

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

Landmark Management Group Inc.,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee,

Case Nos: 12C 767 & 12C 768

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

**For the Appellant:**

David Paladino,  
President, Landmark Management Group Inc.

**For the Appellee:**

Malina M. Dobson,  
Deputy Douglas County Attorney.

These appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property consists of two separate residential parcels improved with multi-unit apartment complexes located at 4612 and 4616 Redman Avenue, Omaha, Douglas County, Nebraska. The legal descriptions of the parcels and property record cards for the Subject Property are found at Exhibit 161 and Exhibit 162 respectively.

**II. PROCEDURAL HISTORY**

In Case No. 12C 767, the Douglas County Assessor (the Assessor) determined that the assessed value of the parcel was \$93,000 for tax year 2012.<sup>1</sup> Landmark Management Group Inc., (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board).<sup>2</sup> The County Board determined that the taxable value for tax year 2012 was \$93,000.<sup>3</sup>

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<sup>1</sup> See, E1.

<sup>2</sup> See, E1.

<sup>3</sup> See, E1.

In Case No. 12C 768, the Assessor determined that the assessed value of the parcel was \$164,000 for tax year 2012.<sup>4</sup> The Taxpayer protested this assessment to the County Board.<sup>5</sup> The County Board determined that the taxable value for tax year 2012 was \$164,000.<sup>6</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 November 17, 2014.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>7</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>8</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>9</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>10</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>11</sup>

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<sup>4</sup> See, E2.

<sup>5</sup> See, E2.

<sup>6</sup> See, E2.

<sup>7</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 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>8</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>9</sup> *Id.*

<sup>10</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

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

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>12</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>13</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>14</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>15</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>16</sup>

#### IV. VALUATION

##### A. Law

Under Nebraska law,

[a]ctual 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>17</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>18</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>19</sup> Taxable value is the percentage of actual value

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<sup>12</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).

<sup>13</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>14</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>15</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>16</sup> Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

<sup>17</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.<sup>20</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>21</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>22</sup>

## **B. Summary of the Evidence**

David Paladino, President of Landmark Management Group Inc., asserted that the County Board did not adequately account for a poor neighborhood reputation and vacant, abandoned, and open adjacent properties which negatively influenced the actual value of the Subject Property.<sup>23</sup> Paladino asserted that for the parcel in Case No. 12C 767, the County Board's vacancy and collection loss rate of 8% should have been 10%,<sup>24</sup> and that the County Board's capitalization rate of 11.25% should have been 13%.<sup>25</sup>

Mark Jenkins, a commercial staff appraiser with the Assessor, testified that he authored the assessment report for the parcel in Case No. 12C 767 and the income approach worksheet found in Exhibit 161, page 12. Jenkins asserted that the vacancy and collection loss rate and the capitalization rate found in the income approach worksheet were developed based upon market information appropriate for the Subject Property, and took into account all of the impact of the neighborhood's reputation and desirability in the capitalization rate and vacancy and collection loss rate. Jenkins also asserted that the County Board lowered the assessed value of the parcel based upon an income approach worksheet found at Exhibit 161, page 13.

The Commission notes that the County Board first changed the taxable value of the parcel to \$93,000 in tax year 2005.<sup>26</sup> The evidence also indicates that while the Assessor ran a separate income approach worksheet in 2012 and derived a separate opinion of value for the parcel,<sup>27</sup> the assessed value remained at \$93,000, which was affirmed after Protest by the County Board.<sup>28</sup> The Commission further notes that the assessed rentable area of the parcel in Case No. 12C 767

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<sup>20</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>21</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>22</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>23</sup> See, E161:4. Paladino asserted that trash located in the parking lot of neighboring properties supports his assertions.

<sup>24</sup> See, E161:13 (County Board's Apartment Income Approach Worksheet).

<sup>25</sup> See, E161:13 (County Board's Apartment Income Approach Worksheet).

<sup>26</sup> See, E161:16.

<sup>27</sup> See, E161:12.

