

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

| | | |
|-----------------------|---|---------------------------|
| CAE ENTERPRISES LLC, |) | |
| |) | |
| Appellant, |) | Case No. 08C 002 |
| |) | |
| v. |) | DECISION AND ORDER |
| |) | REVERSING THE DECISION OF |
| SARPY COUNTY BOARD OF |) | THE SARPY COUNTY BOARD OF |
| EQUALIZATION, |) | EQUALIZATION |
| |) | |
| Appellee. |) | |

The above-captioned case was called for a hearing on the merits of an appeal by CAE Enterprises LLC ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on May 29, 2009, pursuant to an Order for Hearing and Notice of Hearing issued March 13, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Wickersham was the presiding hearing officer.

Louis B. Egenberger, General Partner of CAE Enterprises LLC, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

John W. Reisz, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2008, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2008.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lot 2 Hilltop Industrial Park Replat, Sarpy County, Nebraska.

| | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------|-----------------------|------------------------|------------------------|
| Land | \$447,935.00 | \$210,541.00 | \$447,935.00 |
| Total | \$447,935.00 | \$210,541.00 | \$447,935.00 |

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on March 13, 2009, set a hearing of the appeal for May 29, 2009, at 9:00 a.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Equalized taxable value of the subject property for the tax year 2008 is:

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| | |
|-------------|----------------------|
| Land value | \$210,529.00 |
| Total value | <u>\$210,529.00.</u> |

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Supp. 2007).
2. “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.” Neb. Rev. Stat. §77-112 (Reissue 2003).

3. 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. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. 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. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. “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.” *Neb. Const.*, Art. VIII, §1.

8. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
9. 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. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
10. 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. *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).
11. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
12. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
13. 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 excessive and is the result of systematic

will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

14. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
15. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. 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. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

19. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."
Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
20. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
21. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
22. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).
23. 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. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet the burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

25. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982).

IV. ANALYSIS

The subject property is a 179,174 square foot unimproved commercial lot located in the Hill Top Industrial Park. (E4). Actual value was determined by the County Board at \$447,935 or \$2.50 per square foot. The Taxpayer produced property record files for 6 other unimproved commercial parcels in the Hill Top Industrial Park. (E12,13,14,15,16, &17). Actual value for those parcels was determined at 2.50 per square foot which was discounted by a factor of .47. (E12:5, 13:5, 14:5, 15:5, 16:5 and 17:5). The 6 comparison parcels are owned by the developer of Hill Top Industrial Park. The Taxpayer testified that the 6 comparison parcels were indistinguishable from the subject property.

An appraiser employed by the County Assessor testified that actual value of the 6 comparison parcels was determined with a developer's discount in accordance with the standard operating procedure of the Sarpy County Assessor's Office described in Exhibit 7.

A developer's discount was not applied to the subject property because it had been sold by the developer to the Taxpayer and did not therefore qualify for the discount.

Developer discounts have not been discussed by Nebraska Courts, however, a Kansas Court has provided the following succinct description of the developer's discount method as used for ad valorem tax purposes. "The developer's discount method of valuation which is also known

as the subdivision approach or the development approach, consists of a discounted cash flow analysis which considers a projected absorption rate and the corresponding drop in income from the sale of lots. Inherent in this approach is the notion that, if the owner of multiple lots places them all on the market at once, there would not be enough buyers in the marketplace who would be willing to pay full market price for each lot. Such approach assumes that the seller would have to discount the price of the property to lure additional buyers into the market. The discount is calculated by utilizing an absorption factor, which is based upon the number of willing buyers in any given year. In the alternative, the developer's discount method could be defined as the price that the owner of multiple lots would accept for all of its lots when sold to one buyer; that buyer would presumably pay a discounted price for each individual lot because the buyer would take the absorption factor into account in determining how quickly, and for what price, he or she could in turn sell the lots to other buyers." 19 Kan.App.2d 643, 875 P.2d 297 (1994).

