

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

Amairgen Holdings, LLC,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 15C 0792

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

**For the Appellant:**  
Benjamin White  
Law Offices of White & Jorgensen

**For the Appellee:**  
Shakil A. Malik  
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 commercial parcel located in Douglas County. The parcel is improved with a 31,639 square foot storage warehouse. The legal description and property record card for the Subject Property are found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property was \$1,012,400 for tax year 2015. Amairgen Holdings, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$490,200. The Douglas County Board determined that the taxable value for tax year 2015 was \$1,012,400.<sup>1</sup>

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 and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing

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<sup>1</sup> Exhibit 1. The parcel was first assessed at \$1,012,400 in tax year 2011 and the taxable value remained at that same amount for each subsequent tax year including tax year 2015. See, E3:2.

Conference Report, the parties stipulated to the receipt of exchanged Exhibits 1 through 7, 10 through 12, 15, and 16.<sup>2</sup> The parties also submitted Pre-Hearing Briefs with respect to Exhibits 8, 9, 13, and 14.<sup>3</sup> The Commission held a hearing on February 27, 2018. In the course of the hearing, Exhibit 14 was admitted, and Exhibits 8, 9, 13, and 17<sup>4</sup> were not admitted, for the reasons stated on the record.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is *de novo*.<sup>5</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>6</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>7</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>8</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>9</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>10</sup> The County Board need not put on any evidence to support its

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<sup>2</sup> This exhibit numbering is per the Commission's Exhibit List, not per the numbering in the Pre-hearing Report submitted by the parties.

<sup>3</sup> *Id.*

<sup>4</sup> Exhibit 17 was first submitted and then offered at the hearing.

<sup>5</sup> See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008).

<sup>6</sup> *Brenner, supra.*

<sup>7</sup> *Id.* (Citations omitted).

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

<sup>9</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>10</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 value).

valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>11</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>12</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>13</sup>

#### IV. VALUATION

##### A. Law

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>14</sup>

Actual value, market value, and fair market value mean exactly the same thing.<sup>15</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>16</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>17</sup>

##### B. Summary of the Evidence

Four witnesses testified on behalf of the taxpayer. Monte Bowman, a business consultant, testified as to his opinion of the value of the subject property. Mr. Bowman holds no licensure as

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<sup>11</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>12</sup> Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

<sup>13</sup> Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

<sup>14</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>15</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>16</sup> See Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>17</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

a real property appraiser. He arrived at his conclusions with respect to the value of the Subject Property by selecting three alleged comparable properties in the same market area as the Subject Property and averaging their assessed values on a per-square-foot basis, considering the improvements only and not the land. These comparable properties varied in size from 22,468 square feet to 43,902 square feet; the Subject Property is 31,639 square feet. According to the property record cards prepared by the County Assessor, none of the comparable properties had a quality rating of average and a condition rating of good like the Subject Property. The condition of one comparable,<sup>18</sup> for which Mr. Bowman testified that the “condition and quality matched exactly” with the Subject Property, was rated by the County Assessor as fair condition,<sup>19</sup> was included in Mr. Bowman’s comparison chart as average condition,<sup>20</sup> and was identified by Mr. Bowman in his testimony as poor condition. Two of the three comparable properties were significantly superior to the Subject Property in both location and access.

Mr. Bowman did not make any adjustments for differences in location, access, size, condition, or quality of his alleged comparable properties. He did not perform a sales comparison analysis, an income analysis, or a cost analysis of the Subject Property.<sup>21</sup> There was no evidence that any one of the comparable properties had sold within the relevant time period.<sup>22</sup> Mr. Bowman also testified about alleged statutory and due process violations in the protest process used by the County Board in the 2015 tax year, particularly the in-person meetings required by Neb. Rev. Stat. §77-1311. Mr. Bowman did not attend such a meeting on behalf of this Taxpayer for tax year 2015.

