

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

Miller Memorial Care Center, LLC,  
Appellant,

v.

Deuel County Board of Equalization,  
Appellee.

Case No: 17C 0043

Decision and Order Reversing the Decision  
of the Deuel County Board of Equalization

**For the Appellant:**

Kenneth Asche,  
Member

**For the Appellee:**

Jonathon Stellar,  
Deuel 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 the city of Chappell, Deuel County, Nebraska. The parcel was improved with a 16,959 square foot nursing home care facility, built in 1949. The legal description of the parcel is found at Exhibit 1. The property record card for the Subject Property is found at Exhibit 7:3-5 and Exhibit 8.

**II. PROCEDURAL HISTORY**

The Deuel County Assessor determined that the assessed value of the Subject Property was \$506,955 for tax year 2017. Miller Memorial Care Center, LLC (the Taxpayer) protested this assessment to the Deuel County Board of Equalization (the County Board) and requested an assessed valuation of \$100,000. The County Board determined that the taxable value of the Subject Property for tax year 2017 was \$506,955.<sup>1</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a Single Commissioner hearing on July 5, 2018, and issued an order dated July 12, 2018, reversing the determination by the County Board

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<sup>1</sup> Exhibit 1.

and finding that the taxable value of the Subject Property was \$100,000.<sup>2</sup> On August 6, 2018, the Appellee requested a rehearing.<sup>3</sup> On August 8, 2018, the Commission issue an Order for Re-Hearing and Notice of Re-Hearing, which vacated the Single Commissioner Order that had been issued on July 12, 2018.<sup>4</sup> The appeal was reheard by a panel of commissioners on September 23, 2019.

Prior to the rehearing, the Appellee provided exhibits to the Appellant and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Appellant did not participate in the Pre-Hearing Conference Report; therefore the parties did not stipulate to the receipt of any exchanged exhibits. Exhibits 1 through 13 were admitted into evidence.

### 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

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<sup>2</sup> See Case File. However, after a request for a rehearing made by the Appellee, the Single Commissioner order was vacated per Neb. Rev. Stat. § 77-5005(4).

<sup>3</sup> A party to a proceeding before a single commissioner may request a rehearing. Neb. Rev. Stat. § 77-5015.02(5).

<sup>4</sup> See Case File.

<sup>5</sup> See Neb. Rev. Stat. §77-5016(8) (Reissue 2018), *Brenner v. Banner County 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 County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>6</sup> *Brenner* at 283, 811.

<sup>7</sup> *Id.*

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>

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

#### IV. APPLICABLE LAW

##### A. Valuation 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>15</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

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<sup>8</sup> Neb. Rev. Stat. §77-5016(9) (Reissue 2018).

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

<sup>10</sup> Cf. *Josten-Wilbert Vault Co. v. Bd. of Equal. 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 Equal. of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981) (determination of equalized taxable value).

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

<sup>12</sup> Neb. Rev. Stat. §77-5016(8) (Reissue 2018).

<sup>13</sup> Neb. Rev. Stat. §77-5016(6) (Reissue 2018).

<sup>14</sup> Neb. Rev. Stat. §77-5018(1) (Reissue 2018).

<sup>15</sup> Neb. Rev. Stat. §77-112 (Reissue 2018).

77-1371, (2) income approach, and (3) cost approach.”<sup>16</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>17</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>18</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>19</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>20</sup>

## **B. Equalization Law**

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”<sup>21</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>22</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>23</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>24</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>25</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>26</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>27</sup> If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that the valuation placed on his [or her] property when compared with valuations placed on other similar properties is grossly excessive and is the result of systematic exercise of intentional will or failure of plain

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<sup>16</sup> *Id.*

<sup>17</sup> *Omaha Country Club* at 180, 829.

<sup>18</sup> Neb. Rev. Stat. §77-131 (Reissue 2018).

<sup>19</sup> See Neb. Rev. Stat. §77-1301(1) (Reissue 2018).

<sup>20</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2018).

<sup>21</sup> *Neb. Const.*, Art. VIII, §1.

<sup>22</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>23</sup> *MAPCO; Cabela's Inc. v. Cheyenne County Bd. of Equal.*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

<sup>24</sup> *Cabela's Inc.*

<sup>25</sup> *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>26</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>27</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

legal duty, and not mere errors of judgment.”<sup>28</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>29</sup>

## V. FINDINGS OF FACT

Deuel County owned the Subject Property until it was purchased by the Taxpayer on June 17, 2014. At the time of the sale, the Subject Property was being used as a nursing home. The purchase price was \$350,000. Prior to the sale, Deuel County had advertised a request for bids. The Taxpayer’s bid of \$350,000 was the only bid.

