

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

1101 Harney, LLC,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 15C 0597

Decision and Order Affirming the Decision  
of the Douglas County Board of  
Equalization

**For the Appellant:**  
Dennis P. Lee,  
Attorney at Law

**For the Appellee:**  
Jimmy Pinkham,  
Deputy Douglas County Attorney

This appeal was heard before Commissioners Robert W. Hotz and James D. Kuhn.

**I. THE SUBJECT PROPERTY**

The Subject Property is a 17,424 square foot commercial parcel located in Omaha, Douglas County, Nebraska. The parcel is improved with two commercial buildings, each containing a restaurant on the ground floor and apartments on the four upper stories. One building is 34,848 square feet and the other is 43,560 square feet; the buildings are connected and share common areas such as an entryway, stairwell, and annex. The legal description and property record card for the Subject Property is found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor (the County Assessor) determined that the assessed value of the Subject Property was \$7,590,000 for tax year 2015. 1101 Harney, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The Douglas County Board determined that the taxable value for tax year 2015 was \$7,590,000.<sup>1</sup>

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<sup>1</sup> Exhibit 1.

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits as ordered by the Commission, and stipulated to the receipt of exchanged Exhibits 1 through 13. The Commission held a hearing on February 13, 2018, with Commissioner Hotz presiding.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>2</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>3</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>4</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 unreasonable or arbitrary.<sup>5</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</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>7</sup> The County Board need not

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<sup>2</sup> See Neb. Rev. Stat. §77-5016(8) (2016 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>3</sup> *Brenner*, 276 Neb. at 283, 753 N.W.2d at 811.

<sup>4</sup> *Id.* (citations omitted).

<sup>5</sup> Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

<sup>6</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>7</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).

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>8</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>9</sup> The commission may also take notice of judicially cognizable facts as well as 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>10</sup> The Commission's Decision and Order shall include findings of fact and conclusions of law.<sup>11</sup>

#### **IV. FACTS & ANALYSIS**

##### **A. Summary of the Evidence**

David H. Davis appeared as a witness for the Taxpayer. Mr. Davis testified that he is a professional property manager who manages the Subject Property for the Taxpayer. At the time of the hearing, Mr. Davis had managed the Subject Property since 2003, as well as a previous period of management from 1990 to 1996. In addition to approximately thirty years of experience in the field, he holds a Nebraska real estate license, a real estate broker's license, and four designations in property management: Certified Property Manager, Credited Resident Manager, Real Property Administrator, and Housing Credit Certified Professional. He has managed over 100 properties in the course of his career, including commercial, residential, and combined properties; these properties have been located principally in Omaha, Nebraska.

Mr. Davis testified that the Subject Property is located in the historic Old Market area of downtown Omaha, and was rehabilitated in 1985 or 1986. The buildings on the Subject Property contain two restaurants and either 38 or 39 apartments. For tax year 2015, the restaurants rented for \$15.37 to \$16.00 per square foot, and the apartments rented for \$0.72 to \$1.49 per square foot monthly; the vacancy and collection loss rate for the apartments was around 8.0% for tax year

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<sup>8</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-5018(1) (2016 Cum. Supp.).

2015, but is typically lower. Mr. Davis testified that he provided rental and other income information to the County Assessor, at its request, to be used in the 2015 tax year assessment. According to Mr. Davis's testimony, the assessed value of the Subject Property increased approximately 40% between the 2014 and 2015 tax years.<sup>12</sup>

Based on his experience managing buildings and his familiarity with other buildings in the market area, Mr. Davis identified five properties he considered comparable to the Subject Property. We address each in turn.

#### 1114 Howard Street<sup>13</sup>

1114 Howard Street, located in the same city block as the Subject Property, is a commercial parcel improved with an 87,095 square foot building. Based on Mr. Davis's analysis of information he obtained from the County Assessor's website, he asserted that 1114 Howard Street was valued at a much lower rate per square foot than the Subject Property. He also asserted that 1114 Howard Street was of similar quality and in similar condition to the Subject Property; the Subject Property was rated by the County Assessor as good quality and very good condition,<sup>14</sup> but 1114 Howard Street was rated by the Assessor as being of average quality and average condition. On cross-examination, Mr. Davis testified that 1114 Howard Street had a restaurant on the ground floor, like the Subject Property, and was renovated to contain apartments around 2017. As of January 1, 2015, prior to the renovation, two of the upper floors were used as artists' studios, and the floors above were vacant "wide open" warehouse spaces. Mr. Davis also testified that he agreed with the County Assessor's rating of 1114 Howard Street as average/average for 2015 before the 2017 renovation.

#### 1113 Howard Street,<sup>15</sup> 1123 Howard Street,<sup>16</sup> 1202 Howard Street<sup>17</sup>

Mr. Davis testified that each of these parcels was similar to the Subject Property in that each was in the same neighborhood and each was improved with a commercial building with a

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<sup>12</sup> The increase from 2014 to 2015 was 45.56%. See Exhibit 2 at 15.

