

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

William H. Fleming,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 11R 455

Decision and Order Reversing the Douglas  
County Board of Equalization

**For the Appellant:**

Mark J. LaPuzza,  
Pansing Hogan Ernst & Bachman, LLP.

**For the Appellee:**

Michael Boever,  
Deputy Douglas County Attorney.

The appeal was heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon. Commissioner Salmon writing the majority, Commissioner Freimuth concurring in part and dissenting in part.

**I. THE SUBJECT PROPERTY**

The Subject Property is a residential parcel located in Douglas County, Nebraska. The parcel is improved with a 2,799 square foot, Ranch style residence with Very Good quality and condition. The legal description of the parcel is found at Exhibit 2, page 2. The property record card for the Subject Property is found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property was \$720,600 for tax year 2011.<sup>1</sup> William H. Fleming (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$636,380.<sup>2</sup> The Douglas County Board determined that the assessed value for tax year 2011 was \$720,600.<sup>3</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on November 5, 2012.

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<sup>1</sup> E1.

<sup>2</sup> E3:1.

<sup>3</sup> E1.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>4</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>5</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>6</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>7</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>8</sup>

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.<sup>9</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>10</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

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<sup>4</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>5</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>6</sup> *Id.*

<sup>7</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>8</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>9</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>10</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>11</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>12</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>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 section 77-1371, (2) income approach, and (3) cost approach.”<sup>14</sup> “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 section 77-201 of Nebraska Statutes 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>

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<sup>11</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>12</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>13</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>14</sup> *Id.*

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

<sup>16</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>17</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>18</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

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

William Fleming, the Taxpayer, testified that the Subject Property was one of the first residences constructed in its sub development and that he has been president of the Home Owners Association (HOA) since the developer turned management over to the HOA in 2005. Fleming asserted that in his role as HOA president and friendly neighbor he has obtained knowledge concerning the value of properties in the sub development.

Fleming asserted that both the land component and improvements on the Subject Property were overvalued. Specifically, he asserted that the undeveloped lots in the sub development previously sold for \$1,100 per lakefront foot, but now sold for around \$900 per lakefront foot. He asserted that the Subject Property land component value should be set at \$900 per lakefront foot; for a total land value of \$108,900.

Fleming also asserted that the improvements on the Subject Property were overvalued, and that the County Assessor's records incorrectly identified 900 square feet of unfinished basement area as finished in its cost approach calculation found at Exhibit 2, page 10. Fleming indicated that the combined basement area was the same as the first floor, and that the area under the garage and 900 square feet of the rest of the basement was unfinished. He additionally asserted that if he sold the property he would expect it to sell for about \$610,000.

Fleming generally asserted that "market conditions, specific neighborhood issues, and nature of recent improvements" affected the value of the Subject Property.<sup>19</sup> He generally asserted that his opinion of value was based upon these factors.<sup>20</sup> Fleming was concerned that the assessed value increased by \$110,500 from tax year 2010.

## **C. Analysis**

The assessed value for real property may be different from year to year, dependent upon the circumstances.<sup>21</sup> For this reason, a prior year's assessment is not relevant to the subsequent

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<sup>19</sup> E3:4.

<sup>20</sup> *Id.*

<sup>21</sup> See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

year's valuation.<sup>22</sup> The Commission finds that the mere fact that the assessed value of the Subject Property increased from tax year 2010 to tax year 2011 is not competent evidence sufficient to rebut the presumption.

As an owner, Fleming was permitted to testify concerning his opinion of value of the Subject Property.<sup>23</sup> While the Taxpayer asserted a different opinion of value for the land component of the Subject Property, the Taxpayer did not provide any data, such as transfer statements or property record cards for alleged comparable properties, which would support his assertions. The Commission finds that an owner's opinion of value alone, without supporting basis or data is not clear and convincing evidence that the County Board's determination that the County Assessor's valuation determined using a statutorily permissible method of valuation is unreasonable or arbitrary. The Nebraska Supreme Court has held that even an expert's unsupported opinion of value is not competent evidence of the actual value of real property.<sup>24</sup>

