

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

LARRY F. FUGIT,)	
)	
Appellant,)	CASE NO. 04R-67
)	
vs.)	
)	FINDINGS AND FINAL ORDER
SARPY COUNTY BOARD OF)	AFFIRMING DECISION OF THE
EQUALIZATION,)	COUNTY BOARD OF EQUALIZATION
)	
Appellee.)	

SUMMARY OF DECISION

Larry F. Fugit ("the Taxpayer") protested the Sarpy County Assessor's ("the Assessor") proposed 2004 determination of actual or fair market value for the Taxpayer's single-family residence. The Sarpy County Board of Equalization ("the Board") denied the protest, and the Taxpayer appealed.

**I.
ISSUES**

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's 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 Taxpayer owns Lots 1 and 2 in County Club View Addition, Sarpy County, Nebraska. The Addition has approximately 33

platted lots, but most of the lots are vacant. There appear to be a total of five homes in the platted subdivision.

The Taxpayer's two lots, when combined, are approximately one-half acre in size. These lots are improved with a two-bedroom, two-bathroom, ranch style, single-family residence built in 1999. (E14:1). The home has 1,982 square feet of above-grade living area; an unfinished basement; an attached two car garage; a septic system and a "groundwater" heating and cooling system. (E14:2; Testimony of Taxpayer).

The lots are located near the corner of 36th Street and Platteview Road, on an unpaved road. The City of Bellevue has zoning jurisdiction over Country Club View Addition, and requires a minimum one-half acre parcel size for residential housing served by septic sewer systems. Septic systems are also regulated by the Nebraska Department of Environmental Quality, which defines such systems as a "well" that is used "to place [human] waste fluid below the surface and is typically comprised of a septic tank and 'subsurface fluid distribution system.'" 122 Neb. Admin. Code, ch. 1, §065 (11/2002).

The Sarpy County Assessor ("the Assessor") determined that the subject property's actual or fair market value was \$242,782, as of the January 1, 2004, assessment date. (E1:1). The Taxpayer timely protested that determination and alleged that the

subject property's actual or fair market value was \$213,719.
(E1:2). The Board denied the protest. (E1:1).

The Taxpayer appealed the Board's decision on August 23, 2004. The Commission served a Notice in Lieu of Summons on the Board on September 2, 2004, which the Board answered on September 24, 2004. The Commission issued an Order for Hearing and Notice of Hearing on May 12, 2005. 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 August 11, 2005. Larry F. Fugit appeared personally at the hearing. The Board appeared through Tamra L.W. Madsen, Deputy Sarpy 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 produce evidence and argument. The Board moved to dismiss the appeal at the close of the Taxpayer's case-in-chief for failure to adduce any evidence that the Board's decision was incorrect and either unreasonable or arbitrary. The Commission denied the Motion, and the Board rested without calling any witnesses. The Taxpayer then renewed his objection to the Commission's receipt of the certain exhibits and also alleged for the first time that

the receipt of those exhibits should be denied for lack of foundation. The Commission deferred ruling on the new objections, and took the matter under advisement. The matter now comes on for decision.

The Commission afforded the Taxpayer the opportunity at the commencement of the proceedings to make objections to the receipt of the Board's exhibits. The Taxpayer in fact made certain objections, which were overruled, and the Exhibits were received. There is an established rule concerning timeliness of objections. Objections interposed after an opportunity to interpose objections has passed, and objections having in fact been made, must be overruled. See, e.g., *State v. Daniels*, 220 Neb. 480, 482, 370 N.W.2d 179, 181 (1985). The Taxpayer's objections to the receipt of Exhibits 5 through 35 based on lack of foundation are overruled.

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 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 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 "comparable" property is not truly comparable to the subject property.
2. The Taxpayer's other evidence of actual or fair market value is limited to the Taxpayer's opinion testimony.
3. The Taxpayer's evidence of functional and external obsolescence is also limited to opinion testimony.

V. ANALYSIS

The Taxpayer's testimonial evidence consists of opinion testimony and evidence concerning an adjoining single-family residence. The Taxpayer's testimonial evidence includes his contention that his subdivision is unique; that there are no comparables; and that the property suffers from functional and economic obsolescence. The Taxpayer then testified that in his

opinion the subject property's actual or fair market value was \$213,719 as of the 2004 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). Opinion testimony standing alone, however, does not overcome the statutory presumption. *US Ecology, supra.*

Here, however, the Taxpayer adduced other evidence in support of his opinion of value. First, he contends that his subdivision is unique in that the lot sizes are less than one-half acre and are not served by public sewer systems. The lots must therefore be combined to form lots of at least one-half acre in order to satisfy the Bellevue City Zoning Ordinances governing septic systems. The Taxpayer also contends that the lack of paved roads as of the assessment date and the subject property's location both adversely impact actual or fair market value. The Taxpayer, however, failed to adduce any evidence quantifying the impact of any of these factors on actual or fair market value.

