

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

ALAN L. TOOMBS and JANET C.)	
TOOMBS,)	
)	CASE NO. 04R-157
Appellants,)	
)	
vs.)	FINDINGS AND FINAL ORDER
)	VACATING AND REVERSING THE
CASS COUNTY BOARD OF)	DECISION OF THE COUNTY BOARD
EQUALIZATION,)	OF EQUALIZATION
)	
Appellee.)	

SUMMARY

Alan L. Toombs and Janet C. Toombs ("the Taxpayers") protested the Cass County Assessor's ("the Assessor's") proposed 2004 assessed value of the Taxpayer's single-family residential real property to the Cass County Board of Equalization ("the Board"). The Board denied the protest, and the Taxpayers appealed.

**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 Lot 17343 A, Beaver Lake, Cass County, Nebraska. (E15:7). The tract of land is improved with a single-family residence built in 2002. The Assessor determined that the subject property's actual or fair market value was \$447,288 as of the January 1, 2004, assessment date. (E1:1). The Taxpayers timely protested that determination and alleged that the subject property's actual or fair market value was \$343,814.97. (E1:2). The Board denied the protest and the Taxpayers appealed that decision on August 25, 2004. (E1:1; Appeal Form).

The Commission served a Notice in Lieu of Summons on the Board on September 13, 2004, which the Board answered on September 15, 2004. The Commission issued an Order for Hearing and Notice of Hearing on January 31, 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 May 18, 2005. Alan L. Toombs, one of the Taxpayers, appeared personally at the hearing. The Board appeared through Nathan B. Cox, the Cass County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The Commission recessed that hearing to allow each Party to file additional exhibits and to allow an inspection of the subject property. The Commission then reconvened the hearing on November 3, 2005. The Parties offered two additional exhibits at that hearing, which were received without objection. The Taxpayers' new evidence consisted of a "fee" appraisal which indicated an actual or fair market value as of August 1, 2005, of \$365,000. (E20:4). The Board's new exhibits included a revised opinion of actual or fair market value of \$406,158. (E21:3).

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 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 subject property is a unique single-family residential property.
2. The subject property's first or street level is approximately 1,789 square feet in size, which is entirely finished. The subject property's middle level is approximately 2,876 square feet in size, of which 2,389 square feet is finished, and approximately 287 square feet is unfinished. The subject property's lowest or lakeside level is approximately 1,485 square feet in size and is entirely unfinished.
3. The Taxpayers' "comparables" are not truly comparable to the subject property.

**V.
ANALYSIS**

The Board originally determined that the subject property's actual or fair market value was \$447,288 as of the January 1, 2004, assessment date. (E15:1). The Board later adduced evidence establishing that this value, derived using the Cost Approach, was flawed in that it was based on incorrect physical characteristics. (E15:8; E21:3). The Board's revised Cost Approach indicated that the subject property's actual or fair

market value was \$406,158 as of the assessment date. (E21:3).

The Board's exhibit constitutes clear and convincing evidence the Board's original decision was incorrect and both unreasonable and arbitrary, and that the Board's original determination of value was unreasonable. The Commission must therefore determine the subject property's actual or fair market value from the record before it. Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).

The Parties offered five different values for the subject property. The Taxpayer offered as evidence of value (1) his costs to build the improvements (E1); (2) his opinion testimony based on ten "comparable" properties (E4 - E13); (3) the Taxpayers' "fee" appraisal (E20); (4) the Board's original determination of value (E15); and (5) the Board's revised determination of value. (E21:3).

A.

THE OWNER'S EVIDENCE OF ACTUAL OR FAIR MARKET VALUE

The Taxpayers Protest requested that the subject property's actual or fair market value be fixed at \$343,814.97. (E1). This value represented the amount the Taxpayers paid to build their home. The Taxpayer testified, however, that this amount did not include the Taxpayer's "sweat equity," that is the monetary value of their time, talent and labor in making some of the improvements. The Taxpayer further testified that he could not

quantify the value of the "sweat equity." While it is true that the price paid may be taken into consideration in determining the actual value, the price paid does not establish actual or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637, (1998). The Taxpayers' investment costs exclusive of the value of their "sweat equity" does not constitute clear and convincing evidence of actual or fair market value as of the assessment date.