Concerning the improvement component of the Subject Property, the Commission notes that the County Board provided the Commission with an Assessment Report for the Subject Property as prepared by Brian Lustgraaf, listing an appraiser name of G. Kevin Corcoran, and signed by Larry Thomsen expressing an opinion of value of \$720,600.<sup>25</sup> The cost detail of the improvements indicates that the County Assessor assessed 2,735 square feet of basement area as finished.<sup>26</sup> The evidence before the Commission indicates that 900 square feet of basement area is unfinished and should not be included as finished basement square footage used in the County Assessor's cost detail. The Commission also notes that while the cost detail indicates that an adjustment of 4% physical depreciation is the proper amount to be applied to the Subject Property, the Subject Property actually only received a 3.462% physical depreciation adjustment ( $\$20,417/589,667 = 3.462\%$ ).<sup>27</sup> The Commission finds that there is clear and convincing evidence that the County Board's decision which relied upon the County Assessor's opinion of value, was arbitrary and unreasonable, because the County Assessor used an inaccurate

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<sup>22</sup> See, *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944); *Affiliated Foods*, 229 Neb. at 613, 428 N.W.2d at 206 (1988).

<sup>23</sup> See, *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

<sup>24</sup> See, *McArthur v. Papio-Missouri River Natural Resources District*, 250 Neb. 96, 547 N.W.2d 716 (1996).

<sup>25</sup> E2:1.

<sup>26</sup> E2:10.

<sup>27</sup> E2:10.

measurement of the basement finish. The Commission notes that the living area of the first floor is 2,799 square feet as indicated in the Assessment Report and testified to by the Taxpayer.<sup>28</sup> The Commission also notes that the finished area in the basement is 900 square feet less than the first floor living area as testified to by the Taxpayer. The Commission finds that the finished basement area is 1,899 square feet with an assessed value of \$64,813.

The Commission additionally finds the 4% physical depreciation included in the cost detail is reasonable and should be applied to the Subject Property.<sup>29</sup> The Commission finds that the actual value of the improvement component of the Subject Property is \$538,681 (\$561,126 replacement cost new with add ons after adjusted finished basement area, minus \$22,445 (4% depreciation) (\$561,126 - \$22,445 = \$538,681)).

There is no evidence before the Commission to allow it to relate Fleming's general assertions that market factors were affecting the value of the Subject Property to the value of the Subject Property. Fleming did not illustrate how he quantified the alleged impact of market conditions, nor did he provide any other evidence of the market factors he asserted were affecting the Subject Property. There is limited case law in Nebraska concerning the local impact of the national economic recession of the past decade on real property values. While the Nebraska Supreme Court in *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, did examine a county court's determination of the actual value of a property during a weak market, the Supreme Court's decision to accept the auction price as reasonable evidence of value was based not on the weak market, but on the specific condition of the property in that case.<sup>30</sup> The evidence in *Craven* demonstrated that the previous owner had allowed pets to urinate and defecate throughout the property, and that attempts to remove the stains and smells had failed.<sup>31</sup> The Supreme Court held that "there were no truly comparable properties in the area because of the unique deficiencies of the home."<sup>32</sup> To this Commissioner's knowledge the Nebraska Supreme Court has never required the reduction of the actual value of real property due to

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<sup>28</sup> E2:2.

<sup>29</sup> E2:10.

<sup>30</sup> See generally, *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (2011).

<sup>31</sup> *Id.* at 125, 794 N.W.2d at 408.

<sup>32</sup> *Id.* at 129, 794 N.W.2d at 411.

market conditions without appropriate supporting data quantifying the impact in evidence. This Commissioner finds that no such evidence was presented to the Commission in this case.

## 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>33</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>34</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>35</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>36</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>37</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>38</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>39</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 grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”<sup>40</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>41</sup> “To set the

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<sup>33</sup> *Neb. Const.*, Art. VIII, §1.

