

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

GARY S. LERNER,)	
)	
Appellant,)	Case No. 08R 506
)	
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 Gary S. Lerner ("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 April 5, 2010, pursuant to an Order for Hearing and Notice of Hearing issued February 9, 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 Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Gary S. Lerner 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: WEST FAIRACRES VILLAGE 2ND PLATTING LOT 43 BLOCK 0 IRREG,
Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$66,200.00	Included in total	\$66,200.00
Improvement	\$415,200.00	Included in total	\$378,800.00
Total	\$481,400.00	\$400,320.00	\$445,000.00

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, set a hearing of the appeal for April 5, 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	\$ 66,200.00
Improvement value	<u>\$317,019.00</u>
Total value	<u><u>\$383,219.00.</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 a residential parcel improved with a 1 ½ story house of 3,090 square feet of living area built in 1989. (E6:2). The house is rated very good for both quality and condition. (E6:2).

The Taxpayer testified that there were few sales of alleged comparable parcels to the subject property that had sold in her neighborhood; however, she did testify that the County's comparables #1 and #2 did sell and were from her neighborhood. She alleged that their sale prices demonstrated that the valuation of real property in her neighborhood had diminished due to the economy and other factors. The Commission finds little probative value to such generalizations without further evidence of the history of each sale and the attendant circumstances surrounding each sold parcel.

The first alleged comparable parcel testified to by the Taxpayer was that parcel shown in Exhibit 7. The Taxpayer also provided 7 additional allegedly comparable parcels to the subject property. (E8 to 14). The Commission has reviewed the alleged comparable parcels and finds that all but one of the Taxpayer's alleged comparable parcels have differences to the subject property. Examples of these differences include that the parcel in Exhibit 7 has 4,356 square feet of living space compared to the subject property's 3,090 square feet. (E7:2 and E6:2). Only

three of the Taxpayer's alleged comparable parcels are of the same style as the subject property, 1 ½ story, while the others are 2 story. (E8,9 and 12). Lastly, only three of the Taxpayer's alleged comparables are from the same neighborhood, 59, neighborhood extension # 42410. (E7,8 and 9).

“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.

From the Commissions review of each of the Taxpayer's alleged comparable parcels, the Commission finds that only one of the parcels is comparable to the subject property without adjustments and that is the parcel shown in Exhibit 8. The Commission makes this finding based on the similarities between the subject property and that parcel shown in Exhibit 8 regarding the improvements on each parcel: the style of the houses (1 ½ story), the year built, 1989 and 1990, the same ratings of the house for quality and condition, very good, the size of the living area, 3,090 and 3049 square and all of the other physical characteristics. The parcel shown in Exhibit 8 is located in the same neighborhood as the subject property. The Taxpayer testified that the parcel shown in Exhibit 8 is an "exact duplicate" of the subject property in that it was built by

the same builder using the same blueprints. Her testimony was that the only difference between the subject parcel and that parcel shown in Exhibit 8 is that the parcel in Exhibit 8 has one less bedroom (2 instead of 3) and another bath on the second level, but both have the same living area. The property record file for that parcel shown in exhibit 8 shows that the only material difference between the parcels are the number of fireplaces. (E6:5 and E8:6). However, the Taxpayer testified that the subject property has one more fireplace than shown on the property record file for a total of two and the parcel shown in Exhibit 8 has only two fireplaces instead of the three fireplaces shown. This testimony was uncontroverted by the County and removes any obvious differences between the parcels previously shown on the property record files. The Commission finds that the parcel shown in Exhibit 8 is highly comparable to the subject property.

The Commission's review of the property record files for the subject property and the parcel shown in Exhibit 8 show that the County Board reduced the valuation recommended by the County Assessor for both parcels. The County Board did not reduce the land component of either parcel, \$66,200, only the improvement value. The Commission finds the reductions of the improvement component of each parcel by the County Board have not been done in a uniform manner as further explained below. The County Board reduced the recommended valuation of the parcel shown in Exhibit 8 from \$429,000 for the improvement component of the parcel to \$345,400. (E8:7 rounded). The total new valuation as determined by the County Board was \$411,600 (improvement value of \$345,400 + \$62,200 land value = \$411,600. This represents a reduction to 83.1% ($\$411,600/\$495,200 = .831$) of the market value recommended by the County Assessor.

