

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

JAMES M. OCHSNER,)	
)	
Appellant,)	CASE NO. 04R-159
)	
vs.)	FINDINGS AND ORDER
)	AFFIRMING THE DECISION OF THE
KEITH COUNTY BOARD OF)	KEITH COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by James M. Ochsner to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 200 Platte Oasis Parkway, in the City of North Platte, Lincoln County Nebraska, on June 21, 2005, pursuant to a Notice and Order for Hearing issued February 8, 2005. Commissioners Wickersham, Lore, and Hans were present. Commissioner Wickersham presided at the hearing.

James M. Ochsner ("the Taxpayer") appeared at the hearing without counsel.

The Keith County Board of Equalization ("the County Board") appeared through counsel, Jeffrey Eastman, Esq., County Attorney for Keith County, Nebraska.

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Reissue 2003 as amended by 2005 Neb. Laws L.B. 15 §10) to state its final decision concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

I. STANDARD OF REVIEW

The Taxpayer, in order to prevail, is required to demonstrate that the decision of the County Board was incorrect and arbitrary or unreasonable. Neb. Rev. Stat. §77-5016(8)(Cum. Supp. 2004). The presumption created by the statute can be overcome if the Taxpayer shows by clear and convincing evidence that the County Board either failed to faithfully perform its official duties or that the County Board failed to act upon sufficient competent evidence in making its decision. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). It is the Taxpayer's burden to overcome the presumption with clear and convincing evidence of more than a difference of opinion. *Garvey Elevators, Inc v. Adams County Bd. of Equalization* , 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001). The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the value as determined by the County Board was unreasonable. *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

II. FINDINGS

The Commission finds and determines that:

A. PROCEDURAL FINDINGS

1. The Taxpayer is the owner of record of certain real property described in the appeal as Lots 1 & 2, Block 5, Searle's 2nd Addition to the City of Ogallala, Keith County,

Nebraska a/d/a 818 West D St, Ogallala, Nebraska (“the subject property”). The actual or fair market value of the subject property, placed on the assessment roll as of January 1, 2004, (“the assessment date”) by the Keith County State Assessing Official was:

Land value	\$ 11,250.00
Improvement value	<u>\$134,365.00</u>
Total value	<u>\$145,615.00.</u>

2. The Taxpayer timely protested that value to the County Board. The Taxpayer proposed the following value for the subject property:

Land value	\$ 11,250.00
Improvement value	<u>\$110,030.00</u>
Total value	<u>\$121,280.00.</u>

3. The County Board determined that the actual or fair market value of the subject property as of the assessment date was:

Land value	\$ 11,250.00
Improvement value	<u>\$131,070.00</u>
Total value	<u>\$142,320.00.</u> (E:1)

4. The Taxpayer timely filed an appeal of that decision to the Commission.
5. The County Board was served with a Notice in Lieu of Summons, and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on February 8, 2005, set a hearing of the Taxpayer's appeal for June 21, 2005, at 1:00 p.m. CDST.

7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Notice and Order for Hearing was served on all parties.

B.

SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. The subject property is improved with a 2,166 square foot one story residence with a 1,926 square foot basement and an attached 672 square foot garage. The home was built in 1994. (E15:2).
2. The Taxpayer has not adduced sufficient, clear and convincing evidence to overcome the statutory presumption in favor of the County Board.
3. Based on the entire record before it, the Commission finds and determines that the actual or fair market value of the subject property for the tax year 2004 is:

Land value	\$ 11,250.00
Improvement value	<u>\$131,070.00</u>
Total value	<u>\$142,320.00.</u>

4. The value of the subject property as of the assessment date determined by the County Board is supported by the evidence.
5. The decision of the County Board was correct and neither arbitrary nor unreasonable.
6. The decision of the County Board should be affirmed.

III.

CONCLUSIONS OF LAW

1. Subject matter jurisdiction of the Commission is over all issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353, (1998)
2. The Commission has jurisdiction over the parties and the subject matter of this appeal.
3. The Commission, while making a decision, may not consider testimony, records, documents or other evidence which is not a part of the hearing record except those identified in the Commission's rules and regulations or Section 77-5016 (3). Neb. Rev. Stat. §77-5016(3) (Cum. Supp 2004 as amended by 2005 Neb. Laws 2005 L.B. 15 §9).
4. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
5. "Actual value is 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 a 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. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued." Neb. Rev. Stat. §77-112 (Reissue 2003).
6. Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Neb. Rev. Stat. §77-112 (Reissue 2003).
7. "Actual value, market value, and fair market value mean exactly the same thing." *Richards v. Board of Equalization*, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965).

8. The Taxpayer must adduce evidence establishing that the action of the County Board was incorrect and unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Cum. Supp 2004, as amended by 2005 Neb. Laws L.B. 15 §9). The Nebraska Supreme Court, in considering similar language, has held that “There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.” *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).
9. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736, (2000).
10. The term "unreasonable" can be applied to a decision of an administrative agency only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447, (1999).
11. The Court has also held that “In an appeal to the county board of equalization or to [the Tax Equalization and Review Commission] and from the [Commission] to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere

difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.” *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523, (2001).

