

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

DANA L. CICOTELLO,)	
)	
Appellant,)	CASE NO. 04R-167
)	04R-168
vs.)	
)	FINDINGS AND FINAL ORDER
ADAMS COUNTY BOARD OF)	DISMISSING ONE APPEAL FOR WANT
EQUALIZATION,)	OF STANDING AND AFFIRMING
)	ONE DECISION OF THE COUNTY
Appellee.)	BOARD OF EQUALIZATION
)	

SUMMARY OF DECISION

Dana L. Cicotello appeals two Adams County Board of Equalization orders granting the Taxpayer's 2004 residential valuation protests only in part. The Commission on its own motion raised the issue of standing in Case Number 04R-167, and dismisses that appeal. The Commission, in Case Number 04R-168, affirms the Board's decision to grant the Taxpayer's protest only in part.

**I.
ISSUES**

The issues before the Commission are (1) whether the Taxpayer has standing to prosecute the appeal in Case Number 04R-167; (2) whether the Board's decision to deny the Taxpayer's valuation protest in Case Number 04R-168 was incorrect and either unreasonable or arbitrary; and (3) if so, whether the Board's determination of value was unreasonable.

II.
STATEMENT OF THE CASE

The Taxpayer owned two parcels of residential real property as of the January 1, 2004, assessment date. The first parcel is located at 600 "C" Street in the City of Hastings, Adams County, Nebraska, and is the subject of the appeal in Case Number 04R-167. The parcel is legally described as Lot 1, Cicotello's Subdivision, City of Hastings, Adams County, Nebraska, and is a tract of land approximately 10,545 square feet in size.

(E20:10). The tract of land is improved with a 902-square foot, single-family residence built in 1910, and later updated.

(E20:10). The Adams County Assessor ("the Assessor") determined that the first parcel's actual or fair market value property was \$79,790 as of the January 1, 2004, assessment date. (E1).

The Taxpayer timely protested that determination, and alleged that this parcel's actual or fair market value was \$32,500 as of the assessment date. The Board granted the Taxpayer's protest in part and determined that the parcel's actual or fair market value was \$72,500. (E1).

The second parcel is located at 604 East "C" Street in the City of Hastings, Adams County, Nebraska, and is the subject of the appeal in Case Number 04R-168. This parcel is legally described as Lot 2, Cicotello's Subdivision, City of Hastings, Adams County, Nebraska, and is a tract of land approximately 10,545 square feet in size. (E19:7). The tract of land is

improved with a single-family residence built in 1920. (E20:3). The Assessor determined that the actual or fair market value of this parcel was \$56,995 as of the assessment date. (E2). The Taxpayer timely protested that determination and alleged that the parcel's actual or fair market value was \$22,400. (E2). The Board granted the Taxpayer's protest in part and determined that this parcel's actual or fair market value was \$44,100 as of the assessment date. (E2).

The Taxpayer timely appealed each of the Board's decisions. The Commission served a Notice in Lieu of Summons on the Board in each case on which the Board answered. The Commission consolidated the appeals for purposes of hearing, and issued an Order for Hearing and Notice of Hearing. Copies of the Order and Notice were served on each of the Parties. The Commission called the cases for a hearing on the merits of each appeal in the City of Kearney, Buffalo County, Nebraska, on July 26, 2005. Mr. Dana Cicotello appeared personally at the hearing. The Adams County Board of Equalization appeared through Charles A. Hamilton, Deputy Adams County Attorney. Commissioners Lore, Reynolds and Wickersham heard the appeal. Commissioner Hans was excused from the proceedings. Commissioner Reynolds served as the presiding officer.