The subject property was also reduced by the County Board from the recommended valuation of the improvement component only of \$415,200 to \$378,800. (E6:5). The new total valuation as determined by the County Board was \$445,800 (improvement value of \$378,000 + land component valuation of \$66,200 = \$445,800). This represents a reduction to 92.4% ($\$445,000/\$481,400 = .924$) of the recommended market value by the County Assessor. The Commission finds that the County Board has not made uniform reductions in taxable valuations between the two parcels, having given a larger percentage reduction to that parcel shown in Exhibit 8 than the subject property. In other words, the County Board has valued each of the two parcels to different percentages of their market value. This failure by the County Board to equalize the disparate valuations of the two parcels is the primary basis for the Commission's finding of a failure of plain duty by the County Board to equalize the disparate valuations of comparable real properties.

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). 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).

“Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative

standard, so that no one part is compelled to pay a disproportionate share of the tax. Where it is impossible to secure both the standards of the true value of a property for taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief. However, the burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuation placed on other similar property is grossly excessive.” *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).

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). The Commission finds that the Taxpayer has shown by its

own competent evidence that the presumption in favor of the County Board has been rebutted. In addition, the Commission finds that the valuations placed on other similar property to the subject property is grossly excessive.

The Commission also finds that the decision of the County Board was arbitrary or unreasonable in that they set the valuation of similarly situated property, determined by this Commission to be comparable, at materially different levels which is by definition unreasonable and arbitrary. The Nebraska Constitution provides that "(t)axes shall be levied by valuation uniformly and proportionately upon all real property. " Neb. Const. Art. VIII, § 1. Neb. Rev. Stat. § 77-1501 (Reissue 2009). Neb. Rev. Stat. § 77-1501 (Reissue 2009) mandates that "the county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately." "Pursuant to *Chief Indus. V Hamilton Cty. Bd. Of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988), the Taxpayer is entitled to have her property taxed at the same percentage of market value as are other properties." *Zimbawa v Douglas County Board of Equalization*, November 18, 2008. Therefore, the Taxpayer is entitled to relief as a matter of law.

The Commission notes that the probable reason that the County Board reduced the subject property's taxable valuation was due to the recommendation of the referee hired by the County Board. (E3:2). The report by the referee reads "...and some equalization is need (sic) to equalize values." His recommendation was to reduce the improvement component of the subject property to \$378,800 versus the recommendation of the County Assessor of \$415,245. (E6:5). The coordinator for the referee agreed that the lowered valuation recommended by the referee should be approved "... for equalization purposes." (E3:3).

The facts of this appeal are similar to those in the *Zimbawa* case but in this appeal the evidence shows that the County Board had also made some reduction to the taxable value of the subject property as a result of the protest hearing. *Zimbawa v Douglas County Board of Equalization*, November 18, 2008. The problem in this appeal is that the County Board did not make a uniform reduction to the subject property in comparison with that parcel shown in Exhibit 8.

An additional concern to the Commission is that an inspection had been made in this appeal of the subject property as shown on Exhibit 2 page 5. The appraiser for the County Assessor found several adjustments that needed to be made to the subject property as a result of his inspection. A summary of the adjustments which would now be necessary, are shown on Exhibit 2 page 14. In summary, the appraiser for the County Assessor determined that a net reduction of \$20,289 should be made to the improvement component of the subject property previously recommended, bringing the improvement valuation down from \$415,244.76 to \$394,955.31 for a new total taxable valuation of the subject property for 2008 of \$461,155.31 ($\$394,955 + \$66,200 = \$461,155$). (E2:14). The Commission finds that it is this revised and corrected taxable valuation of \$461,155 for the subject property that should be uniformly equalized with the parcel shown in Exhibit 8. The Commission finds that the difference in nonuniform valuation between the subject property and that parcel shown in Exhibit 8, is grossly excessive. The Commission finds that uniformity is accomplished by taking 83.1% of the total revised valuation, \$461,155, which equals \$383,219 for the 2008 taxable valuation of the subject property.

The Commission finds that the Taxpayer has provided competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination and she 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 taxable valuation of the subject property for 2008 is \$383,219, itemized as \$66,200 for the land and \$317,019 for improvements.

**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	\$66,200.00
Improvement value	<u>\$317,019.00</u>
Total value	<u>\$383,219.00</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 June 9, 2010.

Nancy J. Salmon, 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.