

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

THE KROGER COMPANY  
APPELLANT,

CASE NOS: 20C 0508,  
22C 0852

V.

DOUGLAS COUNTY BOARD  
OF EQUALIZATION,  
APPELLEE.

DECISION AND ORDER  
REVERSING THE DECISIONS  
OF THE DOUGLAS COUNTY  
BOARD OF EQUALIZATION

**For the Appellant:**  
Max Rodenburg,  
Rembolt Ludtke, LLP

**For the Appellee:**  
Jennifer D. Chrystal-Clark  
Deputy Douglas County Attorney

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn. Commissioner Hotz presided.

**I. THE SUBJECT PROPERTY**

The Subject Property is a 5.89-acre parcel improved with a 57,895 square foot Baker's Supermarket located at 4405 N. 72<sup>nd</sup> Street in Douglas County, Nebraska. The legal description and Property Record File (PRF) of the Subject Property are found at Exhibit 3.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property was \$4,793,700 for tax years 2020 and 2022.<sup>1</sup> The Kroger Company (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board). The

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<sup>1</sup> The Taxpayer did not file an appeal for tax year 2021.

County Board determined that the taxable value of the Subject Property for tax years 2020 and 2022 was \$4,793,700.<sup>2</sup>

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on January 26, 2023. Prior to the hearing, the parties exchanged exhibits and submitted a pre-hearing conference Report, as ordered by the Commission. Exhibits 1-20 were admitted into evidence.

### III. STANDARD OF REVIEW

The Commission's review of the County Board's determination is de novo.<sup>3</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>4</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>5</sup>

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

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<sup>2</sup> Exhibits 1, 2.

<sup>3</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>4</sup> *Brenner v. Banner County Bd. of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (citations omitted).

<sup>5</sup> *Id.*

decision, determination, or action was unreasonable or arbitrary.<sup>6</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>7</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>8</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the Taxpayer establishes that the County Board's valuation was unreasonable or arbitrary.<sup>9</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>10</sup> The Commission may take notice of judicially cognizable facts, 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>11</sup> The Commission's Decision and Order shall include findings of fact and conclusions of law.<sup>12</sup>

#### IV. RELEVANT 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,

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<sup>6</sup> Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

<sup>7</sup> *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>8</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>9</sup> *Bottorf v. Clay County Bd. of Equal.*, 7 Neb. App. 162, 580 N.W.2d 561 (1998).

<sup>10</sup> Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

<sup>11</sup> Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

<sup>12</sup> Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

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>13</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 Neb. Rev. Stat. § 77-1371, (2) income approach, and (3) cost approach.<sup>14</sup> Nebraska courts have held that actual value, market value, and fair market value mean exactly the same thing.<sup>15</sup> Taxable value is the percentage of actual value subject to taxation as directed by Neb. Rev. Stat. § 77-201 and has the same meaning as assessed value.<sup>16</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>17</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>18</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 the Nebraska Constitution.<sup>19</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>20</sup> The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same

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<sup>13</sup> Neb. Rev. Stat. § 77-112 (Reissue 2018).

<sup>14</sup> Neb. Rev. Stat. § 77-112 (Reissue 2018).

<sup>15</sup> *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>16</sup> Neb. Rev. Stat. § 77-131 (Reissue 2018).

<sup>17</sup> See Neb. Rev. Stat. § 77-1301(1) (Reissue 2018).

<sup>18</sup> Neb. Rev. Stat. § 77-201(1) (Reissue 2018).

<sup>19</sup> Neb. Const., art. VIII, § 1.

<sup>20</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.<sup>21</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>22</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>23</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 the 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 legal duty, and not mere errors of judgment.<sup>24</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>25</sup>

## V. FINDINGS OF FACT

### A. Summary of the Evidence

The Taxpayer called its appraiser, Peter Helland, to testify. Helland is a commercial real estate appraiser with over 15 years of experience. Helland is a certified general appraiser licensed in Nebraska and holds the MAI designation from the Appraisal Institute.<sup>26</sup> Helland has appraised over 200 'big box' stores.

