

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

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| JOHN F. SCHAUER and JOLENE A. |) | |
| SCHAUER, |) | |
| |) | CASE NO. 03R-235 |
| Appellants, |) | |
| |) | |
| vs. |) | FINDINGS AND |
| |) | FINAL ORDER |
| LANCASTER COUNTY BOARD OF |) | |
| EQUALIZATION, |) | |
| |) | |
| Appellee. |) | |

Appearances:

For the Appellant: John F. Schauer
5020 Waverly Road
Lincoln, NE 68514

For the Appellee: Michael E. Thew, Esq.
Chief Deputy, Civil Division
Lancaster County Attorneys Office
575 South 10th Street
Lincoln, NE 68508

Before: Commissioners Hans, Lore, Reynolds, and Wickersham.

**I.
STATEMENT OF THE CASE**

John F. Schauer and Jolene A. Schauer ("the Taxpayers") own a 5.3 acre tract of land legally described as Lot 30, SE¼ of Section 8, Township 11, Range 7, Lancaster County, Nebraska. (E13:39). The tract of land is improved with a single-family, "earth-sheltered home" built in 1987 with 1,741 square feet of finished living area. (E7:2; 13:40). The home has two bedrooms and three bathrooms. (E7:2). The Assessor determined that the home is of "Average" Quality of Construction and "Average" Condition. (E7:1). There are also three "outbuildings" on the

property: the "chicken coop" which has two overhead garage doors and is used as a dog shelter and tool shed; a detached garage; and an open shed.

The Lancaster County Assessor ("the Assessor") determined that the actual or fair market value of the Taxpayer's real property was \$177,200 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and requested a value of \$130,000. (E13:34). The Lancaster County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayers appealed the Board's decision on August 25, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 30, 2003, which the Board answered on October 17, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on March 29, 2004. 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 June 23, 2004. The Taxpayers appeared personally at the hearing. The Board appeared through Michael E. Thew, Esq., Chief Deputy, Civil Division, Lancaster County Attorneys Office. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Wickersham served as the presiding officer.

II.
ISSUES

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayers' protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

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)(Reissue 2003, as amended by 2003 Neb. Laws, L.B.973, §51)). 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 an "earth-sheltered home."
2. The Taxpayers' requested a value of \$130,000 in their protest to the Board.
3. The Taxpayers' four "comparable" properties are not all comparable to the subject property.
4. The Taxpayer adduced no evidence quantifying the impact on actual or fair market value of the differences between the subject property and the properties offered as "comparables."

**V.
ANALYSIS**

One of the Taxpayers testified that the requested value for the subject property as shown on the Form 422 (E13:34) was the actual or fair market value of the subject property as of the assessment date. The Taxpayer qualified this opinion by stating that he wasn't an appraiser and didn't know the value of the property, a disclaimer which he also stated at the hearing before the County Board of Equalization. (E13:28). The Taxpayer testified regarding the methodology used to reach his opinion of value. With the information given the Commission, the Commission was unable to reach the same calculation of value.

The Taxpayers offered four single-family residences as "comparable" properties. (E8 - E11). When comparing assessed values of other properties with the subject property to determine actual value the properties must be truly comparable. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998). "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. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . . " *Property Assessment Valuation*, 2nd Ed., 1996, p. 98. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105.

The subject property is an "earth-sheltered home." An "earth-sheltered home" is defined as:

". . . a residence built into or beneath the side of a hill, with the roof covered by 18" to 24" of soil and sod. Southern facing exterior walls have large amounts of insulated glass, with minimal cladding of various

types of siding, stucco, masonry veneers or solid masonry. The remaining exterior walls can be poured concrete, concrete block or treated wood, and include extensive waterproofing. The ground floor is a concrete slab with a vapor barrier and drainage system. The roof structure is usually concrete joist and slab, or pan/waffle slab and joist, and includes extensive waterproofing. Earth-berm homes are similar to earth-sheltered homes but have conventional roofing systems with composition shingles."