12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. “It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization.” *AT & T Information Systems, Inc. v. State Bd. of Equalization and Assessment*, 237 Neb. 591, 595, 467 N.W.2d 55, 58, (1991).
14. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581, (1999).
15. That a Taxpayer, who offered no evidence that the subject property was valued in excess of its actual value and who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of her property was not fairly and proportionately equalized or that valuation placed upon

- her 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).
16. The appraisal of real estate is not an exact science. *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874, (1977).
 17. “Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its 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).
 18. Where “the discrepancy was not the result of an error of judgment but was a deliberate and intentional discrimination systematically applied” the Taxpayer’s right to relief is clear. “The right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true

value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.” *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

IV. ANALYSIS

The Taxpayer asserts in this appeal that the subject property's taxable value exceeds its actual value and that its taxable value is not equalized with comparable property. The Taxpayers' evidence of actual value of the subject property as of the assessment date was his unsupported opinion that the actual value was between \$100,000.00 and \$120,000.00. An unsupported opinion of value expressed as a range with a 20% variance between the low and the high value is not clear and convincing evidence. The Taxpayer criticized the County Board's determination of value because the Board believed that the residence had a partially finished basement. The Taxpayer had refused access to the State Appraiser for an interior inspection of the residence. The presumption that determinations of an Assessor are correct is overcome if there is evidence that the Assessor did not rely on his or her own inspection of the property. *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966). The presumption cannot however be overcome by evidence of a failure to inspect when the failure is occasioned by the party attacking the presumption. In addition testimony of the Taxpayer that the basement was not partially finished when verification of that assertion was not allowed is not clear and convincing evidence of an error by the Appraiser or the Board. See, e.g., *Yarpe v. Lawless Distrib. Co.*, 7 Neb.App. 957, 587 N.W.2d 417 (1998).

The Taxpayer's evidence concerning equalization was the recitation of assessed values of various properties during a two or three year time span. The Taxpayer also testified concerning the sale price of several homes and the taxable value of those homes over various time frames. The Taxpayer's testimony, if the recited years and values were correct, established that some homes for various tax years had a taxable value less than their sale price and that the taxable value of some homes was adjusted for the tax year 2004 while others were not. The taxable value of the subject property had been adjusted for the tax year 2004. The State Appraiser for Keith County testified that a reappraisal had been completed for the tax year 2003 and that changes to taxable value for the year 2004 were based on the correction of errors and building permits. The State Appraiser further testified that with respect to the subject property the change in value proposed by the State Assessing Official for Keith County was due to a computer programming error. As part of a review after the Taxpayer's protest evidence, of basement finish was obtained. The County Board acted on the Appraiser's recommendation to reduce the taxable value of the subject property based on the computer error and to increase the value based on evidence of a partially finished basement. The Commission cannot conclude that the actions of the Board, the State Appraiser or the State Assessing Officer were based on discrimination systematically applied to a determination of taxable value. The Taxpayer's assertion of a lack of equalization on the basis of discrimination or intentional ill will fails. see. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). If relief is to be granted based on a lack of equalization, it is necessary for the Taxpayer to prove the actual value of comparable property with its taxable value on the same date and the actual value of a subject property with its taxable value on that same date. *Kearney Convention Center*

v. Buffalo County Board of Equalization, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984). If the ratios of taxable value to actual value are equal the subject and the comparable have equalized values. As noted above the Taxpayer has failed to prove an actual value for the subject property other than the value determined by the Board. The ratio of taxable value to actual value for the subject property based on the evidence is 100%. That is the ratio required by law. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004). While the Taxpayer presented testimony concerning the taxable value of various properties, production of the property record file for each property deemed comparable to a subject property is required by the Commission's order for hearing. The Taxpayer did not provide the property record files for any property which he might have claimed was comparable to the subject property. The Commission is unable to determine whether the properties noted by the Taxpayer are comparable to the subject property. Without a basis to determine the ratio of taxable value to actual value of any comparable property, the Taxpayer's equalization claim fails.

V. ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the decision of the County Board determining the actual or fair market value of the subject property as of the assessment date, January 1, 2004, as follows:

Land value	\$ 11,250.00
Improvement value	<u>\$131,070.00</u>
Total value	<u><u>\$142,320.00</u></u>

is affirmed.

2. That this decision, if no appeal is timely filed, shall be certified to the Keith County Treasurer, and the Keith County officer charged with preparation of the tax list, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2003).
3. That any request for relief, by any party, which is not specifically provided for by this order is denied.
4. That each party is to bear its own costs in this matter.
5. That this decision shall only be applicable to tax year 2004.
6. This order is effective for purposes of appeal July 1, 2005.

Signed and Sealed. July 1, 2005.

Wm. R. Wickersham, Chairperson

Susan S. Lore, Commissioner

Robert L. Hans, Commissioner

SEAL

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 PETITION MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW CONTAINED IN NEB. REV. STAT. §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.