<sup>13</sup> See Exhibit 5.

<sup>14</sup> See Exhibit 2:4 and Exhibit 2:6.

<sup>15</sup> See Exhibit 6, Exhibit 13 at 16-28.

<sup>16</sup> See Exhibit 7, Exhibit 13 at 29-43.

<sup>17</sup> See Exhibit 8, Exhibit 13 at 44-57.

restaurant or retail establishment on the ground floor, and apartments on the floors above. In each case, the taxpayer offered an exhibit based on documents retrieved from the County Assessor's website, together with the testimony of Mr. Davis, to demonstrate that the Subject Property was excessively valued by comparison.<sup>18</sup> In response, the County Board offered Exhibit 13, which contains two property record cards, one containing "base" information and one containing "excess," for each of these three parcels relating to tax increment financing (TIF).<sup>19</sup> On cross-examination, Mr. Davis acknowledged that the County Board's exhibits appeared to contain two property record cards for each of these three properties. He testified that he had not been provided with the additional property record cards, and was unaware of their existence, until shortly before the hearing.

### 1115 Harney Street<sup>20</sup>

As with the other proposed comparable properties, Mr. Davis testified that this parcel was similar to the Subject Property in that it was in the same neighborhood and improved with a four-or-five story commercial building with a retail establishment on the ground floor and apartments on the floors above. On cross-examination, Mr. Davis testified that his company managed the 1115 Harney Street property in tax year 2015, and that the apartments were used for Title XII low-income housing; he further testified that there is no low-income housing in the Subject Property.

The County Board did not call any witnesses, but it did offer exhibits that provide information about the valuation of the Subject Property. Exhibit 12 was a spreadsheet of the County Assessor's comparable properties, showing (among other things) the value per-square foot when both "TIF base" and "TIF excess" were considered. This exhibit indicated that the improvement components on the Subject Property were assessed at a value of \$96.80 per square foot. The improvement components to the three comparable parcels identified by both the County Assessor and the Taxpayer (1113 Howard Street, 1123 Howard Street, and 1202 Howard

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<sup>18</sup> The Commission notes that the Notice of Hearing sent to the parties in this matter instructed each party to submit copies of the County's Property Record File for any parcel the party asserted was a comparable parcel, and explicitly stated that a "screen shot or print out of a web page is not a property record file. A property record file is only maintained in the office of the County Assessor and should be obtained from that office prior to the hearing."

<sup>19</sup> As discussed further in the Law and Analysis section below, some counties, including Douglas, use multiple property record cards in assessing parcels with Tax Increment Financing (TIF).

<sup>20</sup> See Exhibit 9, Exhibit 11.

Street) were assessed at rates of \$93.45 per square foot, \$96.18 per square foot, and \$165.19 per square foot, respectively. A fourth parcel used as a comparable only by the County Assessor, 1201 Howard Street, was listed with an assessment rate of \$122.16 per square foot.<sup>21</sup> Exhibit 2, the Property Record File for the Subject Property, contained information on the methodology used by the County Assessor in determining the taxable value of the Subject Property. Exhibit 2 indicates that the income approach was used to assess the property, making use of market-derived data including rent of \$20 per square foot for the restaurants and \$12 per square foot for the apartments, with a vacancy and collection loss rate of 6.0%.<sup>22</sup>

## **B. Law and Analysis – Equalization**

“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>23</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>24</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>25</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>26</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>27</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>28</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>29</sup> 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

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<sup>21</sup> The property record cards for 1201 Howard Street are found at Exhibit 13, 58 through 69.

<sup>22</sup> See Exhibit 2 at 11-14. The Commission understands these rental rates to be annualized.

<sup>23</sup> *Neb. Const.*, Art. VIII, §1.

<sup>24</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>25</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>26</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>27</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>28</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>29</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.<sup>30</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>31</sup> Comparable properties share similar use (residential, commercial industrial, or agricultural), physical characteristics (size, shape, and topography), and location.<sup>32</sup>

The Taxpayer offered evidence of five parcels it asserted were comparable to the Subject Property to support its claim that the Subject Property was overvalued when compared with other, similar properties in the same market area. However, the testimony of the Taxpayer's own witness indicates that one of the parcels, 1114 Howard Street, contained artist studios and vacant storage space rather than apartments on the upper floors until it was renovated in 2017. Another parcel, 1115 Harney Street, contained low-income housing rather than market-based housing. Because these parcels were not being used for similar commercial purpose as the Subject Property in the relevant time frame (January 1, 2015), the Commission finds that they are not comparable to the Subject Property for the purpose of equalization.

The remaining three properties were being used for similar commercial purposes as the Subject Property: each had a restaurant or retail establishment on the ground floor and apartments on the upper floors. However, because these properties had Tax Increment Financing, the documents offered by the Taxpayer and relied upon by Mr. Davis in his analysis do not indicate the full market value of those parcels.