Marshall-Swift Residential Cost Handbook, Marshall & Swift LP, 3/2004, p. Spec-13.

The Taxpayers' "comparables" shown in Exhibits 9, 10 and 11 are not "earth-sheltered homes." These properties are not comparable to the subject property. The Taxpayers' "comparable" shown in Exhibits 8 is an "earth-sheltered home." The single-family residence described in Exhibit 8 was built in 1987, is of "Fair-Average" Quality of Construction, "Average" Condition, has 2,091 square feet of finished living area, two bedrooms and three bathrooms. (E8:2). The residence is situated on 5.61 acres of land. (E8:5). The 2003 assessed value of this property was \$192,600. (E8:1).

The Taxpayers adduced no evidence to quantify the impact on actual or fair market value, if any, due to differences in age,

size, quality, condition, number of bathrooms, number of bedrooms, lot size, or difference in Market Area.

The Taxpayers alleged that the subject property was incorrectly listed as Quality of Construction "300" (shown as "Average" on Exhibit 7, page 2) and that the Quality of Construction should be changed to "250" (shown as "Fair-Average" on Exhibit 8, page 2). The Taxpayer allowed the County Referee to inspect the interior of the subject property, but declined to allow the County's Appraiser to inspect the interior. The County's Referee, after the interior inspection on July 14, 2003, did not recommend a change in either "Quality of Construction" or "Condition." The County's Appraiser testified that without an interior inspection he was unable to recommend that the Quality of Construction ("300" or "Average") be changed. The Commission cannot, from the record before it, conclude that the "Quality of Construction" was incorrectly listed.

The Taxpayer also alleges that the property suffers from deferred maintenance as shown in Exhibit 3, pages 1 through 3. The "Condition" for the subject property is listed as "Average" on Exhibit 7, page 2. The Taxpayer requested the "Condition" be changed from "Average" to "Average -." (E15:6). The Taxpayer offered evidence of the cost to cure some of these items of deferred maintenance. But the Taxpayers failed to adduce clear

and convincing evidence of the impact on actual or fair market value due to the requested change in "Condition."

The Taxpayers also allege that the subject property is incorrectly listed as having (1) a "hip/blt-up rock" roof; (2) "wood frame stucco" walls; and (3) erroneous dimensions for the gross living area. The first two allegations are supported by the evidence. However, the Taxpayers failed to adduce clear and convincing evidence of the impact on actual or fair market value if any of this information were corrected.

The Taxpayers failed to adduce 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) (Reissue 2003, as amended by 2003 Neb. Laws, L.B.973, §51).
3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have

acted upon sufficient competent evidence to justify its decision. 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).
5. "Comparing assessed values of other properties with the subject property to determine actual value has the same inherent weakness as comparing sales of other properties with the subject property. The properties must be truly comparable." *DeBruce Grain, Inc. v. Otoe County Bd. of*

Equalization, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998).

6. The Taxpayer has failed to adduce clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary.
7. The Taxpayer has failed to adduce clear and convincing evidence that the Board's determination of value was unreasonable.
8. The Board's decision must be affirmed.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Lancaster County Board of Equalization's Order setting the assessed value of the subject property for tax year 2003 is affirmed.
2. The Taxpayer's real property legally described as Lot 30, SE¼ of Section 8, Township 11, Range 7, Lancaster County, Nebraska, more commonly known as 5020 Waverly Road, shall be valued as follows for tax year 2003:

| | |
|--------------|-----------|
| Land | \$ 40,000 |
| Improvements | \$137,200 |
| Total | \$177,200 |
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 Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2003 Neb. Laws, L.B.973, §51).
5. This decision shall only be applicable to tax year 2003.
6. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Lore made and entered the above and foregoing Findings and Orders in this appeal on the 23rd day of June, 2004. Commissioner Hans dissented as neither adduced evidence of truly comparable properties which sold. The Findings and Orders were approved and confirmed by Commissioners Reynolds and Wickersham and are therefore deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Reissue 2003).

Signed and sealed this 23rd day of June, 2004.

SEAL

Wm. R. Wickersham, Chair