Helland conducted two appraisals on the Subject Property with an effective date of January 1, 2020,<sup>27</sup> and January 1, 2022.<sup>28</sup> Each of these appraisals conformed to the Uniform Standards of Professional

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<sup>21</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>22</sup> *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>23</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge Cty. Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>24</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (citations omitted).

<sup>25</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>26</sup> Exhibit 7:135.

<sup>27</sup> See Exhibit 7.

<sup>28</sup> See Exhibit 8.

Appraisal Practice (USPAP). Helland performed an economic analysis of the market area containing the Subject Property.<sup>29</sup> Based upon this analysis, Helland found that 6% was an appropriate vacancy rate for the Subject Property for tax year 2020.<sup>30</sup> Helland conducted a land, site, and improvement analysis for the Subject Property, finding that the improvements are of good construction quality and are in good condition for the age and use schedule based upon the Marshall Valuation Service cost manual.<sup>31</sup>

Helland's appraisals considered three approaches to value: the cost approach, the sales comparison approach, and the income capitalization approach.

**i. Cost Approach**

In developing his cost approach analysis, Helland analyzed four comparable land sales, which, after adjustment and reconciliation, yielded a land valuation of \$1,540,000.<sup>32</sup> Helland estimated the replacement-cost-new (RCN) for the improvement using the Marshall Valuation Service cost guide. Helland adjusted the RCN to include a 5% entrepreneurial profit adjustment. Helland further adjusted for depreciation due to the age of the improvements, but found no other physical obsolescence, functional obsolescence, or economic obsolescence was warranted. Using this cost approach, Helland found the value of the Subject Property as of January 1, 2020, to be \$4,200,000<sup>33</sup> and \$4,100,000 as of January 1, 2022.<sup>34</sup>

**ii. Sales Comparison Approach**

In the sales comparison approach, Helland states that he was able to identify four comparable fee simple sales, as well an additional four leased fee sales.<sup>35</sup> Helland explained that the leased fee sales he

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<sup>29</sup> Exhibit 7:15-49.

<sup>30</sup> Exhibit 7:33.

<sup>31</sup> Exhibit 7:59; 8:61.

<sup>32</sup> Exhibit 7:68; 8:70.

<sup>33</sup> Exhibit 7:73.

<sup>34</sup> Exhibit 8:74.

<sup>35</sup> Exhibit 7:75; 8:76.

selected for comparison had the lease terms available, meaning that he could make proper adjustments to compare them with the fee simple sales and the Subject Property.<sup>36</sup> Using this approach, Helland concluded the value of the Subject Property as of January 1, 2020, to be \$3,800,000<sup>37</sup> and \$3,500,000 as of January 1, 2022.<sup>38</sup>

### **iii. Income Capitalization Approach**

In utilizing an income capitalization approach, Helland analyzed recent leases from comparable properties. Adjustments were made to factor differences in size, age, condition, quality, and other characteristics.<sup>39</sup> Helland also analyzed similar market characteristics throughout the Midwest region.<sup>40</sup> Helland determined that a \$6.50 per square foot potential gross rent (PGR),<sup>41</sup> a vacancy rate of 6%,<sup>42</sup> an expense rate of 22.97%,<sup>43</sup> and a loaded market capitalization rate of 8.13%<sup>44</sup> were appropriate to value the Subject Property. This approach resulted in a valuation as of January 1, 2020, of \$3,900,000<sup>45</sup> and \$3,600,000 as of January 1, 2022.<sup>46</sup>

### **iv. Reconciliation of Value**

After considering these three approaches to valuation, Helland testified that the cost approach to value had the least impact upon the reconciled value, because the approach “does not directly mimic the marketplace and its participants.”<sup>47</sup> Helland instead found that the sales comparison and income capitalization approaches provided the

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<sup>36</sup> Testimony of Helland.

<sup>37</sup> Exhibit 7:81.

<sup>38</sup> Exhibit 8:80.

<sup>39</sup> Exhibit 7:87; 8:84.

