

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

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|-------------------------------|---|------------------------------|
| ILENE D. ARNOLD and CARRIE L. |) | |
| LEATHERS, |) | |
| |) | CASE NO. 04R-94 |
| Appellants, |) | |
| |) | |
| vs. |) | FINDINGS AND FINAL ORDER |
| |) | (NO MAJORITY OPINION) |
| SARPY COUNTY BOARD OF |) | |
| EQUALIZATION, |) | |
| |) | |
| Appellee. |) | |

SUMMARY OF DECISION

Ilene D. Arnold and Carrie L. Leathers, the Taxpayers, own a single-family residence in the Millard Park Subdivision of Sarpy County, Nebraska. The Taxpayers protested the Sarpy County Assessor's 2004 determination of actual or fair market value for their property on valuation and equalization grounds. The Sarpy County Board of Equalization denied the Taxpayers' protest and the Taxpayers appealed. No majority of Commissioners agrees to grant the Taxpayers relief, and there is, accordingly, no change to the 2004 assessed value.

**I.
ISSUES**

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

II.
STATEMENT OF THE CASE

The Taxpayers own a tract of land legally described as Lot 483, Millard Park, Sarpy County, Nebraska, more commonly known as 16632 Olive Street. (E15:1). The tract of land is improved with a single-family residence with 1,500 square feet of above-grade finished living area built in 2001 ("the subject property"). (E15:2 - 3). The Assessor determined that the subject property's actual or fair market value was \$213,643 as of the January 1, 2004, assessment date. (E1:1). The Taxpayers timely protested that determination and alleged that the subject property's equalized value was \$180,000. (E1:2). The Board denied the protest. (E1:1).

The Taxpayers appealed the Board's decision on August 23, 2004. The Commission served a Notice in Lieu of Summons on the Board on September 2, 2004, which the Board answered on September 24, 2004. The Commission thereafter issued an Order for Hearing and Notice of Hearing on May 12, 2005. 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, pursuant to the Order and Notice of Hearing, called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on August 11, 2005. The Taxpayers appeared personally at the hearing. The Board appeared through Tamra L. W. Madsen, Esq., Deputy Sarpy County

Attorney. 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 as required by law. Neb. Rev. Stat. §77-5015(Cum. Supp. 2004). Only one witness, one of the Taxpayers, testified during the course of the hearing. The Commission denied the Board's Motion to Dismiss at the close of the Taxpayers' case in chief. The Board then rested without adducing any testimonial evidence. The Commission afforded each of the Parties the opportunity to present argument and then took the matter under advisement, which now comes on for decision.

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) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9). 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 actual or fair market value of the land component of the subject property, \$28,000, is not at issue.
2. The Taxpayers' opinion of actual or fair market value for the subject property's improvement component is not supported by clear and convincing evidence.
3. The Taxpayers' refused the Assessor's Office request to inspect the interior of the subject property's improvements.

**V.
ANALYSIS**

**A.
FAILURE TO INSPECT
AND ALLEGED FABRICATION/FALSIFICATION OF EVIDENCE**

The Taxpayers initial burden in this appeal is to establish that the Board's decision was incorrect and was either unreasonable or arbitrary. *Garvey Elevators, supra*. The Taxpayers satisfy this initial burden if they demonstrate by clear and convincing evidence that the Board either failed to faithfully perform its official duties or failed to act upon sufficient competent evidence. *Garvey Elevators, supra*.

The Taxpayers contend that all evidence satisfies this threshold burden. The Taxpayers contend first that the Assessor's staff failed to inspect the subject property's improvements prior to proposing the increase in the 2004 assessed value. (E23:1). The Taxpayers' further contend that since the Board adopted the Assessor's 2004 proposed value, which was not based on a personal inspection, the Board failed to act upon sufficient competent evidence. (E15:3; E1). An assessor's failure to inspect the property ordinarily constitutes clear and convincing evidence that the Board's decision was not based on sufficient competent evidence. *See, e.g., Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966).

