

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

JASON A. WESTMAN,)	
)	
Appellant,)	Case No. 08R 517
)	
v.)	DECISION AND ORDER
)	REVERSING 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 Jason A. Westman ("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 May 19, 2010, pursuant to an Order for Hearing and Notice of Hearing issued February 9, 2010 as amended by an Order dated April 6, 2010. 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.

Jason A. Westman was present at the hearing. No one appeared as legal counsel for the Taxpayer.

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: DEER CREEK LOTS 244-259 & OL BCDE LOT 383 BLOCK 0 IRREG, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$60,000.00	\$52,500.00	\$60,000.00
Improvement	\$236,900.00	\$214,710.00	\$252,000.00
Total	\$296,900.00	\$267,210.00	\$312,000.00

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 February 9, 2010, as amended by an Order issued on April 6, 2010, set a hearing of the appeal for May 19, 2010, at 3:00 p.m. CDST.
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	\$60,000.00
Improvement value	<u>\$236,900.00</u>
Total value	<u>\$296,900.00.</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 a residential parcel improved with a one story townhouse of 1,636 square feet of living area built in 2005. (E2:9). The house is rated good for both quality and condition. (E2:9).

VALUATION

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 Taxpayer testified that the notice of valuation which he received from the County Assessor for 2008 was for \$296,900. Exhibit 1, page 1, verifies this statement. The Taxpayer protested this valuation to the County Board, and the taxable valuation determined by the County Board for the subject property for 2008 was raised to \$312,000. The Taxpayer testified that he had purchased the subject property on April 18, 2007 for \$312,000. The basis for the County Board's increase in valuation for the subject property for 2008 appears to be the recommendation

of the referee and coordinator hired by them. (E3:3). The coordinator for the County Board stated, "Adjust to 4/18/2007 sale price of \$312,000. State law requires property to be assessed at current market value." The Taxpayer testified that it was his opinion that the County Board simply raised the initial recommended valuation by the County Assessor to that of the 2007 purchase price with no other supporting evidence. The Taxpayer highlighted the fact that the County Assessor's Report dated June 18, 2008, and given to the County Board as part of its assessment, had printed in the upper left hand corner the notation, "Subject sold on 4/19/2007 for \$312,000." (E4:1). No evidence was provided to the Commission to refute the Taxpayer's opinion.

“It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value 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 Taxpayer testified that the neighborhood in which the subject property is located was the victim of a fraudulent purchasing/lending scheme in which properties were purchased for more than their actual values. Many of these inflated purchases were foreclosed upon by the banks holding the mortgages. It was his testimony that he paid too much for the subject property because the builder believed he could demand a higher sales price due to the inflated sales caused by this fraudulent purchasing/lending scheme involving properties in the same neighborhood.

The testimony of the Taxpayer cautions the Commission in the use of the sales prices for those parcels sold within the neighborhood including the sale price of the subject property. The Commission finds that the reliance upon the sale price in such an unstable market is unreasonable. The Commission therefore finds that the County Board's determination to increase the taxable valuation of the subject property for 2008 from the County Assessor's recommended valuation of \$296,900, to the purchase price of \$312,000 is unreasonable and arbitrary. The Commission gives great weight to the County Assessor's recommendation of actual value of the subject property to the County Board in the amount of \$296,900 and finds that the actual valuation of the subject property for 2008 is \$296,900. This opinion of valuation was made by the County Assessor using the cost approach as shown in Exhibit 4, pages 10 and 11.

EQUALIZATION

The Taxpayer provided the property record files for the sale of four alleged comparable parcels as shown on Exhibit 5, page 1. Two of the Taxpayer's alleged comparables are the same as those alleged comparable sales used by the County and shown on Exhibit 2, page 6, 11427 Iowa Circle and 7141 N. 121st Street.

The Commission notes that no adjustments were made by the County to the County's three alleged comparable parcels shown on Exhibit 2, page 6 in order to allow for a direct comparison of them to the subject property.

The Commission has made comparisons between each of the four alleged comparable sales and the subject property. The Commission notes that the four alleged comparable parcels are not comparable to the subject property without significant adjustments for age, size of the living area and basement, the size of the finished basement, if any, and other differences in

valued physical characteristics. “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 property record files for the subject property are provided, Exhibits 2 and 6, and for each of the four alleged comparables. (E7:1, E7:9, E7:15, and E7:20). The Commission notes that the County Assessor used the cost approach to value the subject property and for each of the four alleged comparable parcels. (E2:11, E7:7, E7:13, E7:18, and E7:25). Perhaps the largest adjustment that would need to be made to the Taxpayer's alleged comparables 1-3 is for their lack of a finished basement. From Exhibit 2, page 11, the Commission can determine that the subject property has a 1,040 square foot finished basement while neither of the first three comparables have any finished basement.

The Commission notes that the alleged comparable parcel #1 located at 12663 Read has a sales history of \$360,000 on March 29, 2005, and \$215,000 on March 19, 2008. The latest sale of this parcel was from a bank as the grantor. (7:1). There is no evidence as to whether this parcel was part of the fraudulent sales/lending scheme alleged by the Taxpayer, but the Commission questions whether the latest sale constitutes a qualified sale or a sale influenced by

the fact that it was foreclosed upon and taken back by the bank for resale. The Commission finds that either of the sale prices of the alleged comparable parcel #1 are not credible and it puts little weight in their reliability.

The Commission's review of the Taxpayer's alleged comparable #4, 11408 Iowa Circle, shows that it has a finished basement and has many similar physical characteristics to the subject property except it is four years older than the subject property. The Commission notes that the County Assessor has only depreciated the subject property 2% while comparable #4 was depreciated 9%. (E2:11 and E7:25). This difference in depreciation equals \$19,372 ($\$23,633 - \$4,261 = \$19,372$). This difference when added to the sales price of alleged comparable #4 equals \$307,151 ($\$280,000 + \$19,372 = \$307,151$) versus the 2008 taxable valuation of the subject property at \$312,000, or the \$296,900 valuation by the County Assessor.

When the Commission analyzes the other two alleged comparable parcels (alleged comparable #1 is removed from further consideration), it finds that the alleged comparable parcels are equalized to the subject property, at \$296,900.

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. *Id.* 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).

Based upon the issue of valuation, the Commission finds that the Taxpayer has provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and did not have sufficient competent evidence to make its determination.

The Commission finds that the Taxpayer has provided clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The appeal of the Taxpayer is granted to the extent that the actual value of the subject property for 2008 is found to be \$296,900.

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 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 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 vacated and reversed.

**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 vacated and reversed.
2. Actual value, for the tax year 2008, of the subject property is:

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Land value	\$60,000.00
Improvement value	<u>\$236,900.00</u>
Total value	<u>\$296,900.00.</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.