A Taxpayer also offered opinion evidence concerning the subject property's 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). The Taxpayer testified that in his opinion, the subject property's actual or fair market value was \$350,000 as of the assessment date. The Taxpayer further testified that this opinion was not based on his "fee" appraisal, but was based on ten "comparable" properties. (E4 - E13). "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. *Id.* at 103. "Financing

terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments”
Id. at 98. Most adjustments are for physical characteristics.
Id. at 105.

The Taxpayer agrees that the subject property is a unique property. The first or entry level is at street level. The lot elevation drops toward the rear of the property, and the lowest level is almost level with Beaver Lake. The two levels below street level have windows on three sides. The home’s three bedrooms are located on the middle level, along with two bathrooms, an office and storage space.

The Taxpayer’s “comparables” for which records were provided differ from the subject property in terms of quality, style, age, size, amenities, functional utility, and physical condition. [Compare the Board’s Appraiser’s determination of the subject property’s physical characteristics (E21:3) with the Taxpayer’s “comparable’s” inventory of physical characteristics (E3 which is missing the necessary information; E4:1; E5:1; E6:1; E7:1; E8:1; E9:1; E10:1; E11:1; E12:1; and E13 which is also missing the necessary information.] The Taxpayer offered no evidence concerning the adjustments necessary to account for the differences between the subject property and “comparable” properties. The Taxpayer also offered no clear and convincing evidence demonstrating how he reached his opinion value based

either on the assessed values or on the prices paid for any of his "comparable" properties.

The subject property's actual or fair market value may be established using assessed values of "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 a taxpayer to demonstrate by clear and convincing evidence that the properties offered as "comparables" are truly comparable and that the assessed values of the properties represent actual or fair market value. *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). Mere assertions that the assessed value of the subject property is wrong and that the assessed values of "comparable" properties are right does not satisfy the burden imposed on the complaining taxpayer.

The Taxpayer has failed to establish that any of his "comparables" are truly comparable to the subject property. The Taxpayer's opinion evidence does not therefore constitute clear and convincing evidence of actual or fair market value.

B.
THE TAXPAYER'S "FEE" APPRAISAL

The Taxpayer also adduced a "fee" appraisal for the subject property. This appraisal has an effective date of August 1, 2005. (E20:4; E20:7). The author of the appraisal did not testify and was not present at the hearing. There is, accordingly, no evidence reconciling the August 1, 2005, opinion of value to the subject property's actual or fair market value as of January 1, 2004. The Taxpayer's appraisal also raises other issues.

The Taxpayer's appraisal includes both a Cost Approach and a Sales Comparison Approach. (E20:7). The Cost Approach used to estimate value as of August 1, 2005, lists cost factors as \$69.75 per square foot and \$14.25 per square foot. (E20:7). The *Marshall Swift Residential Cost Handbook* cost factors are revised periodically. New cost factors were published on June 1, 2005, two months prior to the effective date of the Taxpayer's appraisal. The *Handbook* identifies cost factors based on quality of construction. Both the Taxpayer's Appraiser and the Board's Appraiser agree that the quality of construction is "Good." (E20:6; E21:3). The *Handbook's* cost factors for "Good" quality of construction lists unadjusted per square foot costs for above-grade finished living area at between \$90.51 and \$92.68 for one-story homes. *Marshall Swift Residential Cost Handbook*, Marshall-Swift L.P., 6/2005, page Good-15. Nothing in the record explains

the difference between the Taxpayer's Appraiser's per square foot costs for an effective date of August 1, 2005, and those published in the *Handbook* on June 1, 2005.

The Taxpayer's Appraiser's Cost Approach states "Refer to addendum for calculations." (E20:7). The addendum does not include any Cost Approach calculations. The Taxpayer's appraisal lacks any information concerning the date of the costing manual used. The appraisal report lacks any information concerning the land sales used or the method used to determine the value of the land component [\$70,000 (E20:7) as opposed to the Board's determination of \$81,598 (E21:3)]; and also lacks any information concerning the appraiser's allocation of the value of the "basement finish" [\$86,500 is allocated to "2FP/Patio/Decks/basement finish" (E20:7)]. This Cost Approach is not clear and convincing evidence of the subject property's actual or fair market value.