The Board's evidence includes the Assessor's written acknowledgment that the interior of the subject property's improvements had not been inspected for purposes of setting the subject property's 2004 assessed value. (E23:1). The Board argues, however, that the Taxpayers' refusal to allow a requested inspection prevented the Assessor from performing duties mandated by law. The Board argues that in light of these uncontroverted facts, the Taxpayers should not prevail.

The Taxpayers respond, however, that at the time the assessed value was proposed (prior to the requested inspection), the Assessor's records were "falsified" and the documents

"fabricated" in order to set the value. The Taxpayers' argument, however, ignores the fact that the subject property was in fact improved sometime prior to the assessment date by the addition of a partition finish to the basement and by the addition of a 216 square foot deck. The record also establishes that the no Building Permit was issued for the basement improvements. Such permits are required by state law. §77-1318.01 (Reissue 2003). The Taxpayers, whether intentionally (by refusing to permit an inspection) or unintentionally (by failing to insure that the required Building Permit was issued) have prevented the Assessor from performing his official duties which are required as a matter of law. Neb. Rev. Stat. §77-1301, *et seq.*, (Reissue 2003, as amended).

The Board, however, presented no testimonial evidence. There is, therefore, nothing in the record to refute the Taxpayers' allegations that a member of the Assessor's staff admitted to "fabrication of evidence" and "falsification of records."

(E23:1). The Commission must base its decision on the record before it. Neb. Rev. Stat. §77-5016(3) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9). In the absence of any testimony refuting the Taxpayers' allegations, the only evidence contained in the record on this issue is the Taxpayers' unrefuted allegations that at the time the Board determined the subject property's 2004 assessed value the Assessor's records were

"fabricated" and "falsified." The Commission must accordingly conclude that the Board's decision was not based on sufficient competent evidence, and was therefore incorrect and unreasonable and arbitrary. The statutory presumption in favor of the Board is therefore extinguished. The only remaining issues are (1) whether the Board's determination of value was unreasonable; and (2) whether that value was equalized with assessed values of comparable properties.

**B.
INCREASE OVER PRIOR YEAR'S ASSESSED VALUE**

The Taxpayers contend that the Board's value was unreasonable in light of the prior year's assessment. The Millard Park Subdivision of Sarpy County has at least 613 platted residential lots, many of which are vacant. (E18). The Assessor's Office had identified proposed increases for each of the subdivisions' improved residential lots by January 26, 2004. (E22). Many of the proposed increases were due to the addition of "Finished Basements" ("FB"), decks, patios, and other improvements. (E22). The Assessor's proposed changes over the prior years' assessed values for the subdivisions' improved residential lots ranged from a low of -2.5% to a high of +28.2%. (E22:10).

The subject property's 2004 assessed value increased by 19.6% over its 2003 assessed value. (E22:11). The Assessor's

Office attributed the increase to the addition of a deck and a finished basement ("FB"). (E22:11). A Building Permit was issued prior to construction of the new deck, but no Building Permit was requested for the basement improvements. (E15:1). One of the Taxpayers testified that the construction company responsible for the basement finish was responsible for securing a Building Permit but failed to do so. Although the Taxpayers also complain of the increase in the assessed value of their property compared to significantly smaller increases in the assessed values of two specific "comparable" properties, nothing in the record indicates those properties had additional improvements prior to the 2004 assessment date such as those made to the subject property.

The Taxpayers failed to adduce any evidence of the estimated cost of the subject property's new deck or evidence of the estimated cost of the subject property's finished basement. The relationship of the cost of the new improvements to actual or fair market value or to the increase over the prior year's assessed value cannot be determined from the record made by the Taxpayers.

The Assessor's records, however, indicate that the Replacement Cost New of the Taxpayers' finished basement was \$33,432 and the Replacement Cost New for the 216 square foot deck was \$3,765. (E15:3). Physical depreciation attributed to the

RCN was 1%. (E15:3). The Replacement Cost New Less Depreciation for these two items totals \$36,825. [$\$33,432 + \$3,765 = \$37,197 - 1\% = \$36,825$]. The subject property's 2003 assessed value was \$178,628. (E15:1). The subject property's 2004 assessed value was \$213,643. (E15:1). The difference between these amounts is \$35,015. The difference between the RCNLD and the increase in the 2004 assessed value is \$1,810. Nothing in the record explains the basis for the subject property's 2003 determination of actual or fair market value. The increase in the subject property's 2004 determination of actual or fair market value over the 2003 value includes the added value of the new improvements with a reduction for some unidentified factor.