The contract for the sale of the property indicates that the purchase price of \$350,000 was paid for the real property, the personal property, and the business as a going concern, including good will, but not including the accounts receivable at the time of the sale.<sup>30</sup> The contract set out an allocation of the purchase price; that \$100,000 would be used for payment on outstanding bond debt, and \$250,000 would be paid to the Miller Memorial Care Center Board of Trustees.<sup>31</sup>

The Real Estate Transfer Statement relating to the sale was recorded and filed on July 1, 2014. However, the Real Estate Transfer Statement is inconsistent with the Sale Agreement in several respects.<sup>32</sup> According to the Transfer Statement, the total purchase price was \$0 (line 22), the sale date was July 1, 2014 (line 3), and no personal property was included in the sale (line 23). None of the testimony or evidence offered by either party was consistent with these items as recorded in the Real Estate Transfer Statement.

Kenneth Asche, a member of Miller Memorial Care LLC, testified on behalf of the Taxpayer. Asche testified as to the motivation and circumstances of the 2014 sale. He stated that a relative who worked at the nursing home had encouraged him to consider offering to buy the property and the business. He testified that his motivation was to keep the nursing home operational after the purchase. The Taxpayer continued to operate the Subject Property as a nursing home until January 2018. Asche testified that the nursing home as a going concern never profited during his

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<sup>28</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>29</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>30</sup> See Exhibit 10, Sale Agreement.

<sup>31</sup> *Id.*

<sup>32</sup> See Exhibit 8:1.

ownership and it was determined that the going concern was not viable. Asche testified that his opinion of the value of the Subject Property as of January 1, 2017, was \$100,000.

Asche testified that an online auction for the personal property was held in January 2019. At the live auction, an attempt was also made to sell the real estate. At the auction, the gross sales revenue for the personal property were approximately \$40,000; Asche said that the Taxpayer netted about \$27,000.<sup>33</sup> A bid of \$55,000 to purchase the real estate was rejected by the Taxpayer. After the auction, the Taxpayer did not list or advertise the real estate for sale.

According to Asche, in April 2019, the Taxpayer accepted an offer to purchase the real estate for \$100,000. The sale was not advertised or listed, and since the nursing home business had not been a going concern since January 2018, no personal property or business going concern was involved in the sale, unlike the 2014 sale discussed above. Asch further testified that after the 2019 sale the buyer converted the use of the real property to exclusive care for dementia patients and residents.

Marica Schievelbein, the Deuel County Assessor, testified on behalf of the County Board. She stated that she became the County Assessor in October 2017, which was after the effective date of the tax year 2017 assessment of the Subject Property. She stated that the assessment had been completed by an independent contractor, Tax Valuation, Inc. per a contract with the County Assessor. The conclusion of the assessment by Tax Valuation, Inc. was an assessed value of 506,955. That assessment included reviewing sales of four properties that were alleged to be comparable from the cities of Chadron, Sutherland, Alliance, and Gothenburg, Nebraska. No comparable sales were identified from Deuel County. The assessment also included a cost approach using computer assisted mass appraisal software relying upon cost data from Marshall and Swift Valuation Service (Marshall). The cost approach resulted in an estimate of value of \$506,956.<sup>34</sup> The County Board also offered a summary appraisal report that was prepared in 2008 for the County Board.<sup>35</sup> In that report, the appraisers concluded that the fair market value of the fee simple interest of the Subject Property was \$1.5 million.

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<sup>33</sup> For tax year 2015, the Taxpayer paid personal property tax in the amount of \$63,859. Exhibit 7:6-7. For tax year 2017, \$38,135 was paid for personal property taxes. Exhibit 9:1.

<sup>34</sup> Exhibit 7:5.

<sup>35</sup> Exhibit 11.

## VI. ANALYSIS

The sale of the Subject Property in 2014 from the County Board to the Taxpayer included the real property, personal property, and interest in the nursing home business going concern. Since the sale price of \$350,000 included payment for personal property and for business going concern it is not a reliable indicator of the actual value of the Subject Property. The fact that the online auction of personal property in January 2019 resulted in approximately \$40,000 in sales, and the fact that the taxpayer paid personal property taxes in 2015 and 2017 in the amounts of \$63,859 and \$38,135 respectively, indicate that there was a measurable amount of personal property that should not have been included in the real property assessment for tax year 2017. The 2017 assessment was substantially higher than the 2014 advertised sale of the Subject Property at \$350,000, even though the sale had included both personal property and interests in the going concern of the nursing home business.

In its decision, the County Board relied upon the comparable sales that came from other counties and other commercial markets. There was no evidence of comparability of these markets to the Deuel County market.