<sup>34</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>35</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>36</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>37</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>38</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>39</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>40</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>41</sup> *Id.* at 673, 94 N.W.2d at 50.

valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary, under the Nebraska Constitution.”<sup>42</sup>

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

Fleming asserted that the assessed value of the Subject Property should be equalized with two alleged comparable properties, and provided the property record cards for these properties; 11933 N. 173<sup>rd</sup> Circle<sup>43</sup> and 12112 N. 177<sup>th</sup> Circle.<sup>44</sup> Fleming asserted that the Subject Property was most comparable to 12112 N. 177<sup>th</sup> Circle found in Exhibit 5, because it was built the same year as the Subject Property and has a similar open floor plan. Fleming admitted that 12112 N. 177<sup>th</sup> Circle was smaller than the Subject Property and that it had a lower quality rating.<sup>45</sup> Additionally, Fleming testified that the Subject Property’s foundation was concrete block while the alleged comparable properties both had poured concrete foundations.<sup>46</sup> Fleming asserted that regardless of these differences, the Subject Property should be valued at \$227.36 per square foot, similar to the alleged comparable at 12112 N. 177<sup>th</sup> Circle, for a total actual value of \$636,380.

The Commission finds that the alleged comparable properties and the Subject Property are not similarly situated due to differences in size, type of construction, and quality of construction, and, therefore, are not comparable. This Commissioner further finds that it would be unreasonable to value the Subject Property at the same per square foot value as the alleged comparable property when the actual sales and market factor data used to create a mass appraisal model indicates that the differences affect the value of the properties.

The Taxpayer did not provide the Commission with ratios of assessed to actual values for the Subject Property or any of the alleged comparable properties. Without evidence of the actual value of the alleged comparable properties, the Commission cannot compare ratios of the assessed to actual values for the Subject Property or the alleged comparable properties.

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<sup>42</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>43</sup> E4.

<sup>44</sup> E5.

<sup>45</sup> E5.

<sup>46</sup> See, E4 and E5.



The Commission notes that the sales of the Flemings alleged comparable properties, for less than their assessed values, occurred prior to the date of assessment.<sup>47</sup> The Commission also notes that the County Assessor's packet included the property records cards for other alleged comparable properties with similar sales dates that sold for more than their assessed values.<sup>48</sup> Among these comparable properties are 17868 Island Circle and 11813 N. 176 Circle.<sup>49</sup> The Commission notes that both of these alleged comparable properties had higher selling prices than the County Assessor's assessed values.<sup>50</sup> These results, sales prices higher than assessed values and sales prices lower than assessed values, are expected when a mass appraisal model is used. Mass appraisal models derive the value of components or market factors by comparing costs or sales of properties with the component or market factor and then stratifying the results to derive a measure of central tendency: i.e. the mean, median, or similar factor.<sup>51</sup> By definition, some sales or costs to build will be below the derived value and some will be above the derived value. This is not a problem so long as measures of reliability derived from a performance analysis indicate that the model is performing within acceptable parameters.<sup>52</sup> No evidence was provided or ascertainable concerning the measures of reliability of the County Assessor's model.

The Nebraska Supreme Court has consistently held that sales price is not synonymous with actual value.<sup>53</sup> Sales price may be taken into consideration, but it is not conclusive of actual value.<sup>54</sup> It is necessary to know the "character and circumstances" of a sale in order to determine that a sale is competent evidence of actual value.<sup>55</sup> Where evidence indicates that a sale was part of an arm's length transaction, the sale price should be given strong consideration.<sup>56</sup> "The

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<sup>47</sup> See, E4 and E5.

<sup>48</sup> E2:14-36.

<sup>49</sup> See, E2:14-21, and E2:29-36.

<sup>50</sup> *Id.*

<sup>51</sup> International Association of Assessing Officers, *Mass Appraisal of Real Property*, at 74-142 (1999).

<sup>52</sup> *Id.*

<sup>53</sup> *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *Dowd v. Board of Equalization*, 240 Neb. 437, 482 N.W.2d 583 (1992).

<sup>54</sup> See, *Novak v. Board of Equalization*, 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945); *Collier v. County of Logan*, 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959); *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999); *Cabela's Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

<sup>55</sup> *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965).