The Commission must also note that the prior year's assessed value is not relevant to the subject property's current assessed value. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988). The Taxpayers' allegation that the Board's determination of actual or fair market value for 2004 was unreasonable based on the prior year's assessment is not supported by clear and convincing evidence.

C.
OWNERS' OPINION OF VALUE

The Taxpayers also allege that the Board's determination of subject property's 2004 actual or fair market value for the

improvement component exceeded actual or fair market value. One Taxpayer testified that in her opinion the subject property's actual or fair market value, including both land and improvements, was \$200,000 as of the assessment date. This testimony indicates that the Taxpayers' opinion of the subject property's improvement component value was \$172,000.

The Board determined that subject property's improvement component had an actual or fair market value of \$185,643. (E1:2). The Board's determination of value is based on the Cost Approach. (E15:3; E1). Indicated value under the Cost Approach is derived in part from the property's inventory of physical characteristics. (E15:2 - 3). Physical characteristics are identified based on criteria established by the *Marshall Valuation Service* and associated handbooks. *350 Neb. Admin. Code, ch. 10, §003.04* (04/2003). The *Marshall-Swift Residential Cost Handbook* is one of the associated handbooks. This handbook requires that above and below-grade dimensions reflect external measurements. *Id.*, Marshall-Swift L.L.P., 2004, p. 6. The Taxpayers did not challenge the external dimensions or, for that matter, any of the other physical characteristics described in the Assessor's records other than the size of the partition finished basement. Those characteristics include the estimated 1,500 square feet of above-grade finished living area (based on external dimensions); three bedrooms above-grade; 2.0 bathrooms

above-grade; and a walkout basement which is 1,446 square feet in size. (E15:3; E24:1).

The Taxpayers principle valuation issue is the size of the finished basement area. (E2). The Assessor's Office's for 2004 estimated that the subject property had a "partition finished" basement. There are two types of "basement finish:"

"The minimal basement finish includes floor covering, wall and ceiling finish and electrical lighting, but only incidental heating. The partitioned basement finish is somewhat similar in quality of both materials and workmanship to that of the basic residence. It is fully partitioned for recreation room, bedroom, laundry room, bathroom, etc. The costs include ceiling, wall and floor finishes and electrical lighting, as well as heating (allowance for additional ducts and room registers)."

Id at p. 10. The Assessor's Office estimated for 2004 that the partitioned basement area was 1,446 square feet in size. (E15:3). There are handwritten notes on the Property Record File for the subject property revising that determination and estimating that the "partition finish" is 1,301 square feet in size. These notes are not dated, and the subject property's 2004 assessed value was not changed based on these notes. (E15:1; E15:3).

The Taxpayers challenge both the Assessor's original estimation and the revised estimation of the finished basement area. (E2). The Taxpayers adopted as their estimated size of the partition finished basement the measurements made for purposes of selling the property. The partition basement finish is shown on the Multiple Listing Service as being 976 square feet in size. (E24:1). The "MLS" report states that the subject property's finished basement area consists of a recreational room 637 square feet in size, a $\frac{3}{4}$ bath, and a "large [15 x 12 feet] 4th bedroom with walk-in closet." (E24:1 - 2). The area of the bedroom and recreational room total 817 square feet, leaving the remainder of the 976 square feet of finished basement area, 159 square feet, to the bathroom and other unidentified areas. (E24:1 - 2). The MLS report does not establish the value of the partition finished basement.

The Assessor's records noted the addition of a 216 square foot deck as another reason for the increase in the subject property's 2004 assessed value. (E22:11). The Taxpayers adduced no evidence of the cost or of the contribution to value of the new deck.

