

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

| | | |
|-------------------------------|---|-----------------------------|
| MICHAEL FEE AND MAUD DOHERTY, |) | |
| |) | |
| Appellant, |) | Case No. 08R 340 |
| |) | |
| v. |) | DECISION AND ORDER |
| |) | AFFIRMING THE DECISION OF |
| DOUGLAS COUNTY BOARD OF |) | THE DOUGLAS COUNTY BOARD OF |
| EQUALIZATION, |) | EQUALIZATION |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by Michael Fee and Maud Doherty ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on February 10, 2010, pursuant to an Order for Hearing and Notice of Hearing issued December 4, 2009. Commissioner Warnes, Vice-Chairperson of the Commission, was the presiding hearing officer. Commissioner Wickersham, Chairperson of the Commission, was absent. Commissioner Warnes as Vice-Chairperson acting in the absence of the Chairperson designated Commissioners Warnes, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Salmon was excused. Commissioner Hotz was present. The appeal was heard by a quorum of a panel of the Commission.

Maud Doherty, co-owner, was present at the hearing.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

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

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2008.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2008.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: THE RESERVE LOT 2 BLOCK 0 IRREG, Douglas County, Nebraska.

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------------|-----------------------|------------------------|------------------------|
| Land | \$110,000.00 | \$110,000.00 | \$110,000.00 |
| Improvement | \$1,291,100.00 | \$955,300.00 | \$1,291,100.00 |
| Total | \$1,401,100.00 | \$1,065,300.00 | \$1,401,100.00 |

4. An appeal of the County Board's decision was filed with 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 December 4, 2009, set a hearing of the appeal for February 10, 2010, at 3:00 p.m. CST.

7. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2008 is:

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| | |
|-------------------|-------------------------------|
| Land value | \$110,00.00 |
| Improvement value | <u>\$1,291,100.00</u> |
| Total value | <u><u>\$1,401,100.00.</u></u> |

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
2. “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 2009).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in

section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2009).

4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).
6. 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) (Reissue 2009).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
9. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

10. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
11. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
12. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
13. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
14. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
15. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic

will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

16. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
17. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization, fixing or determining valuation of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
18. The presumption disappears if there is competent evidence to the contrary. *Id.*
19. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2008).
20. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

21. "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).
22. 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).
23. A decision is unreasonable 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).
24. "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).
25. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
26. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon 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).
27. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and*

Tel. Co. v. County Bd. Of Equalization of York County, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value); *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved residential parcel with a 1 ½ story house of 5,722 square feet built in 2000. (E5:2) The house is rated as excellent for quality and good for condition. (E5:2). The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, is less than actual value as determined by the County Board and that the taxable value of the subject property as of January 1, 2008, is not equalized with the taxable value of other real property.

The Taxpayer testified that the subject property is located in a subdivision known as the "The Reserves." A map of the Reserves was provided by the Taxpayer. (E32). The Taxpayer testified that Exhibit 2, page 3, was a list of all of the 26 parcels located within the neighborhood of the subject property known as the "Reserves." The Taxpayer provided the property record files for ten (10) of the 26 parcels listed on Exhibit 2, page 3, as alleged comparable parcels. (E4, and E6 to E14).

The neighborhood in which the subject property is located is neighborhood 66 and the neighborhood extension is 38312. (E5:2). The appraiser for the County Assessor testified that the unit values for physical characteristics would be the same for all parcels located within the same neighborhood. His testimony included that parcels from outside the neighborhood of the

subject property would have differing values per units for physical characteristics, preventing a direct comparison of parcels on this basis alone.

The Commission's review of the 10 alleged comparable parcels from within the Reserves as shown on Exhibit 2, page 3, shows that the Taxpayer's alleged comparable parcels are not comparable to the subject property without adjustments. One difference noted by the Commission between the alleged comparable parcel and the subject property is size. The subject property is the largest, with 5,722 square feet of living area, while the alleged comparable parcels vary to a low of 3,107 square feet, in that parcel shown as Exhibit 12. (E5:2 and E12:3).

Another difference between the alleged comparables and the subject property is the size of the basement and the portion of the basement that is finished. The subject property has a 3,417 square foot basement with 2,019 square feet finished. (E5:6). The valuation per square foot of basement is \$21 per square foot and the valuation of the finished basement is \$43.75 per square foot. (E5:6).

The subject property is the largest in size for living area, total basement area, and finished basement area among each of the alleged comparable parcels, with the exception that the parcel shown in Exhibit 8 has a larger finished basement, 2,620 square feet to 2,019 square feet for the subject property. That parcel shown as exhibit 8 is assessed for 2008 at \$1,379,185. (E8:1). That parcel shown as Exhibit 8 has less living area, 5,296 square feet, and a smaller garage, 977 square feet, than the subject property.

