

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

MARY SUSAN WINDLE FUNNEL TRUST,)	
)	
Appellant,)	CASE NO. 03R-161
)	
vs.)	FINDINGS AND
)	FINAL ORDER
LANCASTER COUNTY BOARD OF EQUALIZATION,)	
)	
Appellee.)	

Appearances:

For the Appellant: Dr. Richard J. Windle
3152 South 25th Street
Lincoln, NE 68502

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

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

**I.
STATEMENT OF THE CASE**

The Mary Susan Windle Funnel Trust ("the Taxpayer") owns an improved tract of land legally described as Lot 9 and Vac High St Adj, Block 9, Woodsdale Addition, City of Lincoln, Lancaster County, Nebraska. (E21:2). The tract of land is improved with a single-family residence with 2,682 square feet of above-grade living area originally built in 1932. (E12:2). The second floor was added in approximately 1980, with a new master bedroom added over the family room. The original garage on the subject property was demolished and replaced with a new three-car garage,

and the kitchen completely remodeled within the last ten years.
(E21:2).

The Lancaster County Assessor ("the Assessor") determined that the actual or fair market value of the Taxpayer's real property was \$280,900 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and alleged that the proposed value should be reduced. (E15:8). The Lancaster County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayer filed an appeal of the Board's decision on August 26, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 15, 2003, which the Board answered on October 10, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on October 10, 2003. 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 March 12, 2004. The Taxpayer appeared personally at the hearing. The Board appeared through Michael E. Thew, Chief Deputy, Civil Division, Lancaster County Attorney's Office. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The Commission afforded each of the Parties the opportunity to present evidence and argument. The Board rested without adducing any testimonial evidence. The Taxpayer, after closing arguments, requested the Commission take the matter under advisement. The matter now comes on for decision.

II. ISSUES

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

III. APPLICABLE LAW

The Taxpayer is 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)). 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 Taxpayer, 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 Taxpayer's opinion of actual or fair market value is between \$250,000 and \$260,000.
2. The subject property was substantially remodeled within the last ten-years. (E21:2).
3. The Taxpayer refused the Assessor's Office request to inspect the interior of the subject property improvements.

**V.
ANALYSIS**

**A.
EVIDENCE OF VALUE BASED ON COMPARABLE PROPERTIES**

The Taxpayer alleges the assessed value exceeds actual or fair market value. (E15:8). The Taxpayer also alleges (1) the Assessor's comparable properties are not truly comparable to the subject property; and (2) the properties offered as comparable properties by the Taxpayer demonstrate the subject properties are overvalued. The Taxpayer, based on these allegations, testified that the actual or fair market value of the subject property was between \$250,000 and \$260,000 as of the assessment date. 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 Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

"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 "comparable" properties to establish valuation the "comparable" 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). If there are differences between the subject property and the "comparable" properties, then the differences must be accounted for through the adjustment process.

"The adjustment process is an analysis designed to show what the comparable property would have sold for if these differences were eliminated. The sale price of the comparable property is adjusted to account for as many of its differences from the subject property as possible. In adjusting the sale price of the comparable, lump sum dollar amounts or percentages are customarily employed. Adjustments are always applied to the sale price of the comparable property, not to the subject property. If the sold property is inferior in some respect to the subject property, the sale price

is increased by a dollar amount or percentage. If the sold property is superior in some respect, the sale price is decreased. Applying the adjustments to the sale price of the comparable property provides a value indication for the subject property."

Property Assessment Valuation, 2nd Ed., IAAO, 1996, p. 76.

"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.

The Taxpayer alleges that the Assessor's "comparable" properties differ from the subject in terms of location. (E15:8). The subject property is located in the "7311 Country Club Addition." (E21:2). All of the Assessor's comparable properties listed on the original documents considered by the Board are also located in the "7311 Country Club Addition." (E15:22). Although the Taxpayer alleged that these comparable properties differ in location from the "microclimate" of the subject property, the Taxpayer failed to provide any evidence of any adjustments necessary to account for the alleged difference in location.

The Taxpayer also alleged that a "lighting district" within the "7311 Country Club" neighborhood provided a more homogenous and comparable neighborhood. The Taxpayer offered eight single-

family residential properties drawn from the "lighting district" as properties which are comparable to the subject property. (E4 through E10; E13). The Commission's Order for Hearing compels a party utilizing comparable properties as evidence to provide complete and legible copies of the County's Property Record File for the tax year at issue for those comparable properties. (*Order for Hearing*, ¶2, p. 3). The Taxpayer failed to adduce the Property Record File for any of the Taxpayer's "comparable" properties. The Taxpayer did adduce copies of some information posted on the internet by the Assessor's Office. (E4 - E10; E13).