Finally, the Board argues that the price at which the subject property is offered for sale is demonstrative of actual or fair market value as of the assessment date. The record does establish that the Taxpayers' listed their property for sale in

2005 for \$229,500. (E24:1). Nothing in the record correlates this requested value to the subject property's actual or fair market value as of the January 1, 2004, assessment date. Furthermore, the listing price does not necessarily represent market value. In fact, market value may be higher than, equal to, or less than the listing price, depending on the market. This evidence, in this appeal, is not clear and convincing evidence of value as of the assessment date.

D.
TAXPAYERS' "COMPARABLE" PROPERTIES
USED TO ESTABLISH VALUE

The Taxpayers offered evidence of the prices paid for two "comparable" properties in support of their opinion testimony. Both of the "comparable" properties are located in the Millard Park Subdivision in support of their opinion evidence. (E9; see also E26; E10; see also E25). "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. *Id.* at 103. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making

adjustments” *Id.* at 98. Most adjustments are for physical characteristics. *Id.* at 105.

The Taxpayers’ first “comparable” is a tract of land legally described as Lot 485, Millard Park, Sarpy County, Nebraska, located at 16640 Olive Street. (E9:1; E26:1). The tract of land is located two lots west of the subject property, and is improved with a single-family residence with 1,380 square feet of above grade living area (120 square feet smaller than the subject property) built in 2001 by Rocz Construction. (E9:1; E26:1). The residence is a ranch-style home with a walkout basement 1,337 square feet in size, or 109 square feet smaller than the subject property. (E9:2; E26:2). A portion of the basement 941 square feet in size is finished, which is 25 square feet smaller than the Taxpayers’ estimated finished basement area for their property. (E9:2; E 24:1; E26:2). This “comparable” property has 3 bedrooms and 2 and one-half bathrooms above grade. (E9:2; E24:1; E26:2). This property sold for \$183,093 on November 29, 2000, and had an assessed value of \$172,945 as of the January 1, 2004, assessment date. (E25:1).

The original Building Permit for this home was issued on August 7, 2000, and listed the estimated cost of construction as \$83,820. (E9:4). Another Building Permit was issued for this property on March 9, 2001, in the amount of \$44,450 for a “Finished Basement.” (E9:4). This property then sold for

\$180,000 on November 19, 2001, and had an assessed value of \$178,796 as of the assessment date. (E26:1; E9:1).

The Taxpayer's second "comparable" property is a tract of land legally described as Lot 482, Millard Park, Sarpy County, Nebraska, located at 16628 Olive Street. (E10; E25:1). This tract of land abuts the subject property on the east side and is improved with a single-family residence with 1,409 square feet of above grade living area (91 square feet smaller than the subject property) built in 2001 by Prairie Homes, Inc., the same builder who built the subject property. (E25:1 - 2). This residence is also a ranch-style home with a walkout basement 1,377 square feet in size (123 square feet smaller than the subject property). (E25:2). A portion of the basement approximately 675 square feet in size is finished. (E25:3; E24:1). The partition finished basement area of this home is 300 square feet smaller than the partition finished basement area of the subject property. This "comparable" property also has 3 bedrooms and 2 bathrooms. (E25:2). This property sold for \$183,093 on November 29, 2000. (E25:1).

The Assessor's records indicate that all three homes are of "Average" condition (E15:2; E25:2; E26:2). The Assessor's records also indicate that the subject property is of "Good" Quality of Construction while the other two "comparables" are of "Average +" Quality of Construction. (E25:2; E26:2).

[Handwritten notes on the Residential Data Sheet printed January 28, 2004, for the property located at 16628 Olive Street indicate that the Quality of Construction is wrong and should be changed back to "Good." (E25:3). The assessed value for this property for 2004 was based on the lower Quality of Construction. (E25:1; E25:3).]

The subject property and each of the "comparable" properties has 8 plumbing fixtures. The subject property's garage, at 631 square feet, is smaller than either of the "comparable" properties (650 square feet and 682 square feet, respectively). The Assessor attributed a 1% depreciation factor to the subject property's improvements, while attributing a 2% depreciation factor to each of the "comparable" property's improvements. (E15:3; E25:3; E26:3).

Finally, the MLS report for the subject property indicates that Taxpayers' home has a "Lge rec room, $\frac{3}{4}$ bath & large 4th bdrm with walk-in closet in lower level. exquisite landscaping in both front and rear yards (sic) issure (sic) to please!"

