as comparables as of the assessment date. There is, therefore, no clear and convincing evidence of the level of assessment for comparable properties. In the absence of this evidence, there is no evidence of a lack of equalization.

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, as amended by 2004 Neb. Laws, L.B.973, §51).

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. Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. Appeals from a

county board of equalization to the Commission are controlled by [state law], which provides that the Commission "shall hear . . . and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof." This statute "restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the [Commission] is without power to adjudicate any other factual question or issue in the taxpayer's appeal. There is no presumption that issues being raised on appeal were those issues, in fact, before the County Board of Equalization. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equal.*, 7 Neb.App. 499, 504 - 505, 583 N.W.2d 353, 356 - 357 (1998) (Citations omitted).

6. The prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).
7. The Taxpayer has failed to adduce clear and convincing evidence (1) that the Board's decision was incorrect; (2) that the Board's decision was either unreasonable or arbitrary; and (3) that the Board's value was unreasonable.
8. The Board's decision must accordingly be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Keith County Board of Equalization's decision setting the assessed value of the subject property for tax year 2003 is affirmed.
2. The Taxpayer's real property legally described as Lots 1 and 2, Block 5, Searle's Second Addition, City of Ogallala, Keith County, Nebraska, more commonly known as 818 West "D" Street, shall be valued as follows for tax year 2003:

Land	\$ 11,250
Improvements	\$126,480
Total	\$137,730
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 Keith County Treasurer, and the State Assessing Official for Keith County pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51).
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 13th day of October, 2004.

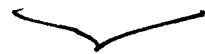




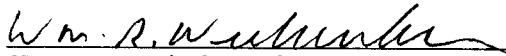
Robert L. Hans, Commissioner



Susan S. Lore, Commissioner



Mark P. Reynolds, Vice-Chair



Wm. R. Wickersham, Chair

SEAL