<sup>56</sup> *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 47, 328 N.W.2d 175, 181 (1982).

statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its ‘market value in the ordinary course of trade.’”<sup>57</sup> This interpretation is required by Nebraska Statutes section 77-112.<sup>58</sup>

Nebraska Statutes section 77-112 and Nebraska common law comport with current professionally accepted mass appraisal methods. “The terms *price*, *cost*, and *value* are used and defined carefully by appraisers.”<sup>59</sup> “The term price refers to the amount a particular purchaser agrees to pay and a particular seller agrees to accept under the circumstances surrounding their transaction.”<sup>60</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>61</sup> Actual value is defined by Nebraska Statutes section 77-112 and means “the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market” and not the particular amount of a specific transaction.<sup>62</sup> The distinctions between *price* and *actual value* are meaningful. They acknowledge that circumstances and factors may effect a particular purchase price to such an extent that it is of limited value or irrelevant in determining the actual value of a property. Factors which tend to illustrate that a transaction is not an arm’s length transaction harm the credibility and relevance of a purchase price in determining the actual value of a subject property.

An arm’s length transaction is defined as: “A transaction between unrelated parties under no duress.”<sup>63</sup> Some types of transactions are generally considered to be non-arm’s-length transactions because they are not made on the open market or one or all of the parties involved in the transaction are not operating with the objective of maximizing their financial position.<sup>64</sup>

No evidence was presented to the Commission concerning the terms or characteristics of the sales of the Taxpayer’s alleged comparable properties.

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<sup>57</sup> *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999) (citing Neb. Rev. Stat. §77-112). See also, *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

<sup>58</sup> *Cabela’s Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted).

<sup>59</sup> Appraisal Institute, *The Appraisal of Real Estate*, at 21 (13th ed. 2008).

<sup>60</sup> *Id.*

<sup>61</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>62</sup> Neb. Rev. Stat. §77-112 (Reissued 2009).

<sup>63</sup> Appraisal Institute, *The Dictionary of Real Estate Appraisal*, at 18 (4th ed. 2002).

<sup>64</sup> International Association of Assessing Officers, *Mass Appraisal of Real Property*, at 53-54 (1999).

This Commissioner finds that Fleming’s \$636,380 opinion is based upon an unreasonable application of the per square foot assessed value of a single incomparable property, and, therefore, given little weight as evidence of value. This Commissioner further finds that Fleming’s opinion of value is not sufficient evidence that the Subject Property’s assessed value was not equalized with other properties.

## **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 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 that there is not clear and convincing evidence that the valuation placed on the Subject Property was grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment.

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

## **VII. ORDER**

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the subject property for tax year 2011 is vacated and reversed.<sup>65</sup>
2. The assessed value of the subject property for tax year 2011 is:

Land	\$151,300
<u>Improvements</u>	<u>\$538,681</u>
Total	\$689,981

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<sup>65</sup> Assessed 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 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 2011.
7. This Decision and Order is effective for purposes of appeal on February 24, 2014.

Signed and Sealed: February 24, 2014

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Nancy J. Salmon, Commissioner

SEAL

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.

Commissioner Freimuth, concurring in part and dissenting in part,

1. The Taxpayer submitted documentation found at Exhibits 3 through 5 analyzing the sale and assessment history of two properties near the Subject Property located at 12112 North 177th Circle (\$600,000 sale in September 2010;<sup>66</sup> 2006 – 2011 tax year assessment: \$616,100<sup>67</sup>); and 11933 North 173<sup>rd</sup> Circle (\$593,000 sale in September 2010;<sup>68</sup> 2010 assessment: \$680,900<sup>69</sup>).
2. The County submitted documentation that sets forth the sale and assessment history of a property near the Subject Property located at 12107 North 179<sup>th</sup> Circle (\$610,000 sale in April 2011;<sup>70</sup> 2006 – 2011 assessment: \$613,700<sup>71</sup>);
3. The County Board submitted an Assessment Report for tax year 2011 for the Subject Property found at Exhibit 2. The Assessment Report for the Subject Property indicates

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<sup>66</sup> E5:1.

<sup>67</sup> E5:1 & E5:9.

<sup>68</sup> E4:1.

<sup>69</sup> E4:7.

<sup>70</sup> E2:22.