The uncontroverted evidence establishes that the Taxpayers "comparables" differ significantly from the subject property. The Taxpayers' comparable at 16640 Olive Street sold for \$180,000 after a \$44,450 basement partition finish project was completed. (E9; E26). The Taxpayers' purchased their home for \$180,300 before the addition of the partition finish basement,

216 square foot deck, or any of the landscaping. The Taxpayers' "comparable" at 11628 Olive Street is 120 square feet smaller than the subject property, and the "comparable" property's partition finished basement is more than 100 square feet larger than the subject property's.

The Taxpayers adduced no evidence establishing the adjustments necessary to account for any of the differences between the subject property and their "comparable" properties. The subject property's actual or fair market value may be established using the prices paid for "comparable" properties or the assessed values of comparable properties. *See, e.g., DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998). The Taxpayers' however, when attempting to establish actual or fair market value of the subject property, must demonstrate by clear and convincing evidence that the properties offered as "comparables" are truly comparable to the subject property. *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998); *Westgate Recreation Ass'n v. Papio-Missouri River Natural Resources Dist.*, 250 Neb. 10, 17, 547 N.W.2d 484, 492 (1996). In the absence of such evidence, the Commission cannot determine that the proffered "comparables" are truly comparable to the subject property.

The Taxpayer's testimonial evidence and evidence of the prices paid for and assessed values of two nearby residences does not demonstrate that the Board's determination of actual or fair market value for the subject property, \$213,643, was unreasonable. The Taxpayers have failed to meet their burden, and their valuation claim must accordingly be denied.

E.
EQUALIZATION

The Taxpayers also allege that the subject property's assessed value is not equalized with "comparable" properties. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of actual value. "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. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). " The Taxpayers bear the burden, however, of establishing by clear and convincing evidence that the Board's valuation is "grossly excessive" and that the "discrepancy was not the result of an error of judgment but was a deliberate and intentional discrimination systematically applied. . . " *Cabela's, supra; Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

The Taxpayers failed to adduce any evidence in support of the "deliberate and intentional discrimination systematically applied" test. The Taxpayers allege however, that the error in the Quality of Construction for the property located at 16628 Olive Street (E25) supports their request for equalization.

The Taxpayers selected two homes out of 613 parcels in the Millard Park Subdivision to support their valuation and equalization claims. One of those two properties may be undervalued due to a possibly erroneous listing of the Quality of Construction. (E25:2). It appears, however, that the lower grade Quality of Construction may, in fact, be accurate. There is a handwritten entry dated "11/8" which unequivocally states "ALL OK F/R." (E25:2). These handwritten notes do not rise to the level of clear and convincing evidence that the subject property "is assessed in excess of the value at which others are taxed."

Finally, the Commission cannot conclude that one residential property which may be undervalued out of 613 parcels in a subdivision constitutes evidence of "a deliberate and intentional discrimination systematically applied." The Taxpayers have also failed to adduce clear and convincing evidence that the subject property's assessed valuation of \$213,643 is either "grossly excessive" or the result of a "deliberate and intentional discrimination systematically applied." *Cabela's, supra; Kearney*

Convention Center, supra. The Taxpayer's equalization claim must accordingly be denied.

COMMISSIONERS LORE AND REYNOLDS WOULD ADOPT THE ABOVE AND FOREGOING ANALYSIS IN THIS APPEAL. COMMISSIONERS WICKERSHAM AND HANS WOULD ADOPT THE FOLLOWING ANALYSIS.