III.
APPLICABLE LAW

Jurisdiction is the inherent power or authority to decide a case. *Riley v. State*, 244 Neb. 250, 255, 506 N.W.2d 45, 48 (1993). There is no presumption that the Commission has jurisdiction. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equal.*, 7 Neb. App. 499, 504 - 505, 583 N. W. 2D 353, 356 - 357 (1998). If the appellant lacks standing, the Commission lacks jurisdiction, and the appeal must be dismissed as a matter of law. *See, e.g., Jacobson v. Jacobson*, 10 Neb.App. 622, 624, 635 N.W.2d 272, 275 (2001).

If the Commission has jurisdiction over an appeal, 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) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9). 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 sold the property which is the subject of the appeal in Case Number 04R-167 in September, 2004. (E20:5).
The property sold again in 2005. (E20:8).
2. The Taxpayer, if successful in his appeal, would not receive any part of a tax refund resulting from a reduction in assessed value of the property which the subject of the appeal in Case Number 04-167.
3. The Taxpayer's only evidence of value in Case Number 04R-168 is opinion testimony that the subject property's actual or fair market value was \$22,400 as of the assessment date.

**V.
ANALYSIS**

**A.
VALUATION OF THE RESIDENTIAL REAL PROPERTY
IN CASE NUMBER 04R-167**

The Taxpayer's only issue in Case Number 04R-167 (600 East "C" Street) is the value of the improvement component. The evidence establishes that the Taxpayer sold this property in 2004 for \$85,000. The new owner, in turn, sold the property in 2005 for \$90,000. (E20:5; E20:8).

The Commission on its own Motion raised the question of the Taxpayer's standing during the hearing. The Commission afforded

each of the Parties the opportunity to present evidence and argument on the issue. The Taxpayer testified that, if successful, he would not receive any part of a tax refund resulting from a reduction in assessed value. This testimony raises the question of whether the Taxpayer has standing to continue his prosecution of this appeal.

There is no presumption that the Commission has jurisdiction. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equal.*, 7 Neb.App. 499, 504 - 505, 583 N.W.2d 353, 356 - 357 (1998). The absence of subject matter jurisdiction may be raised at any time by any party or by the court or tribunal *sua sponte*. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 752, 635 N.W.2d 112, 118 (2001), citing *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Spring Valley IV Joint Venture v. Nebraska State Bank of Omaha*, 269 Neb. 82, 85, 690 N.W.2d 778,782 (2005).

"Standing" requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and to justify the exercise of the courts remedial powers on the litigant's behalf. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 316, 622 N.W.2d 627, 630 (2001). This "personal stake" requires some interest in the cause of

action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 527, 591 N.W.2d 543, 552 (1999). In order for a party to establish standing, the party must demonstrate that it is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Nebraska Against Exp. Gambling v. Nebraska Horsemen's Assn.*, 258 Neb. 690, 693, 605 N.W.2d 803, 807 (2000).

A taxpayer in a proceeding before the Commission is held to the same standard as an attorney licensed to practice law in the State of Nebraska. See *Prokop v. Cannon*, 7 Neb.App. 334, 583 N.W.2d 51 (1998), cited in *Kuhns v. Seward Cty. Bd. of Equalization*, 1999 WL 248632, (Neb.App. 1999) (unpublished decision). The Taxpayer therefore has an affirmative obligation to establish his standing to file and prosecute the appeal. The Taxpayer here adduced testimony and uncontroverted evidence that the Taxpayer no longer has any ownership interest in the subject property which is the subject of this appeal. (E20:5; E20:8). The Taxpayer therefore lacks standing, and this appeal must accordingly be dismissed as a matter of law.

B.
VALUATION OF THE RESIDENTIAL REAL PROPERTY
IN CASE NUMBER 04R-168

The Taxpayer alleged in this appeal that the Commission's determination of value for this parcel for tax year 2002 (\$22,400) is controlling. (E2). The prior year's assessment, however, 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). The only remaining issue is the second parcel's actual or fair market value as of the January 1, 2004, assessment date.

The Taxpayer contends that no certificate of occupancy had been issued for this property; that a number of features essential to residential occupancy were not completed as of the assessment date; and by taking issue with the Assessor's methodology used to determine the percentage of completion. (E2; E19:5).

