

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

LARRY E. FOSTER, TRUSTEE, OF)	
THE CATHY J. FOSTER REVOCABLE)	
TRUST,)	CASE NO. 03R-135
)	
Appellant,)	
)	
vs.)	FINDINGS AND FINAL ORDER
)	DISMISSING APPEAL AT CLOSE OF
)	TAXPAYER'S CASE IN CHIEF
DAWSON COUNTY BOARD OF)	
EQUALIZATION,)	
)	
Appellee.)	

Appearances:

For the Appellant: Larry E. Foster,
Trustee
9 Northeast Bay Drive 4
Johnson Lake, NE 68937

For the Appellee: Kurt R. McBride, Esq.
Chief Deputy Dawson County Attorney
700 North Washington
Lexington, NE 68850

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

**I.
STATEMENT OF THE CASE**

Larry E. Foster, Trustee of the Cathy J. Foster Revocable Trust, ("the Taxpayer") owns certain improvements on leased land. The leased land is legally described as Lot 9, Northeast Bay, Johnson Lake, Section 32, Township 9, Range 22, Dawson County, Nebraska. (E23:1). The leased land is improved with a single-family residence with 2,064 square feet of above-grade finished living area built in 1964. (E11:2;E23:1).

The Dawson County Assessor ("the Assessor") determined that the actual or fair market value of the Taxpayer's real property was \$171,300 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 \$140,633. (E1). The Dawson County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayer appealed the Board's decision on August 25, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 11, 2003, which the Board answered on September 23, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on April 16, 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 September 1, 2004. The Taxpayer appeared personally at the hearing. The Board appeared through Kurt R. McBride, Chief Deputy County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Wickersham served as the presiding officer.

The Parties afforded each of the Parties the opportunity to present evidence and argument. The Board moved to dismiss the

appeal at the close of the Taxpayer's case-in-chief for failure to overcome the statutory presumption.

II. ISSUES

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's 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. §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 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 purchased the subject property in July, 1999, for \$173,000. The Taxpayer sided the exterior of the residence using wood siding and erected a garage on the property in early 2000 at a total cost of \$24,800. The Taxpayer's total investment in the subject property is \$197,800.
2. The Taxpayer adduced no evidence of actual or fair market value for the subject property as of the assessment date.

**V.
ANALYSIS**

Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). The Taxpayer bears the burden of establishing by clear and convincing evidence that his assessed value 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 Taxpayer adduced no evidence of the actual or fair market value of the subject property or of the comparables as of

the assessment date. The Taxpayer offered evidence of assessed values of certain properties offered as "comparables" for the subject property. (E10). When comparing assessed values of other properties with the subject property to determine actual 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). "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 "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. "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. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105.

The Taxpayer's "comparable" properties differ from the subject property in terms of quality, style, age, size, amenities, functional utility, and physical condition. The Taxpayer adduced no evidence of the adjustments necessary, if

any, to account for the differences between the subject property and the properties offered as comparables.

The most credible evidence of the level of assessment for Johnson Lake is found in the *2003 Reports and Opinion of the Property Tax Administrator*, which establishes that there were 42 sales of single-family residential properties during the applicable time frame. (*Opinion*, at p. 48). The median level of assessment was 99.18%. This factor, applied to the subject property's actual or fair market value, could aid in establishing the level of assessment for the subject property, and also provide an indication of the equalization of assessments, or lack thereof. The Taxpayer, however, has adduced no evidence of actual or fair market value of the subject property or of the comparables. There is, therefore, no evidence of the subject property's level of assessment or the level of assessment of the comparables. 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).

The Taxpayer has failed to meet its burden of proof. The Board's Motion to Dismiss must accordingly be granted.

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 2003 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. Equalization is defined as the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. Assessments must be equalized so that no taxpayer 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).
6. If a taxpayer's property is assessed in excess of the value at which others are taxed, that taxpayer has a right to relief. The taxpayer, however, bears the burden of establishing by clear and convincing evidence that his assessed value 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).
7. When comparing assessed values of other properties with the subject property to determine actual 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).

8. A taxpayer who offers no evidence that the subject property is valued in excess of its actual value and who only produces evidence that is aimed at discrediting valuation methods utilized by county assessor fails to meet his or her burden of proving that value of the property was not fairly and proportionately equalized or that valuation placed upon the property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
9. 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); Neb. Rev. Stat. §77-5016(7) (Reissue 2003).
10. The Board's Motion to Dismiss must accordingly be granted.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Board's Motion to Dismiss is granted.

2. The Dawson 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 improvements to leased land legally described as Lot 9 Northeast Bay, Johnson Lake, Section 32, Township 9, Range 22, Dawson County, Nebraska, shall be valued as follows for tax year 2003 as determined by the Board:

Land	\$	-0-
Improvements	\$171,300	
Total	\$171,300	
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 Dawson County Treasurer, and the Dawson County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2003 Neb. Laws, L.B.973, §51).
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 Commissioner Lore made and entered the above and foregoing Findings and Orders in this appeal on the 1st day of September, 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 3rd day of September, 2004.

SEAL

Wm. R. Wickersham, Chair