The Taxpayers offered evidence of sales for two properties they asserted were comparable to the subject property. One comparable offered by the Taxpayer sold on November 29, 2000. (E25:1). That date is three years prior to January 1, 2004, the valuation date at issue in this appeal. That sale would not be considered by the Assessor for mass appraisal purposes for January 1, 2004, valuations. See, Directive 03-2, Property Tax Administrator, August 29, 2003. While there is no fixed standard, adjustments to compensate for differing market conditions over a period of time are recognized as appropriate for a determination of value. See. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001), p. 434. A sale occurring more than three years prior to the valuation date is not clear and convincing evidence of value without evidence of either a stable market for which no adjustment is necessary or the adjustments necessary to account for either a rising or declining market over the three year period. The second

comparable sold on November 19, 2001. (E26:1). That sale could have been utilized by the Assessor for mass appraisal purposes. Directive 03-2, supra. When used for mass appraisal techniques the sale data would have been analyzed in conjunction with data from other sales. A single sale may offer evidence of value as of the assessment date. *Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 240, 622 N.W.2d 605, 611 (2001). The weight to be given to a sale is reserved to the trier of fact. *Id.* In this instance a single sale occurring more than two years prior to the valuation date at issue is not clear and convincing evidence of actual or fair market value as of the assessment date. The Taxpayer's opinion of value was not supported by an analysis of the market and was not clear and convincing evidence of actual value for the subject property as of January 1, 2004. For reason stated below the presumption in favor of the County was extinguished. The Taxpayers however, failed to prove that actual value as determined by the Board was unreasonable and their claim for relief on that basis fails. *Garvey supra.*

The Taxpayers also advanced an equalization claim. The assessor's records show that the comparables offered by the Taxpayers and the subject property were inspected by a person bearing the initials MG on 05/15/01. (E15:2), (25:2) and (E26:2). A Taxpayer testified that the subject property was

built as a "spec home." A Taxpayer bought the subject property 01/10/01. (E15:1). The same Taxpayer testified that to her knowledge the subject property had never been inspected by the Assessors office. That testimony was not refuted by the County. The presumption in favor of the County is extinguished. *Grainger Bros. Co. v. County Bd. of Equalization of Lancaster Co.*, 180 Neb. 571, 580, 144 N.W.2d 161, 169 (1966). Despite the lack of a current inspection the subject property's taxable value was increased from \$178,628 for tax year 2003 to \$213,643 for tax year 2004. (E15:1). In this instance, the increased valuation of the subject property is attributable a determination that it had a finished basement (FB) and a deck. (E22:11). Attribution of a finished basement to the subject property was, according to the assessor in a letter to one of the Taxpayers, based on experience of the appraiser with homes having a walkout basement. (E23:1). The subject property was assessed for tax year 2004 as a dwelling with a full partition finished basement. (E15:3 and E16:50). The basis for attribution of a full partition finished basement to the subject property is not explained. If the information in Exhibits 22 and 16 is analyzed actions of the appraiser can be placed in perspective. There are 651 parcels in the Millard Park neighborhood. (E22). Prior to assessment year 2004, 101 of the 484 homes in the neighborhood were assessed having finished basements. (E22). The Assessor had determined

that two of those 101 homes had full partition finished basements. (E16). For tax year 2004, the appraiser added 20 homes to those having full partition finished basements. (E16 and 22). Twenty-eight other homes had partial finished basements added to their 2004 assessment. (E16 and 22). A plat map showing part of the neighborhood in the immediate area of the subject property was introduced as Exhibit 5. Exhibit 5 shows lots 403 through 487 of Millard Park. Of the 84 lots on that map only two properties with full partition finished basements lot 483, the subject property, and lot 437. It is also worth noting the two properties offered by the Taxpayers as comparables have walkout basements but have not been assessed for full partition finished basements. One of these comparables is next door to the subject the other is separated from the subject by one lot. The Exhibits do not show that attribution of a full partition finished basement to properties in the subject's neighborhood was usual practice of the appraiser. That conclusion is also supported by unchallenged testimony by a Taxpayer that an employee of the assessor's office stated that numbers for assessment of the subject property were "fabricated."

The County produced Exhibit 25, the Property Record Card, for one of the Taxpayers' comparables. On page two of that Exhibit the following notation appears next to the quality rating "change back to 40. Don't know why it was changed but it should

be 40 to equalize w/neighbor. (Lot 483)." (E25:2). Lot 483 is the subject property. A further notation is "Still under sale prior the year 2000." (E25:2). Three conclusions can be drawn from the notation, first that notation was made by someone in the assessor's office, second that some action was necessary to equalize the taxable value of the subject with a neighboring property and third that the change would have increased the taxable value of the neighboring property. Substantial change in valuation based on unsupported generalizations, selectively applied, is evidence of ill will and intentional discrimination in the 2004 assessment of the subject property. Further the County acknowledged that an action was necessary to equalize the subject property with another property. There is no evidence that any action was in fact taken to equalize assessment of the properties. The Taxpayers are entitled to equalization relief. *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620, (1984).

