

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

OHW Holdings LLC,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee.

Case Nos: 13C 141 & 16C 0014

Decision and Order Affirming the  
Determinations of the Sarpy County  
Board of Equalization

**For the Appellant:**  
Steve Olson,  
Brown & Brown, PC, LLO

**For the Appellee:**  
Bonnie Moore  
Deputy Sarpy County Attorney

These appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property is a commercial parcel located at 611 Fenwick Drive, Papillion, in Sarpy County, Nebraska. The parcel is improved with an 8,175 square foot medical office building. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibits 4, 5, 20, and 28.

**II. PROCEDURAL HISTORY**

The Sarpy County Assessor determined that the assessed value of the Subject Property was \$1,030,000 for tax year 2013.<sup>1</sup> OHW Holdings, LLC (the Taxpayer) protested this assessment to the Sarpy County Board of Equalization (the County Board). The County Board determined that the taxable value for tax year 2013 was \$1,030,000.<sup>2</sup>

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<sup>1</sup> Exhibit 3:1.

<sup>2</sup> Exhibit 3:1.

For tax year 2016, the Sarpy County Assessor determined that the assessed value of the Subject Property was \$1,030,000.<sup>3</sup> The Taxpayer protested this assessment to the County Board. The County Board determined that the taxable value for tax year 2016 was \$1,030,000.<sup>4</sup>

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission).<sup>5</sup> Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission.<sup>6</sup> In the Pre-Hearing Conference Report, the parties stipulated to the receipt of exchanged exhibits 1-38. The Commission held a hearing on April 3, 2017.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>7</sup> 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."<sup>8</sup>

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.<sup>9</sup>

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was arbitrary or

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<sup>3</sup> Exhibit 4:1.

<sup>4</sup> Exhibit 4:1.

<sup>5</sup> Case File.

<sup>6</sup> Case File.

<sup>7</sup> See, Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>8</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>9</sup> *Id.*

unreasonable.<sup>10</sup> Proof that the order, decision, determination, or action was arbitrary or unreasonable must be made by clear and convincing evidence.<sup>11</sup>

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>12</sup> 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.<sup>13</sup>

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.”<sup>14</sup> 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.”<sup>15</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>16</sup>

#### IV. APPLICABLE 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.<sup>17</sup>

“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.”<sup>18</sup> The steps required for use of the

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<sup>10</sup> Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

<sup>11</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>12</sup> 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).

<sup>13</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>14</sup> Neb. Rev. Stat. §77-5016(9) (2014 Cum. Supp.).

<sup>15</sup> Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

<sup>16</sup> Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

<sup>17</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>18</sup> *Id.*

income approach with direct capitalization may be summarized as (1) estimate potential gross income; (2) deduct estimated vacancy and collection loss to determine effective gross income; (3) deduct estimated expenses to determine net operating income; (4) divide net operating income by an estimated capitalization rate to yield indicated value.<sup>19</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>20</sup> 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.<sup>21</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>22</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>23</sup>

“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.”<sup>24</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>25</sup> 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.<sup>26</sup> In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the Subject Property and comparable property is required.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>30</sup> If taxable values are to be equalized it

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<sup>19</sup> See, The Appraisal Institute, *The Appraisal of Real Estate*, at 466 (13th ed. 2008). See, The Appraisal Institute, *The Appraisal of Real Estate*, at 460-461 (14th ed. 2013).

<sup>20</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>21</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>22</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>23</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>24</sup> *Neb. Const.*, Art. VIII, §1.

<sup>25</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>26</sup> *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).

<sup>27</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>28</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>29</sup> *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).

<sup>30</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

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 [sic].”<sup>31</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>32</sup>

## V. SUMMARY OF THE EVIDENCE

The Subject Property includes a medical office building which was originally built in 1988, with additions in 1993.<sup>33</sup> The improvements were rated as good quality and average condition,<sup>34</sup> and were deemed to be of the construction class of wood frame buildings designated as Class D. The County Assessor utilized both the Cost Approach and the Income Approach to determine the assessed value, with reliance on the Income Approach.<sup>35</sup>

The Taxpayer asserted that the Subject Property should not have been assigned a good quality rating, which is typical for medical office buildings which include laboratories and radiology facilities. The Taxpayer did not offer sufficient evidence to support this assertion.