<sup>28</sup> See, E1; See also, E161:13-15.

according to the Assessor is 5,220 square feet,<sup>29</sup> but the assessed rentable area according to the County Board is 3,480 square feet.<sup>30</sup> The County Board and the Assessor also disagreed on the rental rate, vacancy and collection loss rate, and the capitalization rate.<sup>31</sup> Jenkins testified that he did not know how the County Board derived its values in its income approach worksheet.<sup>32</sup>

Jenkins testified that the income approach performed by the Assessor for the parcel in Case No. 12C 768 also adequately took into account the impact of neighborhood influences on the actual value of the parcel, and that similarly the assessed value was lower than the actual value derived from the Assessor's income approach worksheet.<sup>33</sup> The Commission notes that unlike for the parcel in Case No. 12C 767, a County Board income approach worksheet is not in evidence for the parcel in Case No. 12C 768.

### C. Analysis

The Taxpayer must overcome by competent evidence a presumption in favor of the County Board.<sup>34</sup> Competent evidence is relevant and material evidence or that evidence "which the very nature of the thing to be proven requires."<sup>35</sup> A taxpayer must introduce competent evidence of actual value of its property in order to successfully claim that a property is overvalued.<sup>36</sup> An owner who is familiar with his property and knows its worth is permitted to testify as to its value.<sup>37</sup>

Paladino and Jenkins agreed that both the capitalization rate and collection loss rate utilized in the County Board's income approach worksheet were not supported by the market. Additionally, a review of the parcel's property record card and the County Board's income approach worksheet indicates that the County Board utilized an incorrect rentable area when calculating the potential gross income. This is competent evidence to overcome the presumption in favor of the County Board.

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<sup>29</sup> See, E161:12.

<sup>30</sup> See, E161:13.

<sup>31</sup> See, E161:12-13.

<sup>32</sup> See E161:13.

<sup>33</sup> See, E2; See also, E162:13-15.

<sup>34</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013).

<sup>35</sup> *Black's Law Dictionary 6th Edition*, West Group, p. 284 (1990).

<sup>36</sup> See, *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N. W. 2d 515 (1981).

<sup>37</sup> See, *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

Separately, the Taxpayer must meet its burden to show that the County Board's determination was arbitrary or unreasonable.<sup>38</sup> A mere difference of opinion is insufficient to meet the Taxpayer's burden.<sup>39</sup> The evidence in Case No. 12C 767 is clear and convincing that the County Board's determination was based on the incorrect rentable area of the parcel in Case No. 12C 767. Additionally, the capitalization rate, vacancy and collection loss rate, expense ratio, and rental rate used in the County Board's income approach worksheet were contradicted by different factors found in the Assessor's income approach worksheet.<sup>40</sup> Jenkins indicated that the factors used in the Assessor's income approach were based on market data. Paladino agreed with Jenkins' vacancy and collection loss rate and capitalization rate. Conversely, no evidence was presented to support or explain the County Board's income approach worksheet values. Instead, all of the evidence indicates that the values used in the County Board's income approach worksheet were not supported by market data applicable to tax year 2012.

The Commission finds that there is clear and convincing evidence that the County Board's determination in Case No. 12C 767 is arbitrary or unreasonable. The Commission also finds that there is clear and convincing evidence that the factors used in the Assessor's income approach were derived from the market and that the derived income approach value of \$114,300 is the actual value of the Subject Property.

However, the Commission may not order an increase in taxable value from the highest taxable value for which notice was given to the Taxpayer in these appeals.<sup>41</sup> In these appeals, there is no evidence that the Taxpayer was given notice of any taxable value higher than \$93,000 for the Subject Property for tax year 2012. The Commission's Rules and Regulations do not allow the Commission to set taxable value of real property at any amount higher than previously noticed to the Taxpayer by the Assessor, the County Board, or Property Tax Administrator without specific notice from the opposing party prior to the hearing that the opposing party intends to offer evidence and assert that the taxable value for the Subject Property is higher than any previously noticed value.<sup>42</sup> The Commission notes that the County Board did not assert during the hearing that the taxable value should be increased above that value previously noticed,

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<sup>38</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013).

<sup>39</sup> See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 125-26, 825 N.W.2d 447, 452 (2013).

<sup>40</sup> See, E161:12-13.

<sup>41</sup> 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

<sup>42</sup> 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

and that no notice as would be required by the Commission's Rules and Regulations was ever perfected. Therefore, the Commission finds that it cannot set the taxable value of the Subject Property at any amount higher than previously noticed to the Taxpayer by the Assessor, County Board, or Property Tax Administrator in these appeals.