It is also necessary however, to determine whether there is sufficient evidence to determine the relief to be granted. *Id.* Equalization requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999). If the calculated ratios are the same the properties are equalized, that is they are being

taxed at the same percentage of actual value. That calculation requires evidence of both assessed values and actual values. Assessed values are readily determinable with reference to the assessors records in this case.

Comparability determinations require consideration of a variety of factors. "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. Similarity does not require that comparable properties be identical. The following table is a compilation of comparability factors for the subject property and one of the comparables offered by the Taxpayers.

| Characteristics | Subject at 483 Millard Park | Comparable at 485 Millard Park |
|------------------|-----------------------------|--------------------------------|
| Type | 1 - single family | 1 - single family |
| Quality | 40 - good | 35 - av+ ⁽¹⁾ |
| Condition | 30 - average | 30 - average |
| Arch type | Ranch | Ranch |
| Style | One story 100% | one story 100% |
| Exterior Wall | 75% hardboard 25% siding | 75% hardboard 25% siding |
| Floor Area | 1500 | 1409 |
| Basement Area | 1446 | 1377 |
| Partition finish | 976 ⁽²⁾ | 675 |

| | | |
|--------------------|---------------------------|---------------------------|
| Subfloor | wood joist/ wood subfloor | wood joist/ wood subfloor |
| Bedrooms | 3 | 3 |
| Baths | 2 | 2 |
| Heat Type | 100% warm and cooled | 100% warm and cooled |
| Roof Type | comp shingles | comp shingles |
| Plumbing Fixtures | 8 | 8 |
| Year Build | 2001/3 | 2001/3 |
| Effective Age | 3 | 3 |
| Attached Garage | 631 Square feet | 650 Square Feet |
| Fireplace | 1 | 1 |
| Covered Porch | 26 Square feet | 26 Square feet |
| Patio | 100 Square feet | 84 Square feet |
| Wood Deck | 216 Square feet | 96 Square feet |
| Bsmt Outside Entry | 1 | 1 |
| Drive | 1 | 1 |

(1) The County's records indicate that the quality rating should be 40.

(2) The extent of the partition finished basement was disputed. The subject was assessed with 1,446 square feet of partition finish. (E15:3). The extent of the partition finish was at sometime estimated to be 1301 square feet. (E15:3). One of the Taxpayers testified that the subject property has 976 square feet of partition finish in the basement. The Taxpayers listed the property for sale claiming 976 square feet of finished basement. (E24:1). Even if minimization of the extent of the finish in the basement of the subject property was perceived to be in the best interest of the Taxpayers for assessment purposes understatement in an attempt to sell for the best price would not be. The County apparently agrees that sales listings are a reliable source of information as a notation on Exhibit 26 indicates a willingness to change the square feet of partition finish basement attributed to a residence based on MLS 2001. MLS are a common abbreviation for multiple listing service.

The properties were built by the same builder in the same year. (E15:1, 2 and E25:1, 2). The subject property was sold by the builder to one of the Taxpayers on January 10, 2001, for \$180,300. (E15:1). The comparable sold on November 29, 2000, for \$183,093. (E25:1). The purchases indicate that buyers found them comparable at that time. Known changes to either property since the sales were an addition of a 216 square foot deck and 976 square feet of partition finished basement to the subject property. Those differences do not account for a \$40,698 differential in their 2004 taxable values (\$213,643 subject - \$172,945 comparable). (E15 and E25). The noted differences do not preclude equalization relief. This Commission has found that equalization relief should be granted where it was shown that a residential property was not valued uniformly and proportionately with "similarly situated residential real property." *Scribante v. Douglas County Bd. of Equalization*, 8 Neb.App. 25, 38, 588 N.W.2d 190, 204 (1999). That standard was approved by the Court of Appeals. *Id.* Further the Nebraska Supreme Court has held that mathematical precision in equalization is impossible. *LeDioyt v. County of Keith*, 161 Neb. 615, 622, 74 N.W.2d 455, 461 (1956). Because the two properties are comparable, it is possible to conclude they had the same actual value as of the assessment date or that any difference in actual value was not material. Actual value of the subject property as determined by

