

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

WILLIE L. MCCARTY,	)	
	)	
Appellant,	)	CASE NO. 03R-13
	)	
vs.	)	FINDINGS AND FINAL ORDER
	)	DENYING THE MOTION TO DISMISS
DOUGLAS COUNTY BOARD OF	)	FOR LACK OF JURISDICTION AND
EQUALIZATION,	)	DISMISSING THE APPEAL AFTER
	)	THE HEARING ON THE MERITS
Appellee.	)	

Appearances:

For the Appellant: Willie L. McCarty  
1919 John Creighton Blvd.  
Omaha, NE 68111

For the Appellee: Christine A. Lustgarten, Esq.  
Chief Deputy, Civil Division,  
Douglas County Attorneys Office  
909 Civic Center  
Omaha, NE 68183

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

**I.  
STATEMENT OF THE CASE**

Willie L. McCarty ("the Taxpayer") owns a 9,000 square foot tract of land legally described as Lot 10, Block 7, South Omaha First Addition, Douglas County, Nebraska. (E3:1). The tract of land is zoned for "Commercial" use, has asphalt parking for six cars, but is otherwise unimproved. The "back" of the property is covered with trees, shrubs, rocks and stones. (E3:1).

The Douglas County Assessor ("the Assessor") determined that the subject property's actual or fair market value was \$45,000 as of the January 1, 2003, assessment date. (E1). The Taxpayer

timely filed a protest and requested that the proposed value be reduced. (E6:1). The Douglas County Board of Equalization ("the Board") granted the protest in part and found that the subject property's actual or fair market value was \$15,800 as of the assessment date. (E1).

The Taxpayer appealed the Board's decision on August 7, 2003. The Commission served a Notice in Lieu of Summons on the Board on August 15, 2003, which the Board answered on September 5, 2003. The Commission issued an Amended Order for Hearing and Notice of Hearing to each of the Parties on June 10, 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 October 22, 2004. The Taxpayer appeared personally at the hearing. The Board appeared through Christine A. Lustgarten, Chief Deputy, Civil Division, Douglas County Attorneys Office. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The Board filed a written preliminary Motion to Dismiss for Lack of Jurisdiction, alleging that the Taxpayer's only issue was taxation, an issue over which the Commission lacks jurisdiction in an appeal taken under Neb. Rev. Stat. §77-1502 (Reissue 2003). The Commission provided notice of the hearing on the Motion to

Dismiss to each of the Parties. That hearing was held prior to the hearing on the merits of the appeal on October 22, 2004. The Commission afforded each of the Parties the opportunity to present evidence and argument on the Board's Motion. The Commission found that Exhibit 6, page 3, and the Appeal Form each raised the issue of valuation. The Commission therefore denied the Motion to Dismiss, and ruled that the only issue over which it had jurisdiction was the actual or fair market value of the subject property as of January 1, 2003.

The Board, at the conclusion of the Taxpayer's case-in-chief, moved to dismiss the appeal for failure to overcome the statutory presumption.

## **II. ISSUES**

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's valuation 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 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, as amended by 2004 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 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 only evidence of value is opinion evidence.
2. The Taxpayer offered no evidence of any knowledge of commercial property values, and offered no other evidence of value.

#### **V. ANALYSIS**

The Taxpayer's only evidence of value is opinion evidence that the property was worth \$10,000 to \$15,000. The record establishes that the Taxpayer inherited the subject property and an adjoining tract of land in the early 1980's. The subject

property and the adjoining tract of land are located on South 25<sup>th</sup> Street between "L" Street and "Q" Street in South Omaha. Both "L" and "Q" Streets are major thoroughfares running east and west through South Omaha, and both offer access to the South Kennedy Freeway, which runs north and south. The South Kennedy Freeway connects Plattsmouth to downtown Omaha, and the subject property is visible from the interstate.

The adjoining tract of land is improved with a commercial building occupied by the Taxpayer's tenant, a Mexican restaurant. The subject property provides the only off street parking for the restaurant. The Taxpayer couldn't recall the rent he receives for the adjoining building which is allowed use of the subject property. The Taxpayer adduced no evidence of sales of comparable properties, or of assessed values of comparable properties. The Taxpayer has no experience in buying or selling commercial properties in South Omaha, and owns no other property within 6 or 7 miles of the subject property.

The Taxpayer has failed to adduce any evidence that the Board's decision was incorrect or either unreasonable or arbitrary. The Board, based upon the applicable law, need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was [incorrect and either] unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d

561, 566 (1998); Neb. Rev. Stat. §77-5016(7) (Reissue 2003). The Board's Motion to Dismiss must accordingly be granted.

**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 2004 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. The Taxpayer has failed to adduce any evidence that the Board's decision was incorrect and either unreasonable or arbitrary. The Board's Motion to Dismiss must accordingly be granted.

**VII.  
ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:**

1. The Board's Motion to Dismiss is granted.
2. The Taxpayer's real property legally described as Lot 10, Block 7, South Omaha First Addition, Douglas County, Nebraska, more commonly known as 5129 South 25<sup>th</sup> Street, shall be valued as follows for tax year 2003, as determined by the Board:

Land	\$15,800
Improvements	\$ -0-
Total	\$15,800

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 Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 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 Hans made and entered the above and foregoing Findings and Orders in this appeal on the 22<sup>nd</sup> day of October, 2004. The same were approved and confirmed by Commissioners Lore, 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 25<sup>th</sup> day of October, 2004.

**SEAL**

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*Wm. R. Wickersham, Chair*