Erin McMorrow, a member of the Taxpayer who worked at the Subject Property during tax year 2015, testified about the condition of the property. She described problems such as older plumbing, leaking sinks, flooding in the building and parking lot, lack of parking, pests, and neighborhood conditions, such as an animal feed producer in the adjacent parcel, which would generally make the Subject Property less desirable to a prospective buyer because of stronger

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<sup>18</sup> See Exhibit 4.

<sup>19</sup> See Exhibit 4:3.

<sup>20</sup> See Exhibit 7:1.

<sup>21</sup> A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes. The approaches identified are the sales comparison approach, the income approach, the cost approach, and other professionally accepted mass appraisal methods. Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>22</sup> Even had Mr. Bowman quantified any bases for making adjustments to the alleged comparable properties, such adjustments are not recognized in appraisal standards unless they are made to the sale price of the comparable property.

odors, especially during hotter weather. She did not quantify what effect any of these factors had on the market value of the Subject Property nor did she provide an opinion of the value of the Subject Property.

William Nosek, a general contractor, also testified about the condition of the property. He testified that he had been involved in maintenance and building work at the property for approximately thirty years, under the last two owners. He described many of the same issues that were described by Ms. McMorrow, as well as water spots, separation of concrete walls, damage to cinderblock walls, previous rebuilding with inferior materials, oily surfaces, and an ineffective heating system. He explained that many of the problems with the condition of the building were due to a former occupant who used the building to store steel; the weight of the steel had caused the concrete floor to crack and settle as much as six inches in some areas, and the steel wheels of the forklifts used to move the steel had damaged the concrete floor in various places. Mr. Nosek opined that the Subject Property “needs a lot of work,” but he also testified that he had not provided formal estimates on the work in recent years, since many of the projects would be cost prohibitive. Mr. Nosek provided some quantification of costs for needed repairs, but he did not quantify what effect the repair and condition factors had on the market value of the Subject Property. Mr. Nosek also did not provide an opinion of the market value of the Subject Property.

Edward McMorrow III, a member of the Taxpayer who worked at the Subject Property during tax year 2015, testified about many of the same issues as Ms. McMorrow and Mr. Nosek. He also testified that these issues have caused the Taxpayer difficulty in attracting clients to rent space available in the building; the last tenant left the property in 2015. Mr. McMorrow did not quantify what effect these factors had on the market value of the Subject Property nor did he provide an opinion of the market value of the Subject Property.

The County Board declined to present any evidence aside from its exhibits and did not call any witnesses.

### **C. Analysis**

The Taxpayer offered evidence and made argument regarding alleged errors and irregularities in the referee and protest process used by the County Board in tax year 2015.

Specifically, the Taxpayer alleged that the individual who conducted the in-person meeting required by Neb. Rev. Stat. §77-1311 relating to properties other than the Subject Property failed to provide information required by statute or court order.<sup>23</sup> The Taxpayer asserts that this failure constituted a deprivation of due process, and as a result, the “Assessment [of the Subject Property] is void. Because the Assessment is void, no presumption should operate in favor of the Assessor’s valuation and the Appellant’s taxes should be reduced to the extent that the Appellant can demonstrate that a lower valuation is appropriate.”<sup>24</sup>

The Commission finds there is no merit in this due process argument, since the Taxpayer subsequently had both the opportunity for a protest hearing before the County Board and a de novo review of the valuation and equalization of the Subject Property before the Commission.<sup>25</sup> However, we need not rule on the legal merit of the argument because Mr. Bowman testified unambiguously that he did not attend an in-person meeting pursuant to Neb. Rev. Stat. §77-1311 on behalf of the Taxpayer for tax year 2015. Having failed to request or attend such a meeting, the Taxpayer cannot complain that it has been prejudiced by events that might have occurred had such meeting taken place. The Taxpayer’s due process argument has no factual or legal basis in the present case, and we reject it without further discussion.

The issue under consideration in this appeal is the actual value of the Subject Property. 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 Neb. Rev. Stat. §77-1371, (2) income approach, and (3) cost approach.<sup>26</sup> When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.<sup>27</sup> An owner who is familiar with the property and knows its worth is permitted to testify as to its value without further foundation; this principle rests upon the

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<sup>23</sup> Neb. Rev. Stat. §77-1311(6) requires that, “[d]uring such meetings, the county assessor or the county assessor’s designated representative shall provide a basis for the property valuation contained in the notice of preliminary valuation sent pursuant to section 77-1301 and accept any information the property owner provides relevant to the property value.”

