

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

MARK & NANCY DICKHUTE &
THOMAS & SYLVIA CRAINER,
Appellant,

v.

Douglas County Board of Equalization,
Appellee

Case No: 10R-432 & 11R-381

Decision Reversing the Decision
Of the County Board of Equalization

For the Appellant:

Mark Dickhute

For the Appellee:

Thomas Barrett,
Douglas County Attorney

Heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in Douglas County. The parcel is improved with a 978 square foot home. The legal description of the parcel is found at Exhibit 3 page 2. The property record card for the Subject Property is found at Exhibit 3 page 5.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$77,500 for tax year 2010, and \$77,500 for tax year 2011. Mark and Nancy Dickhute and Thomas and Sylvia Crainer (the "Taxpayers") protested these assessments to the Douglas County Board of Equalization ("BOE") and requested an assessed valuation of \$47,760 for tax years 2010 and 2011. The BOE determined that the assessed value for tax years 2010 and 2011 was \$77,500. (E1 & E2)

The Taxpayers appealed the decision of the BOE to the Tax Equalization and Review Commission (the "Commission"). Prior to the hearing, the parties exchanged exhibits and the Taxpayers submitted a Pre-Hearing Conference Report, as ordered by the Commission. The BOE did not submit a Pre-Hearing Conference Report. The parties stipulated to the receipt of exchanged Exhibits 3 through 26 (with the exception of pages 28 – 39 of Exhibit 3 and pages 27 – 38 of Exhibit 6) and Exhibits 28 – 30. The Commission held a hearing on January 13, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo. See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action." *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, 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.

Id. 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) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

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. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value). 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).

In an appeal, the commission "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or

cross appeal.” Neb. Rev. Stat. §77-5016(8) (2011 Supp.). The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it. Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual 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). “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). “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). 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). All real property in [Nebraska] subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009) 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).

B. Summary of the Evidence and Findings

The Taxpayers purchased the Subject Property for \$82,000 on June 30, 2008. (E3). Mr. Dickhute testified that the Taxpayers purchased the home for a premium due to the relocation of

their sons to Omaha from New Orleans, Louisiana for purposes of enrollment in post- graduate schools at Creighton University.

Mr. Dickhute testified that the actual value of the Subject Property is less than the \$77,500 assessed value for the following reasons:

1. Subsequent to their purchase, the Taxpayers discovered significant problems with the Subject Property, including severe settling of the foundation and numerous other problems that they contend were concealed by the seller of the home.
2. Mr. Dickhute and the Taxpayers' contractor testified that the Subject Property is average in quality and fair in condition, while the County's Property Profile states that quality and condition are average. (E3 & E9). The Commission received Exhibit 15 offered by the Taxpayers, which is photographic evidence in support of their testimony that the condition of the Subject Property is fair.
3. The Taxpayers submitted several calculations in writing and through testimony by Mr. Dickhute, alleging that the actual value of the Subject Property is less than the assessed value on the basis of comparisons with nearby properties. (E12 & E13). In addition to addressing differences in terms of "fair" condition, the Taxpayers' comparison calculations addressed differences with respect to several amenities. The Commission notes that the Taxpayers made several adjustments to the Subject Property on Exhibit 13 for comparison calculation purposes. The Commission also notes that adjustments are required to be applied to comparable properties, rather than the Subject Property.

The BOE submitted Exhibits, but did not call witnesses. The BOE arrived at a valuation of \$77,500 for the tax years 2010 and 2011. (E3:3-4 and E6:3-4).

Based on the testimony of Mr. Dickhute and the Taxpayers' contractor, together with the Exhibit 15 photographic evidence, the Commission finds that the Taxpayers adduced sufficient evidence to show that the condition of the Subject Property is fair. The record before the Commission demonstrates that, using the County's guidelines for the difference between average and fair condition, the assessed value of the improvements on the Subject Property should be reduced by \$12,000. (E17:9). Therefore, the Commission finds that the action of the BOE was arbitrary or unreasonable.

V. EQUALIZATION

A. Law

“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. 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). 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). 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). 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). 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). 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 judgment. 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).