As discussed above, the Commission may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it. In this case, the basic workings of the TIF program lie within the Commission's specialized knowledge. TIF provides financing for the redevelopment of certain properties.<sup>33</sup> The value of the parcel prior to the TIF redevelopment is known as the "TIF base," and the value added by the redevelopment is known as the "TIF excess." Some counties within Nebraska, including Douglas County, maintain two separate property record cards for each TIF property, one containing the "TIF base" and the other containing the "TIF excess." The County Board's Exhibit 13 strongly supports this analysis,

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<sup>30</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>31</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>32</sup> See generally, International Association of Assessing Officers, *Property Assessment Valuation*, at 169-79 (3rd ed. 2010).

<sup>33</sup> See generally, Neb. Rev. Stat. §§ 18-2101 to 18-2150.

since it includes two property record cards each for 1113 Howard Street, 1123 Howard Street, and 1202 Howard Street. One property record card for each parcel is labeled “base” and the other is labeled “excess.”

On this basis, the Commission finds that 1113 Howard Street, 1123 Howard Street, and 1202 Howard Street are TIF properties. In analyzing their valuation, Mr. Davis was unaware that the parcels’ values for tax year 2015 were distributed between two property record cards. However, when both property record cards are taken into account, the improvements to these parcels were assessed at rates of \$93.45 per square foot, \$96.18 per square foot, and \$165.19 per square foot, as compared with the improvements to the Subject Property, which were assessed at a value of \$96.80 per square foot, well within the range of the parcels the Taxpayer presented as comparable. A fourth parcel used as a comparable only by the County Assessor, 1201 Howard Street, was listed with an assessment rate of \$122.16 per square foot, greater than the per-square-foot valuation placed upon the Subject Property. For this reason, the Commission finds that the record does not contain clear and convincing evidence that valuation placed on the Taxpayer’s property, when compared with valuations placed on similar property, is grossly excessive.

### **C. Law and Analysis – Valuation**

Under Nebraska law,

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.<sup>34</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>35</sup> Actual value, market value, and fair market value mean exactly the same thing.<sup>36</sup> All real property in Nebraska subject to taxation

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<sup>34</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>35</sup> *Id.*

<sup>36</sup> *Omaha Country Club*, 11 Neb.App. at 180, 645 N.W.2d at 829.



shall be assessed as of January 1.<sup>37</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>38</sup>

The Taxpayer argued that certain information used by the County Assessor (and subsequently by the County Board) in determining the actual value of the Subject Property was incorrect because the information did not reflect the actual rental and vacancy rates of the Subject Property. Mr. Davis testified that he provided revenue information to the County Assessor for use in assessing the Subject Property, but that information was not reflected on the income worksheet for the property. The Property Record File for the Subject Property contains the following explanation of the method used to determine its value:

Income-approach values are based on models for different types of income-producing properties i.e. Retail, Industrial, Hotel/Motel, etc.....and the rental rate, vacancy rate and expenses of those types of properties. The model seeks to reproduce the income stream for the typical properties of an investment class or subclass, based on the type of property and converts that income stream into an estimate of current value. The data in the model is derived from data fathered from the local market for properties of similar type. The variables within the model, rental rate, operating expenses, and vacancy and collection loss may vary based on the location and/or condition of the property.<sup>39</sup>

This methodology is consistent with the principles of mass appraisal, under which the income approach does not necessarily rely on specific information from the individual parcel being assessed. Instead,

Because it is difficult for an assessor to evaluate management quality, typical income and expense figures are deemed to reflect typical management. Income flows are averaged across comparable businesses to reflect *typical* management and smoothed or *stabilized* across years to eliminate random fluctuations. In mass appraisal, expenses frequently are expressed as percentages instead of fixed amounts. They may also be analyzed and expressed on a per-unit basis.<sup>40</sup>

Furthermore, “For properties with reported figures the assessor has two choices: (1) use the reported figures for instances in which they have been verified or are consistent with estimated

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<sup>37</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>38</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>39</sup> Exhibit 2 at 14.

<sup>40</sup> International Association of Assessing Officers, *Fundamentals of Mass Appraisal* (2011) at 175 (emphasis in original).

(typical) figures, or (2) consistently use estimated figures in all cases.”<sup>41</sup> There is not sufficient evidence that the income or expenses presented by the Taxpayer were more typical of other properties in the market area than the market-derived statistical model used by the County Assessor (and, by extension, the County Board). Absent sufficient evidence, the Commission has no basis to conclude that the valuation determined by the County Board on the basis of market data was incorrect.

## V. CONCLUSION

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 determination. The Commission also finds that there is not clear and convincing evidence that the County Board’s decision was arbitrary or unreasonable.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

## 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 year 2015 is affirmed.
2. The taxable value of the Subject Property for tax year 2015 is \$7,590,000.
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 (2016 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 year 2015.

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<sup>41</sup> *Id.* at 341.

7. This Decision and Order is effective for purposes of appeal on April 10, 2018.<sup>42</sup>

Signed and Sealed: April 10, 2018.

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

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<sup>42</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.