<sup>24</sup> Appellant’s Combined Brief at 4.

<sup>25</sup> As noted above, the appellate review conducted by the Commission is a de novo review. See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.). “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>26</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>27</sup> *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it.<sup>28</sup> Two members of the LLC that owns the Subject Property were called as witnesses, but the only evidence of value elicited by the Taxpayer was the opinion of Mr. Bowman, who is neither an owner of the property nor a licensed appraiser. Although he pointed out negative conditions that might affect the valuation of the Subject Property, he did not quantify the impact of these conditions on the Subject Property's market value. His analysis of the property value did not conform to professionally accepted mass appraisal methods or standards, he did not perform a sales comparison, income, or cost analysis, and his conclusion with respect to market value bears no indicia of reliability. Nor is the comparison of dissimilar properties on the basis of assessed value per-square-foot an effective equalization technique when there are substantial differences between the alleged comparable properties and the Subject Property. It follows that Mr. Bowman's opinions regarding the value of the Subject Property had little probative value, and the Commission gave it little weight in deciding this appeal.

The Commission admits to some frustration with the evidence produced in this case. The Taxpayer devoted much of its presentation to the alleged shortcomings of the protest process and offered no competent evidence of the market value of the property. Its most persuasive evidence of the building's condition, Exhibit 17, was not admitted because the evidence was provided to the County Board less than five days prior to the hearing, far short of the thirty days required by the Commission's Order for Hearing, and the County Board appropriately raised a timeliness objection when the exhibit was offered.<sup>29</sup> The Taxpayer presented substantial testimony from several witnesses regarding deficiencies and inferior conditions in and around the Subject Property, but there was no quantification of the effect of these conditions on the market value of the property. Even if the Commission were persuaded that the assessed value of the Subject Property was excessive due to defects in the property's condition, the Commission may not rely upon insufficient evidence to determine what the market value should have been as of January 1, 2015.

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<sup>28</sup> *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 276 Neb. 296, 753 N.W.2d 819 (2008), *Brenner, supra*. A corporate officer or president is not, as such, qualified to testify as to the value of the corporate property. In order to qualify, he or she must also be shown to be familiar with the property and have a knowledge of values generally in the vicinity. *Kohl's Dept. Stores v. Douglas Cty. Bd. of Equal.*, 10 Neb. App. 809, 638 N.W.2d 877 (2002).

<sup>29</sup> However, the Commission did allow the demonstrative use of Exhibit 17 as Mr. Nosek testified regarding various condition issues affecting the Subject Property.

The Commission notes that the County Board elected not to call any witnesses, as is its right, but it also represented to the Commission that no interior inspection of the property had occurred between 2011 and the date of the hearing in 2018. The parties indicated that an inspection was requested by the Taxpayer in approximately 2015, but it did not take place due to construction hazards and was not subsequently rescheduled. Such an inspection might well have provided the parties with the opportunity to resolve the dispute related to the condition of the property and may have eliminated the need for an appeal to the Commission.

Ultimately, the Commission's review is limited to the record established at the hearing, lacking as it may be in this case. That record includes insufficient evidence that the actual valuation of the Subject Property, as determined by the County Board, is incorrect. Nor does the record include sufficient equalization-based evidence that the "valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is a result of arbitrary or unreasonable action and not just a mere error of judgment."<sup>30</sup>

## **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 assessed value of the Subject Property for tax year 2015 is affirmed.
2. The taxable value of the Subject Property for tax year 2015 is \$1,012,400.

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<sup>30</sup> See *JQH La Vista, supra*.



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 and order shall only be applicable to tax year 2015.
7. This Decision and Order and order is effective for purposes of appeal on March 22, 2018.<sup>31</sup>

Signed and Sealed: March 22, 2018.

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

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<sup>31</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.