the Board was \$213,643 and its assessed value was \$213,643. Based on those determinations the subject property is assessed at 100% of its actual value. The comparable property's taxable value for 2004 was \$172,945. If it is assumed that the comparable property in fact had an actual value equal to the subject property's, the comparable property, with a taxable value of \$172,945, is assessed at 80.95% of its actual value ($\$172,945 \div \$213,643$). While the Taxpayers have failed to prove actual value of the subject property as determined by the board was unreasonable they have shown that the subject property is not equalized with comparable property. Comparable properties with widely disparate ratios of taxable value to actual value (80.95% versus 100%) cannot be deemed to have been equalized. The equalized taxable value of the subject property derived from the proceeding analysis is \$172,945 ($80.95\% \times \$213,643$). *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344 N.W.2d 620, 626 (1984).

This case presents an opportunity for an expression of thoughts not necessary for a decision but important to an understanding of the result. The Taxpayers denied a request for an inspection because they had been told by someone in the assessors office that information for assessment of their home had been fabricated. The charge of "fabrication" was not rebutted. The County may have believed that failure of the

Taxpayers to allow an inspection of the subject property when requested would, regardless of other evidence, result in a decision in its favor. That belief is misplaced. Any inference that can be drawn from intentional destruction of evidence, failure to call a witness, failure to testify or other like circumstances such as denial of an opportunity for verification of information is only that, an inference. See, e.g., *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004), *Yarpe v. Lawless Distrib. Co.*, 7 Neb App. 957, 587 N.W.2d 417 (1998), and *Estate of Jeffrey B., deceased, v. Shaner*, 268 Neb. 761, 688 N.W.2d 135 (2004). The adverse inference rule as described and applied in the noted cases is only an aid to fact finding it is not a rule of decision.

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) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
3. The Board is presumed to have faithfully performed its official duties. The Board is also presumed to have acted

upon sufficient competent evidence to justify its decisions. 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 Commission must deny the requested relief unless a majority of the Commissioners present at the hearing on the merits of the appeal determine that relief should be granted. Neb. Rev. Stat. §77-5016(13) (2004 Cum. Supp. as amended by 2005 Neb. Laws, L.B. 15, §9).

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Taxpayers' real property legally described as Lot 483, Millard Park Subdivision, Sarpy County, Nebraska, more commonly known as 16632 Olive Street, shall be valued as follows for tax year 2004 in the absence of a majority decision to grant relief:

| | |
|--------------|-----------|
| Land | \$ 28,000 |
| Improvements | \$185,643 |
| Total | \$213,643 |

2. Any other request for relief by any Party not specifically granted by this Order is denied.
3. This decision, if no appeal is filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5016(9) (Cum. Supp. 2004, as amended by 2005 Neb. Laws, L.B. 15, §9).
4. This decision shall only be applicable to tax year 2004.

5. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 15th day of September, 2005.

Robert L. Hans, Commissioner

Susan S. Lore, Commissioner

Mark P. Reynolds, Vice-Chair

SEAL

Wm. R. Wickersham, Chair

ANY PARTY SEEKING REVIEW OF THIS ORDER MAY DO SO BY FILING A PETITION WITH THE APPROPRIATE DOCKET FEES IN THE NEBRASKA COURT OF APPEALS. THE APPEAL MUST BE FILED WITHIN THIRTY DAYS AFTER THE DATE OF THIS ORDER AND MUST SATISFY THE REQUIREMENTS OF STATE LAW IN NEBRASKA REVISED STATUTE §77-5019 (REISSUE 2003, AS AMENDED BY 2005 NEB. LAWS, L.B. 15, §11). IF A PETITION IS NOT TIMELY FILED, THIS ORDER BECOMES FINAL AND CANNOT BE CHANGED.