The Taxpayer offered property record files for comparable properties for both tax years. The Subject Property and all of the comparable properties were assessed with reliance on the income approach. A summary of the application of the income approach to the Subject Property and the alleged comparable properties for tax year 2013 is demonstrated as follows:

Property	Exhibit	Year Built	Square Feet	Rental Rate	Vacancy & Collection Loss	Expenses	Capitalization Rate	Income Approach Value
545 Fortune Plz.	Exhibit 24:5	2005	10,901	\$14.50	5%	15%	8.75%	\$1,458,720
555 Fortune Dr.	Exhibit 22:5	2004	10,904	\$14.50	5%	15%	8.75%	\$1,459,120
1502 S. Washington	Exhibit 21:5	2002	15,000	\$10.50/\$14	5%	15%	8.75%	\$1,695,749
535 Fortune Dr.	Exhibit 23:5	2006	10,902	\$14.50	5%	15%	8.75%	\$1,458,846
611 Fenwick Dr.	Exhibit 5:5	1988/1993	8,175	\$14.50	5%	15%	9.25%	\$1,034,800

<sup>31</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>32</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>33</sup> Exhibit 5:6.

<sup>34</sup> Exhibit 4:6, Exhibit 5:3.

<sup>35</sup> Exhibit 5:2, Exhibit 6:2.

A summary of the application of the income approach to the Subject Property and the alleged comparable properties for tax year 2016 is demonstrated as follows:

Property	Exhibit	Year Built	Square Feet	Rental Rate	Vacancy & Collection Loss	Expenses	Capitalization Rate	Income Approach Value
401 E. Gold Coast Rd.	Exhibit 29:5	1976/1992	9,029	\$20.00	5%	15%	8.25%	\$1,767,491
249 Olson Dr.	Exhibit 34:5	2014	10,979	\$17.50	30%	15%	8.75%	\$1,306,503
545 Fortune Plz.	Exhibit 33:5	2005	10,901	\$14.50	5%	15%	8.75%	\$1,458,720
555 Fortune Dr.	Exhibit 31:5	2004	10,904	\$14.50	5%	15%	8.75%	\$1,459,120
1502 S. Washington	Exhibit 30:5	2002	15,000	\$10.50/\$14	5%	15%	8.75%	\$1,695,749
535 Fortune Dr.	Exhibit 32:5	2006	10,902	\$14.50	5%	15%	8.75%	\$1,458,846
611 Fenwick Dr.	Exhibit 6:5	1988/1993	8,175	\$14.50	5%	15%	9.25%	\$1,034,800

Mr. Tim Ederer, an appraiser employed by the County Assessor, testified regarding the assessment of the Subject Property for both tax years. According to Mr. Ederer, an internal inspection was completed by an employee of the County Assessor on February 6, 2013. Mr. Ederer testified that the County Assessor relied upon the income approach to value commercial properties in tax years 2013 and 2016 because there was more rental information available than sale information. Regarding the comparable properties, Mr. Ederer testified that the Subject Property had a higher capitalization rate because of its older age. He explained that the net operating income divided by the higher capitalization rate generated a lower income approach value.<sup>36</sup>

Regarding variations in the income approach values used, Mr. Ederer testified that two different rental rates were applied to the comparable at 1502 Washington because only a portion of the improvement was a medical office. He also explained that the vacancy rate at 249 Olson Drive was higher because the improvement was only partially completed as of the effective date of January 1, 2016.

The Commission finds that the County Assessor's reliance upon the income approach was appropriate, and that it was not arbitrary or unreasonable for the County Board to adopt the assessed values as determined by the County Assessor.

<sup>36</sup> The income approach calculation for both years, per Exhibit 5:5 and Exhibit 6:5, was as follows:  
8,175 (square feet) x \$14.50 (rental rate) = \$118,538  
Minus Vacancy Rate of 5% (\$118,538-\$5,927) = \$112,611  
Minus Expenses of 15% (\$112,611-\$16,892) = \$95,719  
Divided by 9.25% (capitalization rate) = \$1,034,800

## VI. CONCLUSION

After a review of the entire record in these appeals, the Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is not clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable.

For all of the reasons set forth above, the decisions of the County Board should be affirmed.

## VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Sarpy County Board of Equalization determining the value of the Subject Property for tax years 2013 and 2016 are affirmed.
2. The taxable value of the Subject Property for both tax years 2013 and 2016 is \$1,030,000.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order, is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax years 2013 and 2016.
7. This Decision and Order is effective for purposes of appeal on April 10, 2017.<sup>37</sup>

Signed and Sealed: April 10, 2017

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

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<sup>37</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.