The limited information provided fails to establish that any of the Taxpayer's comparable properties have the significant remodeling made to the subject property. The Taxpayer's comparables also differ from the subject property in terms of style, above-grade finished living area, quality, basement area, basement area finish, number of bathrooms, number of fireplaces, and number of bedrooms. (E4 - E10; E12). The Taxpayer adduced no evidence which would allow differences between those properties and the subject property. The information provided concerning the Taxpayer's comparable properties does not rise to the level of clear and convincing evidence that the subject property is overvalued.

B.
INSPECTION OF THE SUBJECT PROPERTY

The Assessor's Office asked the Taxpayer's permission to inspect the subject property in December, 2003. The Taxpayer refused the Assessor's Office request. (E30). The Assessor has the statutory duty to value residential real property at market value. Neb. Rev. Stat. §77-1311 (2003 Supp.); Neb. Rev. Stat. §77-201 (Cum. Supp. 2002). An accurate description of the following characteristics is critical in order to determine actual or fair market value: quality of construction, style, age, size, amenities, functional utility, and condition. *Property Assessment Valuation, 2nd Ed.*, International Association of Assessing Officers, 1996, p. 98. The Assessor, in order to accurately describe these critical characteristics must inspect the subject property. Failure to do so carries its own penalties. *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966). Given this mandate, where the Taxpayer refuses the County's request to inspect the property, the provisions of the Adverse Inference Rule may be triggered. See *Yarpe v. Lawless Distrib. Co.*, 7 Neb.App. 957, 962 - 963, 587 N.W.2d 417, 421 (1998).

The provisions of the Adverse Inference Rule as applied to a valuation appeal may be summarized as follows: where a taxpayer refuses to allow the county assessor or his or her designate to

inspect the subject property after challenging the assessed value as determined by the county, there is a presumption that the results of the inspection would militate against the taxpayer's interest. The finder of fact is the sole judge of what probative force to give the fact that the taxpayer refused the county assessor's request to inspect the property. The relative convincing powers of the inferences to be drawn from that fact is for the determination of the finder of fact.

The Taxpayer has substantially improved the subject property in the ten years preceding the assessment date. The improvements include the demolition of a detached garage, removal and replacement of a driveway, the addition of a new three-car detached garage, replacement of one air conditioning unit and the addition of a second unit, and the gutting of the original kitchen and the expansion of that kitchen. Updating or adding components affects the effective age and condition of the improvements. These improvements may also impact the Quality of Construction. These factors could significantly impact actual or fair market value.

The Commission, from the entire record before it, finds and determines that the Taxpayer's refusal to allow an inspection would militate against the Taxpayer's interests: i.e., his request for a reduction in the actual or fair market value of the

subject property would be unsuccessful if an inspection were allowed.

**C.
CONCLUSION**

The Taxpayer's allegation that his assessed value is valued in excess of actual or fair market value is not supported by clear and convincing evidence. The Taxpayer's refusal to permit an interior inspection does not assist the Taxpayer in proving its allegations. Given the Taxpayer's failure to adduce clear and convincing evidence that the Board's decision was incorrect and either unreasonable or arbitrary, the Board's decision must 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).
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. 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 Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
6. When using "comparable" properties to establish 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).

7. After the plaintiff has introduced evidence tending to prove his or her case, if the defendant fails to testify to matters particularly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest. The trier of fact is the sole judge of what probative force to give the fact that a party has failed to call a witness or produce evidence. [T]he relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. *Yarpe v. Lawless Distrib. Co.*, 7 Neb.App. 957, 962 - 963, 587 N.W.2d 417, 421 (1998)(Citations omitted).
8. The Board need not put on any evidence to support its valuation of the property at issue unless the taxpayers establish the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998).
9. The Taxpayer has failed to adduce sufficient evidence to establish that the Board's decision was incorrect and either unreasonable or arbitrary. The Board's decision must accordingly 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 9 and Vac High St adj, more commonly known as 3152 South 25th Street, in the City of Lincoln, Lancaster County, Nebraska, shall be valued as follows for tax year 2003:

Land	\$ 58,500
Improvements	\$222,400
Total	\$280,900
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).
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.

Dated this 12th day of March, 2004.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

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Wm. R. Wickersham, Chair