<sup>40</sup> Exhibit 7:88.

<sup>41</sup> Exhibit 7:89; \$6.00 per square foot for 2022, Exhibit 8:95.

<sup>42</sup> Exhibit 7:33; 5% for 2022, Exhibit 8:95.

<sup>43</sup> Exhibit 7:97; 38.45% for 2022, Exhibit 8:95.

<sup>44</sup> Exhibit 7:97; 7:86% for 2022, Exhibit 8:95.

<sup>45</sup> Exhibit 7:97.

<sup>46</sup> Exhibit 8:95.

<sup>47</sup> Exhibit 7:99; 8:96.

best indication of actual value and provided these approaches equal weight.

After reconciling the approaches, Helland opined that the value of the Subject Property for tax year 2020 was \$3,900,000,<sup>48</sup> and the value for tax year 2022 was \$3,500,000.<sup>49</sup>

## **B. Analysis**

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>50</sup> Here, as the Taxpayer presented the USPAP-compliant appraisals and supporting testimony of Peter Helland, the Commission finds that the Taxpayer has provided competent evidence sufficient to rebut the presumption that the County Board faithfully performed its duties and had sufficient evidence to make its determination.

The County Board elected not to call any witnesses to give testimony. “[T]he 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>51</sup> But, when the presumption of validity afforded to the Assessor's valuation disappears, “the reasonableness of the Assessor's valuation becomes a question of fact based upon all the evidence presented.”<sup>52</sup>

In reviewing the PRF for the Subject Property, the County’s referee<sup>53</sup> indicates disagreement with Helland’s selection of

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<sup>48</sup> Exhibit 7:101.

<sup>49</sup> Exhibit 8:97.

<sup>50</sup> *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018).

<sup>51</sup> *Wheatland Indus. v. Perkins Cty. Bd. of Equal.*, 304 Neb. 638, 647, 935 N.W.2d 764, 771 (2019).

<sup>52</sup> *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 852, 906 N.W.2d 285, 299 (2018).

<sup>53</sup> “In all counties the county board of equalization may appoint one or more suitable persons to act as referees.... The county board of equalization may direct that any protest filed in accordance with section 77-1502, shall be heard in the first instance by the referee in the manner provided for the hearing of protests by the county board of equalization. Upon the conclusion of the hearing in each case, the referee shall transmit to the county board of equalization all papers relating to the case, together with his or her findings and



depreciation figures, life expectancy, comparable selection, rental rate, and expense rate.<sup>54</sup> In affirming the valuations done by the County Assessor, the County Board relied upon the referee's findings in its decisions. However, no testimony was provided to explain these disagreements or demonstrate why the County Board's valuation would be more appropriate. Accordingly, the Commission finds that the Helland appraisals provide clear and convincing evidence that the County Board's decisions as to tax years 2020 and 2022 were arbitrary or unreasonable.

## VI. CONCLUSION OF LAW

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.

For all of the reasons set forth above, the determinations of the County Board should be vacated and reversed.

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recommendations in writing. The county board of equalization, after considering all papers relating to the protest and the findings and recommendations of the referee, may make the order recommended by the referee or any other order in the judgment of the board of equalization required by the findings of the referee, or may hear additional testimony, or may set aside such findings and hear the protest anew." Neb. Rev. Stat. § 77-1502.01 (Reissue 2018).

<sup>54</sup> Exhibit 12:13.

**VII. ORDER**

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the values of the Subject Property for tax years 2020 and 2022 are vacated and reversed.
2. The taxable value of the Subject Property for tax year 2020 is **\$ 3,900,000**
3. The taxable value of the Subject Property for tax year 2022 is **\$ 3,500,000**
4. 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 (Reissue 2018).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2020 and 2022.
8. This Decision and Order is effective for purposes of appeal on February 22, 2023.<sup>55</sup>

Signed and Sealed: February 22, 2023

SEAL



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Robert W. Hotz, Commissioner

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James D. Kuhn, Commissioner

<sup>55</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.