The Property Tax Administrator is required by law to promulgate rules and regulations. Neb. Rev. Stat. §77-702 (Reissue 2003). The Property Tax Administrator has promulgated rules and regulations which provides that assessors use the Marshall Valuation Service "including associated handbooks, as published and updated by Marshall and Swift Publishing Company, shall be used for uniform identification of the physical characteristics of real property." 350 Neb. Admin. Code, ch.

10, §003.04 (3/2004). The Marshall-Swift Residential Cost Handbook includes a "Percentage Breakdown of Base Costs." *Marshall-Swift Residential Cost Handbook*, Marshall Swift LLC, 2002, p. D-8. The Assessor determined that the improvements on Lot 2, Cicotello's Subdivision were 61% complete as of the assessment date, and attributed 39% functional depreciation to the Replacement Cost New. (E19:5; E19:7). The Assessor, based on this evidence, determined that the second parcel's actual or fair market value was \$56,995 as of the assessment date. (E19:1; E2). The Board, however, reduced the percentage of completion to 45%, and determined that the parcels actual or fair market value was \$44,100. (E2).

The Taxpayer provided some documentation of items which were incomplete as of the assessment date. (E3:7 - 12; E9 - E16). The Taxpayer testified, however, that this documentation was incomplete and was only "representative" of the items which were not complete as of the assessment date. The uncontroverted evidence establishes that for this property the basement, exterior walls, roof, insulation, exterior finish and certain other items were completed as of the assessment date. The Taxpayer's admissions support the Assessor's determination that the improvements were 61% complete as of the assessment date. (E19:7). The record does not explain the Board's determination to reduce the percentage of completion to 45%.

The Taxpayer's only evidence rebutting the Assessor's methodology and the Board's determination of value was opinion testimony that this parcel had an actual or fair market value of \$22,400. 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). Opinion testimony alone, however, does not rise to level of clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary. *US Ecology, supra.*

C.
CONCLUSION

The Taxpayer lacks standing to continue his prosecution of the appeal in Case Number 04R-167. The Commission must accordingly dismiss that appeal for want of jurisdiction. The Taxpayer's only evidence in Case Number 04R-168 is opinion testimony that he disagrees with the Assessor's methodology and the Board's determination of value. This opinion does not rise to the level of clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary or that the Board's determination of value was unreasonable. The Board's decision in this case must accordingly be affirmed.

VI.
CONCLUSIONS OF LAW

1. The Taxpayer lacks standing to continue his prosecution of the appeal in Case Number 04C-167. The Commission accordingly lacks jurisdiction to hear and decide that appeal. That appeal must therefore be dismissed as a matter of law. *See, e.g., Jacobson v. Jacobson, supra.*
2. The Commission does have jurisdiction over the Parties and over the subject matter of the appeal in Case Number 04C-168.
3. 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) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
4. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted upon sufficient competent evidence to justify its decisions. 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).

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).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Board's Motion to Dismiss Case Number 04R-167 for want of standing is granted. That appeal is hereby dismissed with prejudice.
2. The Adams County Board of Equalization's Order setting the subject property's 2004 assessed value in Case Number 04R-168 is affirmed.
3. The Taxpayer's real property in Case Number 04R-168 legally described as Lot 2, Cicotello Subdivision, in the City of Hastings, Adams County, Nebraska, more commonly known as 604

East "C" Street, shall be valued as follows for tax year 2004 as determined by the Board:

Land	\$ 7,500
Improvements	\$36,600
Total	\$44,100

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 Adams County Treasurer, and the Adams County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
6. This decision shall only be applicable to tax year 2004.
7. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 9th day of August, 2005.

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

SEAL

Wm. R. Wickersham, Chair

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE APPEAL MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW IN NEBRASKA REVISED STATUTE §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS, L.B. 15, §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.