The developer's discount as applied to undeveloped land is a recognized valuation technique. See, *The Appraisal of Real Estate* 13th Edition, The Appraisal Institute (2008) pp. 370 - 375. Use of the technique for valuation of lots after development has run afoul of statutory and constitutional provisions in various states: valuation of each lot in a developed subdivision at its full cash value approved, use of a developer's discount was rejected, *St. Leonard Shores v. Supervisor of Assessments of Calvert County*, 307 Md. 441, 514 A2d 1215 (1985); use of a developer's discount did not comply with statutes requiring separate valuation of each parcel placed on the assessment rolls, *First Interstate Bank or Oregon N.A. v. Department of Revenue*, 306 Or. 450, 760 P.2d 880 (1988); use of a developer's discount violated statutory scheme of valuing property for ad valorem tax purposes, *Hixon v. Lario Enterprises, Inc.*, 257 Kan. 377,

892 P.2d 507(1995); wholesale discount would violate the constitutional requirement of uniformity of taxation, *Edward Rose Building Company v. Independence Township*, 436 Mich. 620, 462 N.W.2d 325 (1990); statute providing for discount if the property consists of four or more lots within one subdivision, and the lots are held under one ownership would be valued under a method recognizing the time period over which the lots must be sold to realize current market prices was unconstitutional violating the rules of uniformity of taxation for the same class of property and uniformity of assessment, levy and collection found in separate provisions of Oregon's Constitution, *Mathias v. Department of Revenue of the State of Oregon*, 312 Or. 50, 817 P.2d 272 (1991); application of absorption discount to developer's subdivision lots violated uniformity of taxation requirement, and absorption method was contrary to statutory scheme of ad valorem taxation, *Board of Equalization of Salt Lake County v. Utah State Tax Commissioner ex rel. Benchmark, Inc.*, 864 P.2d 882 (1993).

Nebraska law requires an assessor to prepare an assessment roll each year. Neb. Rev. Stat. §77-1303 (Reissue 2003). The assessment roll is to list each parcel, its owner, the number of acres or lots which comprise it and the value thereof and the improvements and the value thereof. *Id.* A parcel is defined as a contiguous tract of land determined by its boundaries under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and contained in the same district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Cum. Supp. 2008). The assessment records indicate the 6 comparison parcels were not described and valued as a parcel.

Courts have recognized that if valuation of a single lot as a parcel is required by law or regulation that requirement precludes grouping of the individual parcels together for valuation. The Court in *St. Leonard Shores* based on a directive of the State Department of Assessment and Taxation prohibiting consideration of bulk ownership found that each lot had to be valued separately. *See, St. Leonard Shores v. Supervisor of Assessments of Calvert County*, 307 Md. 441, 514 A2d 1215 (1985). The Court did not accept the argument of *St. Leonard Shores* that a buyer did not exist for all of the parcels it held. The Court stated: “Regardless of whether a buyer for each lot actually exists, the assessor is required to assess each lot as if a willing buyer exists.” *Id.* at 446, 1215. The Court in *First Interstate* relied on a statute that required preparation of an assessment roll listing each parcel of real property. *See, First Interstate Bank or Oregon N.A. v. Department of Revenue*, 306 Or. 450, 760 P.2d 880 (1988). The Court also noted that use of a developer’s discount does not result in a valuation of a parcel at its highest and best use, i.e. commercial or residential land, but as an investment. *Id.* The Court in *Hixon*, found that statutes which required the appraisal of each parcel of real property at its fair market value in money and the determination of fair market value using statutory factors did not allow use of the discount. *See, Hixon v. Lario Enterprises, Inc.*, 257 Kan. 377, 892 P.2d 507(1995).