<sup>71</sup> E2:22 & E2:26.

that the County Board's \$720,600 determination for tax year 2011 includes \$151,300 for land and \$569,300 for the improvement component.<sup>72</sup>

4. The Assessment Report indicates that the County Board's determination for tax years 2006 through 2010 amounted to \$610,100 (land: \$151,300; improvement: \$458,800).<sup>73</sup>
5. The Assessment Report indicates that the County Assessor's notice value for tax year 2011 attributable to the Subject Property's improvement component is based on a cost approach mass appraisal model.<sup>74</sup> This cost model, which was relied upon by the County Board for its \$720,600 determination for tax year 2010, does not include any adjustment for economic obsolescence.<sup>75</sup>
6. The Taxpayer expressed concern regarding insufficient consideration of the economic crisis by the County.<sup>76</sup> General guidance in this regard in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers.<sup>77</sup> For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as distressed sale rates as a part of developing and maintaining market area databases.<sup>78</sup> Additionally, in addressing mass appraisal techniques such as the model used by the County to value the Subject Property, *Property Assessment Valuation* states as follows:

Although the structure of a mass appraisal model may be valid for many years, the model is usually recalibrated or updated every year. To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**<sup>79</sup>

7. The Illinois Court of Appeal stated as follows regarding consideration of "current market conditions" in a 2012 opinion affirming a lower court's approval of a \$300,000 judicial foreclosure sale of commercial real estate secured by a note with a principal balance in the amount of \$824,540:

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as "the real estate bubble") **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors

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<sup>72</sup> E2:13.

<sup>73</sup> E2:13.

<sup>74</sup> E2:3 & E2:11.

<sup>75</sup> E2:10.

<sup>76</sup> E3:4.

<sup>77</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

<sup>78</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

<sup>79</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

as they exist at the time of the sale, whether such sale is made in the open market or through a judicial sale as a result of a foreclosure action.<sup>80</sup>

8. The Nebraska Supreme Court has also recently considered “current market conditions” in the aftermath of the economic crisis. In *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, the Court upheld a ruling issued by the Lancaster County Court that the \$113,000 purchase price of property sold at an estate auction in a weak real estate market after the decedent’s death in 2008 stemmed from an arm’s length transaction and was the best evidence of value for inheritance tax purposes.<sup>81</sup>
9. The Taxpayer, who has over 40 years of real estate investment experience in several states, stated that his opinion of value for tax year 2011 is \$636,380.
10. This Commissioner is mindful that the events surrounding the economic crisis adversely affected real estate values throughout the United States. In light of the three sales noted above for less than the County’s assessed value for each respective parcel – assessed values derived from the County’s cost approach model that does not include any adjustment for economic obsolescence<sup>82</sup> -- I would find that the best evidence of value in this case is \$636,380 for tax year 2011.<sup>83</sup> I note that this value is significantly above the sale prices of the above-referenced homes (\$593,000, \$600,000 and \$610,000) and accounts for the construction of the retaining wall and pool on the Subject Property in 2010 (\$20,000 estimated cost, although I agree with the Taxpayer that it is arguable whether this cost added to the \$610,100 assessed value of the Subject Property in 2010).

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Thomas D. Freimuth, Commissioner

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<sup>80</sup> *Sewickley, LLC v. Chicago Title and Trust Company*, 974 N.E.2d 397, 406 (Court of Appeal of Illinois, First District, Second Division 2012) (emphasis added).

<sup>81</sup> *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

<sup>82</sup> E2:10 (Subject Property – 0% economic obsolescence adjustment); E2:25 (12107 North 179<sup>th</sup> Circle - 0% economic obsolescence adjustment); E4:5 (11933 North 173<sup>rd</sup> Circle - 0% economic obsolescence adjustment); and E5:7 (12112 North 173<sup>rd</sup> Circle - 0% economic obsolescence adjustment).

<sup>83</sup> The reliability of the cost approach is limited, especially in the context of the adverse conditions stemming from the aftermath of the economic crisis. See, *Appraising Residential Properties*, 4<sup>th</sup> Edition, Appraisal Institute, 2007, at p. 260.