B. Summary of the Evidence and Findings

The Taxpayers assert that the assessed value of the Subject Property is not equalized with the assessed value of other similar properties for the following reasons:

1. The Taxpayers submitted several calculations in writing and through testimony by Mr. Dickhute whereby they allege that the equalized value of the Subject Property is less than the assessed value on the basis of per square foot valuation comparisons with several nearby properties. (E12 & E13).
2. The Taxpayers called the 2010 Referee for the BOE, Tammy Massengale, to testify. Ms. Massengale testified that the value of the Subject Property amounted to \$60,900, which matches her opinion set forth on the BOE's Referee report. (E4:1). Ms. Massengale's comments on the Referee report state as follows with respect to her equalization approach in comparing the Subject Property with an adjacent property: "Based on the current assessment of price per square foot for 345 north 35th Street at \$60.93 psf X 978 = \$59,590 + \$8psf for bsmt finish = \$165 X 8 = 1320 = \$60,900." (E4:1).
3. Referencing County Exhibit 3 page 9 and County Exhibit 6 page 9, Mr. Dickhute testified that the Subject Property's central air conditioning is valued by the County in the amount of \$6,846 for assessment purposes. In contrast, Mr. Dickhute's testimony and Taxpayers' Exhibit 12 reference four alleged comparable properties for which the County allegedly failed to assess central air conditioning. Therefore, Mr. Dickhute testified that the Subject Property's central air conditioning assessment is not equalized with properties in close proximity to the Subject Property.
4. With respect to the central air conditioning assessment equalization issue, Mr. Dickhute offered further testimony and Exhibit 12 regarding the property next door to the Subject Property (343 No. 35th St – Property Record Card at Exhibit 16) and a comparable used by the County in its BOE packets (3047 California St. – Property Record Card at Exhibit 3:24-25 and Exhibit 6:23-24). Moreover, Exhibit 18 depicts the presence of central air conditioning of the alleged comparable property at 355 No. 35th Street, and the Property Record Card for this property at Exhibit 17 indicates that

the County did not assign value to this amenity for assessment purposes. The County did not offer evidence to rebut this allegation.

The Commission finds that the assessed to actual value ratio of the five alleged County and Taxpayer comparable properties with sales history highlighted in Exhibits 3, 6, 12 and 13 range from 92% to 108% (i.e., 3411Cass St. 100%; 3815 Chicago St. 92%; 3047 California St. 108%; 3215 Webster St. 94%; 514 No. 32nd St. 97%), while the Subject Property has a 94.5% assessment/sale ratio (\$77,500/\$82,000).

With respect to the per square foot averaging calculations used by the Taxpayers in Exhibits 12 and 13 and by the Referee, Ms. Massengale, the Commission notes that “[s]imply averaging the results of the adjustment process to develop an averaged value fails to recognize the relative comparability of the individual transactions as indicated by the size of the total adjustments and the reliability of the data and methods used to support the adjustments.” Appraisal Institute, *The Appraisal of Real Estate*, 13th Ed. (2008) at 308. Therefore, the Commission is not persuaded that the Taxpayers’ per square foot averaging evidence is sufficient for purposes of determining that the Subject Property is not equalized with the alleged comparable properties.

The Commission is persuaded that the Taxpayer adduced sufficient evidence to show that the Subject Property’s assessed value was increased by \$6,846 for central air conditioning, while other properties which had central air conditioning did not. The Commission therefore finds evidence of a lack of uniformity in the determination of assessed valuation of the Subject Property as compared to these alleged comparable properties. Therefore, the assessed value of the improvements on the Subject property should be reduced by \$6,846.

CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the BOE faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the BOE’s decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the BOE is Vacated and Reversed. The assessed value of the Subject Property should be reduced by \$12,000 in valuation from the improvement portion of the BOE's valuation to reflect the fair (as opposed to average) condition

of the Subject Property. The assessed value of the Subject Property should also be reduced by \$6,846 for purposes of equalization of the assessed value of the Subject Property with the assessed value of comparable properties in regard to the value of central air conditioning. Therefore, the Commission finds that the improvement value of the Subject Property is \$52,700, resulting in a total actual valuation of \$58,700 (\$6,000 land valuation).

VI. ORDER

IT IS ORDERED THAT:

1. The Decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax years 2010 and 2011 is Vacated and Reversed¹.
2. That the Assessed value of the Subject Property for tax years 2010 and 2011 is:

Land:	\$ 6,000
<u>Improvement:</u>	<u>\$52,700</u>
Total:	\$58,700.
3. This decision and order, 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 (2011Supp.)
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 years 2010 and 2011.

¹ Assessed value, as determined by the county board of equalization, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the county board of equalization at the protest proceeding.

7. This order is effective for purposes of appeal on August 10, 2012.

Signed and Sealed: August 10, 2012.

Thomas D. Freimuth, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2011Supp.), other provisions of Nebraska Statute and Court Rules.