The County Board also offered evidence of the actual value of the Subject Property based upon a cost approach utilizing data from Marshall. The cost approach value was based upon the improvement being built in 1949 and being classified as Class C at average quality.<sup>36</sup> According to Marshall, the improvement should have been assigned a life expectancy of 45 years and depreciation of 80%. The Taxpayer did not dispute the accuracy of the data utilized by the County Assessor in its cost approach. The Commission has also reviewed the Marshall calculations and has found no errors. The cost approach calculation indicated a value of \$506,956.<sup>37</sup>

The cost approach is most effective when used for newer or unique properties.<sup>38</sup> With aging properties, the cost approach is less effective as depreciation of the improvements becomes more difficult to determine.<sup>39</sup> In this case, the improvement of the Subject Property had an age of 67

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<sup>36</sup> Exhibit 7:5 and Exhibit 8:7.

<sup>37</sup> Exhibit 7:5.

<sup>38</sup> See The Appraisal Institute, The Appraisal of Real Property 566-568 (14th ed. 2013).

<sup>39</sup> *Id.*

years on the assessment date, with a life expectancy of 45 years. Marshall indicates 80% depreciation at 45 years, but indicates no additional depreciation from age 46 to age 67. The use of Marshall to determine the depreciation for this 67 year old Subject Property therefore has limited usefulness in correctly determining its value.

The April 2019 sale of the Subject Property did not involve either personal property or business going concern. Even though the 2019 sale was not advertised, and as such should not be regarded as an arm's length transaction, it was agreed upon by a willing buyer and a willing seller. Other than the lack of advertisement, the sale otherwise appeared to have important characteristics of an arm's length transaction. Under Nebraska law, "a single sale may in some instances provide evidence of market value. A single sale should not be excluded merely because it is a single sale. Rather, the fact that evidence of other sales is not presented goes to the weight of the evidence."<sup>40</sup>

In this appeal, there are two sales that are most indicative of the actual value of the Subject Property. Both involved the sale of the Subject Property: one before the effective date of the 2017 assessment, and the other after the effective date.<sup>41</sup> There were no other sales in the market area of the Subject Property during the relevant time period. Because there is no evidence that clearly indicates the portion of value within the 2014 sale price to assign to personal property and business going concern interests, we give the 2014 sale price no weight in determining the actual value of the Subject Property for tax year 2017.

In contrast, the 2019 sale did not include personal property or business going concern. It is noted that since the sale did not occur until two years after the tax year 2017 effective date, neither the County Assessor nor the County Board had that sale to consider for tax year 2017. Nevertheless, under our *de novo* review, we must consider the evidence of the sale and determine what weight to give to that evidence. At the hearing, the County Board asserted that the 2019

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<sup>40</sup> *Firethorn Inv. v. Lancaster County Bd. of Equalization*, 261 Neb. 231, 240, 622 N.W.2d 605, 611 (2001)(Citations Omitted). In this context, we are cognizant of the fact that assessors are appropriately cautioned to avoid "sales chasing," the practice of "using the sale of a property to trigger a reappraisal of that property at or near the selling price." *IAAO Glossary for Property Appraisal and Assessment* at 149 (2nd ed. 2013). "Sales chasing" is discouraged because it tends to create inequities between properties. *County of Douglas v. Neb. Tax Equalization & Review Comm'n*, 262 Neb. 578, 591, 635 N.W.2d 413, 423 (2001).

<sup>41</sup> Because the appeal is *de novo*, we consider the evidence presented at the appeal hearing, some of which may not have been available to the County Assessor at the time of the assessment, and some of which may not have been available to the County Board at the time of the protest proceedings. Neb. Rev. Stat. §77-5016(8) (Reissue 2018).



sale should be given no weight, with the evidence and argument as summarized above. We disagree.

An owner who is familiar with his property and knows its worth is permitted to testify as to its value.<sup>42</sup> Asche is a member of Miller Memorial Care, the LLC that owns the Subject Property. His opinion of the value of the Subject Property is competent evidence and coincides with the 2019 sale price of the Subject Property at \$100,000.

The Deuel County commercial market had no sale that was comparable to the Subject Property other than the sale of the Subject Property in 2019. We therefore give that sale, which corresponds with the owner's opinion of value, the greatest weight under these circumstances and with this record.

## **VII. CONCLUSION**

The Commission finds that there is 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 clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The Commission finds that the actual value of the Subject Property should be \$100,000 for tax year 2017.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

## **VIII. ORDER**

IT IS ORDERED THAT:

1. The decision of the Deuel County Board of Equalization determining the taxable value of the Subject Property for tax year 2017 is vacated and reversed.<sup>43</sup>
2. The taxable value of the Subject Property for tax year 2017 is \$100,000.

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<sup>42</sup> *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

<sup>43</sup> Taxable value, as determined by the County Board, was based upon the evidence at the time of the protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Deuel County Treasurer and the Deuel County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2018).
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 2017.
7. This Decision and Order is effective for purposes of appeal on January 27, 2021.<sup>44</sup>

Signed and Sealed: January 27, 2021

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Robert W. Hotz, Commissioner

SEAL

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James D. Kuhn, Commissioner

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<sup>44</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.