The Taxpayer's appraisal also includes a Sales Comparison Approach. (E20:7). The appraisal report indicates that the Appraiser placed the greatest weight on the first three of six "comparables." (E20:9). The three sales primarily relied on occurred on April 15, 2004, August 2, 2004, and October 29, 2004. (E20:7). Each sale occurred after the January 1, 2004 assessment date. The three "comparables" range in age from 7 to 29 years. The appraisal report lists the subject property's age as three

years. (E20:7). The only adjustment for age used by the Taxpayer's appraiser is a \$10,000 adjustment for the oldest property. (E20:7). The third "comparable" is built on a slab and lacks a basement. The Taxpayer's Appraiser made a \$34,900 adjustment for a difference of 2,685 square feet of "basement." Nothing in the record explains how a \$13 per square foot adjustment would account for presence of the three additional bedrooms, two bathrooms, an office and storage space located in the subject property's two lower levels, all of which are lacking in the third comparable.

The Taxpayer's Appraiser's Sales Comparison Approach with an effective date of August 1, 2005, is not clear and convincing evidence of the subject property's actual or fair market value as of January 1, 2004.

C.
THE BOARD'S EVIDENCE OF VALUE

The Board's evidence of value is based on the Cost Approach with an effective date of January 1, 2004. (E21:3). The actual value of real property may be determined using professionally accepted mass appraisal methods, including, but not limited to the cost approach. *Schmidt v. Thayer County Bd. of Equalization*, 10 Neb.App. 10, 18, 624 N.W.2d 63, 69 - 70 (2001).

The Board's revised Cost Approach was made after an inspection of the subject property by the Board's appraiser. The

Board's Appraiser measured the subject property's improvements, and determined that the first or entry level is approximately 1,789 square feet in size, which is entirely finished. The Board's Appraiser also determined that the subject property's lower level is approximately 2,876 square feet in size, of which 2,389 square feet is finished, and approximately 287 square feet is unfinished. Finally, the Board's Appraiser determined that subject property's lowest or lakeside level is approximately 1,485 square feet in size and is entirely unfinished. The size of the subject property's improvements and the nature of those improvements are at issue in this appeal. (E1). The Taxpayer stated on the record that he had three different people measure the improvements, and that each arrived at different sizes. The Taxpayer also stated on the record that he was satisfied with the size of the improvements as determined by the Board's Appraiser. The Commission therefore finds and determines that these are the correct dimensions for the subject property's improvements as of the January 1, 2004, assessment date.

The Board's revised determination of value is based on the Cost Approach using the agreed area set forth above. The Board's Appraiser used the *Marshall-Swift* residential cost factors dated June, 2000, to determine the home's Replacement Cost New. In estimating the Replacement Cost New the Board's Appraiser used one-story with basement cost factors as requested by the

Taxpayer, and also used two-story with basement cost factors. The Board's Appraiser testified that the use of one-story with basement cost factors resulted in a higher Replacement Cost New than one obtained using two-story with basement cost factors. This evidence is uncontroverted and establishes that the use of two-story with basement cost factors directly benefits the Taxpayers by resulting in a lower Replacement Cost New.

Finally, the Board's Appraiser determined that the subject property's "Condition" was "Average" and attributed a 3% depreciation factor to the subject property's improvements. (E21:3). The Taxpayer's Appraiser determined that the subject property "Condition" was "Good" and attributed a 1% depreciation factor. (E20:7). Each of the Board's determinations benefits the Taxpayers by resulting in a lower value under the Cost Approach.

The Board's evidence of actual or fair market value as of the assessment date is the only clear and convincing evidence of value contained in the record. The Commission therefore finds and determines that the subject property's actual or fair market value was \$406,158 as of the January 1, 2004, assessment date.

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 Taxpayers present 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 Taxpayers. *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 Taxpayers have adduced clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary. The Taxpayers have also adduced clear and convincing evidence that the Board's determination of value was unreasonable. The Board's decision must be accordingly be vacated and reversed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Cass County Board of Equalization's Order setting the subject property's 2004 assessed value is vacated and reversed.
2. The Taxpayers' real property legally described as Lot 1734A, Beaver Lake, Cass County, Nebraska, shall be valued as follows for tax year 2004:

Land	\$ 81,598
Improvements	\$324,560
Total	\$406,158
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 Cass County Treasurer, and the Cass 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.

Dated this 7th day of November, 2005.

Robert L. Hans, Commissioner

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.