Based on the foregoing, the Commission finds that the County Board's determination in Case No. 12C 767 should be affirmed. This results in a taxable value of the parcel in Case No. 12C 767 that is only 81.36% of actual value.<sup>43</sup>

The evidence concerning the County Board's determination in Case No. 12C 768 is meaningfully different. There is no County Board income approach worksheet in evidence for the parcel in Case No. 12C 768, and no direct evidence concerning the County Board's method for determining its actual value. However, an assessment report prepared by Jenkins is in evidence, and Jenkins indicated that his factors were based upon market data.<sup>44</sup> Similarly, Paladino asserted that his opinion of the capitalization rate and vacancy and collection loss rate was the same for the parcel in Case No. 12C 768.

The Commission finds that there is clear and convincing evidence that the County Board's determination was arbitrary or unreasonable because it is not supported by market data. The Commission finds that the actual value for the parcel in Case No. 12C 768 is \$201,000.<sup>45</sup>

However, as was similarly noted above, the Commission may not order an increase in taxable value from the highest taxable value for which notice was given to the Taxpayer in these appeals.<sup>46</sup> In these appeals, there is no evidence that the Taxpayer was given notice of any taxable value higher than \$164,000 for the Subject Property for tax year 2012. The Commission's Rules and Regulations do not allow the Commission to set taxable value of real property at any amount higher than previously noticed to the Taxpayer by the Assessor, the County Board, or Property Tax Administrator without specific notice from the opposing party prior to the hearing that the opposing party intends to offer evidence and assert that the taxable value for the Subject Property is higher than any previously noticed value.<sup>47</sup> The Commission notes that the County Board did not assert during the hearing that the taxable value should be increased above that value previously noticed, and that no notice as would be required by the

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<sup>43</sup> \$93,000/\$114,300.

<sup>44</sup> See, E162:13.

<sup>45</sup> See, E162:13.

<sup>46</sup> 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

<sup>47</sup> 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

Commission's Rules and Regulations was ever perfected. Therefore, the Commission finds that it cannot set the taxable value of the Subject Property at any amount higher than previously noticed to the Taxpayer by the Assessor, County Board, or Property Tax Administrator in these appeals.

Based on the foregoing, the Commission finds that the County Board's determination in Case No. 12C 768 should be affirmed. This results in a taxable value of the parcel in Case No. 12C 768 this is only 81.59% of actual value.<sup>48</sup>

## V. EQUALIZATION

### A. 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>49</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>50</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>51</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>52</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>53</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>54</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>55</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

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<sup>48</sup> \$93,000/\$114,300.

<sup>49</sup> *Neb. Const.*, Art. VIII, §1.

<sup>50</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>51</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>52</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>53</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>54</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>55</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).



grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”<sup>56</sup> There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>57</sup>

## **B. Summary of the Evidence**

For tax year 2012, the parcel in Case No. 12C 767 is assessed at only 81.36% of actual value,<sup>58</sup> and the parcel in Case No. 12C 768 is assessed at only 81.59% of actual value.<sup>59</sup> To grant equalized relief the Commission must find that the assessed value placed on a parcel is grossly excessive when compared to the assessed value of similar properties.<sup>60</sup>

The Commission finds that while the parcel in Case No. 12C 767 is assessed at a lower percentage of actual value than the parcel in Case No. 12C 768, the difference is de minimis and is not grossly excessive.

## **VI. 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 determinations. The Commission also finds that there is clear and convincing evidence that the County Board’s decisions were arbitrary or unreasonable. However, the Commission finds that the actual values of the parcels are higher than any previously noticed values, and that procedures were not followed to permit the Commission to increase the taxable values of the parcels. Moreover, while both parcels are assessed at different percentages of actual value, there is not clear and convincing evidence that the difference results in an assessment that is grossly excessive.

For all of the reasons set forth above, the decisions of the County Board should be affirmed.

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<sup>56</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>57</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>58</sup> \$93,000/\$114,300.

<sup>59</sup> \$93,000/\$114,300.

<sup>60</sup> *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013) (quoting *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 284, 276 N.W.2d 802, 812 (2008)).

**VII. ORDER**

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the taxable values of the parcels for tax year 2012 are affirmed.<sup>61</sup>
2. The taxable values of the parcels for tax year 2012 are:

Case No. 12C 767      \$93,000

Case No. 12C 768      \$164,000

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 (2012 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 2012.
7. This Decision and Order is effective for purposes of appeal on December 15, 2014.<sup>62</sup>

Signed and Sealed: December 15, 2014

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

<sup>61</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.

<sup>62</sup> Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.