The 6 parcels owned by the developer receiving the development discount are Lots 1 & 2 Hilltop Industrial Park Replat 1; Lot 2 Hilltop Industrial Park Replat 9; Lots 1 & 2 Hilltop Industrial Park Replat 12; and Lot 2 Hilltop Industrial Park Replat 6. (E12, 13, 14, 15, 16, and 17). A map shows that Lots 1 & 2 Hilltop Industrial Park Replat 1 are contiguous to each other. (12:2). Lots 1 & 2 of Hilltop Industrial Park Replat 12 are also contiguous to each other. (12:2). The contiguous lots may have been eligible for valuation as a parcel. Neb. Rev. Stat. §77-132

(Cum. Supp. 2008). Nebraska law does not allow the assessor to aggregate lots which are not contiguous and create a developer parcel for valuation purposes. The rationales expressed by the Courts in *St. Leonard Shores*, *First Interstate*, and *Hixon* are compelling. As separate parcels valuation of each of the 6 lots held by the developer must be determined independent of other parcels held by the same owner.

Nebraska law requires the assessment of commercial real property at its actual value. Neb. Rev. Stat. §77-201(1) (Cum Supp. 2008). The Supreme Court of Michigan held in *Edward Rose Building Company v. Independence Township*, 436 Mich. 620, 462 N.W.2d 325 (1990), that use of the developer's discount disregarded several factors essential to the computation of true cash value. The Court held that use of the developer's discount to value lots subdivided and available for single family residential development valued property at its investment value rather than its highest and best use as residential home sites. One factor in the use of the developer's discount is recognition of the cost of development. The use of the developer's discount after development, however, causes those costs to be counted twice. *Id.*, 332, 636. The Court in *Rose* also observed that the market for a single lot must take into account the availability of fungible lots. *Id.* Use of the developer's discount recognizes any weakness in the market twice. *Id.* The rationales discussed by the *Rose* Court all point to one conclusion and that is, use of a developer's discount after development of a parcel does not render a result that can be characterized as actual value.

The subject property, a parcel of real property prepared for commercial use, is valued for taxation at \$2.50 per square foot (179,174 square feet x \$2.50 = \$477, 935). (E4:2). Lot 2 Hilltop Industrial Park Replat 1, another parcel of real property prepared for commercial use is

valued for taxation at \$2.50 per square foot less 53% for the developer's discount (200,250 square feet x \$2.50 x (1 - .53 = .47) = \$235,294). (E12:5). Similar calculations can be made for the other 5 comparison parcels with the results shown in Exhibits 13 at page 5, 14 at page 5, 15 at page 5, 16 at page 5 and 17 at page 5. Taxable value of each of the 6 comparison parcels was determined based on a 53% discount from the \$2.50 per square foot used to determine actual value of the subject property.

The 6 comparison parcels provided by the Taxpayer were valued parcel by parcel as was the subject property. The subject property and the 6 comparison parcels were valued differently only because the developer's discount was applied to the 6 comparison parcels and was not applied to the subject property. The developer's discount as used in Sarpy County is applied in the valuation of a parcel if the owner owns more than one parcel in a development and is also the developer. The developer's discount as applied in Sarpy County, to parcels which have been subdivided, creates a classification for valuation of property that is dependent on characteristics of the owner.

Nebraska's constitution requires that 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. Neb. Const. Art VIII Sec. 1 (1). The Constitution does not prohibit the classification of real property for valuation purposes. See *Constructors, Inc. v. Cass County Board of Equalization*, 258 Neb. 866, 606 N.W.2d 786 (2000). Nebraska's Constitution requires that parcels of the same character be taxed the same. *Constructors, Inc. v. Cass County Board of Equalization*, 258 Neb. 866, 606 N.W.2d 786 (2000).

Differential tax treatments can only be based on the nature of the property not upon who controls the property. *Id.*

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. *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). The Taxpayer is entitled to have the subject property valued on the same basis as the 6 comparison parcels. Equalized taxable value of the subject property is \$210,529 (179,174 square feet x \$2.5 x (1 - .53 = .47) = \$210,529).

V. CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2008, is vacated and reversed.
2. Equalized taxable value, for the tax year 2008, of the subject property is:

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Land value \$210,529.00

Total value \$210,529.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2008.
7. This order is effective for purposes of appeal on July 14, 2009.

Signed and Sealed. July 14, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

Wm. R. Wickersham, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.