

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

CHARLES R. BROKAW and)	
KATHLEEN BROKAW,)	
)	CASE NO. 04R-54
Appellants,)	
)	
vs.)	FINDINGS AND FINAL ORDER
)	DISMISSING APPEAL AT THE CLOSE
HOWARD COUNTY BOARD OF)	OF THE TAXPAYERS' CASE
EQUALIZATION,)	
)	
Appellee.)	

SUMMARY OF DECISION

Charles R. Brokaw and Kathleen Brokaw appeal the Howard County Board of Equalization's order denying the Taxpayers' 2004 valuation protest concerning their rural residential property. The Board moved to dismiss the appeal at the close of the Taxpayers' case-in-chief for failure to adduce any evidence that the Board's decision was incorrect and either unreasonable or arbitrary.

**I.
ISSUES**

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayers' valuation protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

II.
STATEMENT OF THE CASE

The Taxpayers own a 10-acre tract of land legally described as Government Lot 9 lying North and East of the Loup River, in Section 27, Township 13, Range 12, Howard County, Nebraska. (E4:6). The tract of land is improved with a single-family residence with 1,744 square feet of above-grade finished living area built in 1978. The home has three bedrooms, two bathrooms, a partition finished basement, an attached garage and a loafing shed ("the subject property"). (E4:7).

The Howard County Assessor ("the Assessor") initially determined that the subject property's actual or fair market value was \$99,302 as of the January 1, 2004, assessment date. (E1; E4:4). The Taxpayers timely protested that determination and alleged that the subject property's actual or fair market value was \$52,000. (E1). The Board denied the protest and determined that the subject property's actual or fair market value was \$144,108. (E1).

The Taxpayers appealed the Board's decision on August 18, 2004. The Commission served a Notice in Lieu of Summons on the Board, which the Board answered. The Commission issued an Order for Hearing and Notice of Hearing and a copy of each document 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 August 16, 2005. Charles R. Brokaw appeared personally at the hearing. The Board appeared through Karin L. Noakes, Esq., the Howard County Attorney. Commissioners 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 Taxpayers' case-in-chief for failure to prove a prima facie case.

III. APPLICABLE LAW

The Taxpayers are required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was either 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 Taxpayers, 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 original determination of value, \$99,302, was based on a number of incorrect factors. The Assessor, after a personal inspection, corrected those factors, which yielded a recommended value of \$146,586. The Board's determination of value was \$144,108. (E1).
2. The Taxpayers' only issue in this appeal is their request for an additional 25% depreciation factor. The Taxpayers' only evidence in support of this request is opinion testimony.

**V.
ANALYSIS**

The Taxpayers acquired the subject property in 1988 for \$100,000. The subject property is located on the Loup River. In 1993 ice dams built up along the Loup River causing the water to back up behind the ice dams. Eventually the dams broke releasing the water which eroded the river banks, including those adjacent to the subject property. The Taxpayers, in order to prevent further erosion and possible damage to or loss of the subject property, installed a steel bank and a series of five jetties upstream from the subject property. The Taxpayers spent \$30,000 for these improvements in 1993. The County reimbursed the

Taxpayers for the cost of two of the jetties (\$1,800) which protected a county road. The Taxpayer expanded the erosion protection system by adding a wooden bank in 1995.

The Assessor in his original recommended value attributed a 25% "functional" depreciation factor to the Replacement Cost New Less Physical Depreciation. (E4:4). The only issue presented in the appeal is an additional 25% depreciation factor requested by the Taxpayers.

The Cost Approach is a professionally accepted mass appraisal methodology recognized in Neb. Rev. Stat. §77-112 (Reissue 2003). The Cost Approach generally consists of three steps: a determination of replacement cost new; a determination of accrued depreciation; and a determination of the value of the land. The Replacement Cost New less accrued depreciation is added to the value of the land component to yield the actual or fair market value. Accrued depreciation includes physical, functional and external obsolescence (also known as economic depreciation). *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, pp. 128 - 129.

Functional obsolescence is defined as "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. "External Obsolescence" is defined as "the loss in value as a result of an impairment in utility and desirability caused by factors external to the property (outside the property's boundaries) and is generally deemed to be incurable." *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 155.

The subject property's proximity to the Loup River, and the possible threats to the subject property from ice dams and riverbank erosion do not constitute "functional obsolescence." There is no evidence that the subject property suffers from any form of functional obsolescence.

The County Board determined that for 2004 the subject property's Replacement Cost New should be reduced by 20% for physical depreciation and the resulting amount should be reduced by an additional 15% for "economic" or external obsolescence. (E4:7). The Taxpayers do not dispute any of these determinations. The Taxpayers only contend that the subject property's Replacement Cost New Less Physical and Economic Depreciation as determined by the County Board should be reduced

by an additional 25% to account for the subject property's proximity to the Loup River and possible damage from ice dams and high water which they contend adversely impact actual or fair market value.

The Taxpayers' first contend that the 25% additional depreciation should be attributed to the subject property since that same factor was attributed in prior years. The prior year's assessment, however, is not relevant evidence of actual or fair market value in a subsequent year. *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 initial determination that a 25% functional depreciation should be assigned is not binding on the Board. The Assessor's Office reviewed the subject property prior to the Board hearing and recommended a higher value than that adopted by the Board. The Assessor's opinion of functional obsolescence is unknown. The evidence does establish, however, that the Board attributed an additional 5% economic depreciation factor to the subject property than was attributed to other river properties. (E6:5; E6:9; E6:11; E6:16).

The Taxpayers' only evidence in support of their requested 25% additional depreciation for tax year 2004 is opinion testimony that the subject property is "not a functional home site" and that the Taxpayers cannot obtain insurance against the

possibility that the riverbank will erode causing the home to slide down the embankment into the water. The Taxpayers have occupied the subject property continuously since 1988. There is no evidence that the subject property is not a "functional home site." Furthermore the Taxpayers adduced no other evidence of actual or fair market value. 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 standing alone, however, does not overcome the statutory presumption. *US Ecology, 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) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
3. 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).

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. The Board, based upon the applicable law, 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) (Cum. Supp. 2004).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Board's Motion to Dismiss is granted.
2. The Taxpayer's real property legally described as Government Lot 9 Lying North and East of the Loup River, Section 27, Township 13, Range 12, Howard County, Nebraska, shall be valued as follows for tax year 2004 as determined by the Howard County Board of Equalization:

Land	\$ 28,721
Improvements	\$115,387
Total	\$144,108
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 Howard County Treasurer, and the Howard County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
5. This decision shall only be applicable to tax year 2004.

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 16th day of August, 2005. 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) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §7).

Signed and sealed this 16th day of August, 2005.

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.