The Commission has a particular equalization concern regarding two of these parcels, found at Exhibit 4 and Exhibit 7. Both parcels were assessed as being of excellent quality, just as the subject was. And the County Assessor, using mass appraisal multiple regression analysis,

applied the same values and factors to the physical characteristics of these two parcels as were applied to the subject property. Based upon these facts alone, it would appear the subject property was valued uniformly and proportionately to the parcels at Exhibit 4 and Exhibit 7. However, what is of particular concern is that the owners of each of these three parcels filed a protest with the County Board and the County Board gave significant relief to the owners of the parcels shown at Exhibit 4 and Exhibit 7, but not to the subject property. In each case, this relief was styled as a “reconciled” value. For the parcel at Exhibit 4, the relief given by the County Board was \$97,276 (\$972,176 - 874,900) (E4:9). The relief given for the parcel at Exhibit 7 was \$126,031 (\$914,830 - 788,800) (E7:7). It is clear from Exhibit 4:10 and Exhibit 7:8 that these reductions were made to the improvements on the parcels, not to the land.

Neither the Taxpayer nor the County Board offered any evidence to explain these “reconciled” values which appeared to deviate from the values derived from the mass appraisal multiple regression analysis done by the County Assessor. Without such evidence, the Commission cannot conclude the subject property was not equalized with the parcels at Exhibit 4 and Exhibit 7. While the Commission has concern that parcels in the same neighborhood were treated uniformly by the County Assessor, but may not have been treated uniformly by the County Board, the Commission finds there is no clear and convincing evidence that such was the case.

The Taxpayer provided the property record file for another property located outside the Reserves, which she alleged was a superior property to the subject property and yet, its 2008 valuation was lower than the subject property. This parcel was shown in Exhibit 3. Its location was in the vicinity of the subject property, but outside the neighborhood of the Reserves. This

parcel shown in Exhibit 3 has a neighborhood factor of 1.0. (E3:5). The subject property has a neighborhood factor of 1.46. (E5:7). This difference in neighborhood factors is an adjustment that must be taken into account in any comparison made of the properties. In addition, the parcel shown in exhibit 3 is smaller in both the living and basement areas and the subject property has more finished basement area. (E3:5 and E5:6-7).

The Taxpayer testified that she believed that parcel shown in Exhibit 9 was most comparable to the subject property. The Commission notes that the parcel in Exhibit 9 has less living area (4,327 square feet to 5,722 square feet), less basement area (1,861 square feet to 3,417 square feet), and no finished basement area compared to the subject property. (E9:6 and E5:6).

"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, 98.

When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, 103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, 105. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . ." *Property Assessment Valuation*, 2nd Ed., 1996, 98.

The Taxpayer did not compare sales of any alleged comparable parcels to the subject property, but rather she compared only the assessed valuations without making any adjustments for differences. The Commission finds no evidence that the subject property was not fairly and proportionately equalized to comparable properties.

The Taxpayer provided a second listing of parcels. (E2:4). Her testimony was that this list contained 15 parcels which had sold within the past year and these parcels were alleged to be comparable to the subject property. The property record files were provided for these 15 parcels. (E15 to E29). The Taxpayer testified that her basis for choosing these parcels was that they had sold between January of 2007 and June of 2008, and were between 5,000 and 6,000 square feet in size of living area. The Commission's review of these 15 parcels shown on Exhibit 2, page 4, shows that they were not from the neighborhood of the subject property and could not be compared directly with the subject property without adjustments for location. The Commission notes that there are other differences between these sold alleged comparable parcels and the subject property. The Commission finds that those parcels shown in the list of sold parcels, Exhibit 2, page 4, are not comparable to the subject property without adjustments for differences of location, age, quality, condition, and physical characteristics. In addition, the Commission notes that the sale dates of these parcels were from January 29, 2007 to December 14, 2008. (E2:4) A portion of those parcels were sold after June 30, 2007 the cutoff date for sales in the sales file to be used for valuation by the County Assessor. (E15 to E21, and E29). The Commission does not give great weight to the parcels shown in Exhibit 2, page 4, for the reasons stated above.

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. The 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. In an appeal to the county board of equalization or to the district court, and from the district court 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. *US Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 15, 588 N.W.2d 575, 581 (1999).

A taxpayer who offers no evidence that the subject property is valued in excess of its actual value and who only produces evidence that is aimed at discrediting the valuation methods utilized by county assessor fails to meet his or her burden of proving that the value of the property was not fairly and proportionately equalized or that valuation placed upon the 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).

Taxpayer must introduce competent evidence of actual value of its property in order to successfully claim that a property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N. W. 2d 515 (1981).

The Commission finds that the Taxpayer has not provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination nor has she provided clear and convincing

evidence that the County Board's decision was arbitrary or unreasonable. The appeal of the Taxpayer is denied.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2008, is affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

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| | |
|-------------------|------------------------|
| Land value | \$110,000.00 |
| Improvement value | <u>\$1,291,100.00</u> |
| Total value | <u>\$1,401,100.00.</u> |

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2008.
7. This order is effective for purposes of appeal on May 26, 2010.

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.