The Taxpayer next contends that the Assessor failed to adequately consider the functional obsolescence and external or economic obsolescence in reaching his opinion of actual or fair market value under the Cost Approach. Exhibit 14, page 2, appears to be a Cost Approach Worksheet prepared by the Assessor. The Cost Approach is a professionally accepted mass appraisal

methodology recognized under state law. Neb. Rev. Stat. §77-112 (Reissue 2003). Functional obsolescence may be a factor in determining actual or fair market value under this approach. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 154 - 155. 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.”

Supra.

The Taxpayer contends that the subject property has only two bedrooms and two bathrooms. The Taxpayer testified that in his opinion the limited number of bedrooms and bathrooms constitutes functional obsolescence since the market for single family residential properties favors three bedroom homes and more than two bathrooms. The Taxpayer, however, adduced no evidence in support of this testimony.

Finally, the Taxpayer contends that the proximity of two cattle feeding operations and waste lagoon associated with a hog feeding operation emit noxious odors and attract flies. The Taxpayer contends that these nuisances constitute external obsolescence which adversely impacts the subject property's actual or fair market value. "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."

Supra, at 155. The Taxpayer, however, failed to adduce any evidence quantifying these factors' impact on actual or fair market value.

Finally, the Taxpayer' adduced evidence of one "comparable" sale which occurred on September 12, 2002, and was recorded November 6, 2002. (E3). This property, next to the subject property, sold for \$231,739. (E3). The Taxpayer contends that the price paid for this "comparable" property demonstrates that the subject property is overvalued. (E1:2). "Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Supra*, at 98. When using "comparables" to determine value, similarities and differences between the subject property

and the comparables must be recognized. *Id.* at 103. The uncontroverted evidence establishes that the Taxpayer's "comparable" differs from the subject property in terms of age, style, size, number of bedrooms, and number of bathrooms. The Taxpayer adduced no evidence of the adjustments necessary to account for these differences. (E14:1 - 2; E16:1 - 2).

The subject property's actual or fair market value may be established using prices paid for "comparable" properties. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998). This methodology, however, requires the Taxpayer to demonstrate by clear and convincing evidence that the properties offered as "comparables" are truly comparable. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998); *Westgate Recreation Ass'n v. Papio-Missouri River Natural Resources Dist.*, 250 Neb. 10, 17, 547 N.W.2d 484, 492 (1996). The Taxpayer here has failed to adduce evidence that his "comparable" is truly comparable to the subject property. The price paid for that property, standing alone, does not establish the subject property's actual or fair market value as is necessary to grant relief.

The Taxpayer's evidence does not rise to the level of clear and convincing evidence that the Board's decision was incorrect

and either unreasonable or arbitrary. The Board's decision must accordingly be affirmed.

**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).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Taxpayer's renewed objection to the receipt of Exhibits 5 through 35 based on lack of timely filing is overruled.
2. The Taxpayer's objections made at the end of the hearing to the Commission's receipt of Exhibits 5 through 35 based on lack of foundation are untimely and are accordingly overruled.
3. The Sarpy County Board of Equalization's Order setting the subject property's 2004 assessed value is affirmed.
4. The Taxpayer's real property legally described as Lots 1 and 2, Country Club View Addition, Sarpy County, Nebraska, shall be valued as follows for tax year 2004:

Land	\$ 28,000
Improvements	\$214,782
Total	\$242,782

5. Any request for relief by any Party not specifically granted by this Order is denied.
6. This decision, if no appeal is filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
7. This decision shall only be applicable to tax year 2004.
8. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 18th day of August, 2005.

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

SEAL

Wm. R. Wickersham, Chair

I respectfully dissent. The Taxpayer's "comparable" property is larger and it does not suffer from the same functional obsolescence as does the subject property. The actual or fair market value of that property as shown by its sale price is less than the assessed value of the subject property. This

uncontroverted evidence establishes that the subject property is overvalued. I would grant the Taxpayer the relief requested.

Robert L. Hans, Commissioner

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.