

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Kermit R. Engh,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11C 503

Decision Affirming
County Board of Equalization

GENERAL BACKGROUND & PROCEDURAL HISTORY

1. The Subject Property is a commercial parcel improved with a 5,000 square foot dry-cleaning business and a 2,400 square foot storage warehouse located at 3031 Leavenworth Street, Omaha, Nebraska, with a legal description of: BARTLETTS ADD LOT 1 BLOCK 0 W 150 FT LT 1 150 X 148.5.
1. The Douglas County Assessor assessed the Subject Property at \$371,600 for tax year 2011.
2. Kermit R. Engh (herein referred to as the “Taxpayer”) protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”).
3. The County Board determined that the assessed value of the Subject Property was \$246,300 for tax year 2011.
4. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
5. A Single Commissioner hearing was held at the State Office Building, in Omaha, Nebraska, before Commissioner Thomas D. Freimuth, on June 24, 2013.
6. Kermit R. Engh, the Taxpayer, was present at the hearing.
7. No one was present for the County Board.

SUMMARY OF HEARING DOCUMENTS & STATEMENTS

8. The Taxpayer submitted four separate Property Profiles for the Subject Property issued by the Douglas County Assessor’s Office for tax years 2009 – 2012. The “PVAL” page contained in the 2011 Property Profile indicates that the County Board’s \$246,300 determination for that tax year includes \$66,800 for land and \$179,500 for the improvement components. The Commission notes that the PVAL page indicates that the County Board’s determinations for tax years 2006 through 2008 amounted to \$174,000 (land: \$66,800; improvements: \$158,200) and increased to \$225,000 (land: \$66,800; improvements: \$107,200) in tax year 2009 based on a reappraisal (see “RA” notation on PVAL page) by the County Assessor. The PVAL page also indicates that the County Board’s \$225,000 determination for tax year 2009 was reduced to \$187,500 (land: \$66,800; improvements: \$120,700) pursuant to an Order issued by the Commission, and that the County Board’s \$187,500 determination for tax year 2010 was based on a reappraisal by the County Assessor.

9. The 2011 Property Profile states that the Subject Property's 5,000 square foot improvement is classified by the County as "Laundry/Dry Cleaning" under "Occupancy" code 1499. The Subject Property's 2,400 square foot improvement is classified by the County as "Storage Warehouse" under "Occupancy" code 1150.
10. The Property Profile indicates that the County Board's \$246,300 determination for tax year 2011 rejected the County Assessor's \$371,600 income approach valuation.¹ The Property Profile does not contain explanation regarding the basis of the County Board's reduction of the \$371,600 notice value to \$246,300, and no verbal explanation was offered at the hearing because the County was not represented.

STANDARD OF REVIEW

11. The Commission's review of the determination of the County Board of Equalization is de novo.² "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."³
12. When considering an appeal 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."⁴ 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."⁵
13. 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.⁶
14. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁷

GENERAL VALUATION LAW

15. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁸
16. Nebraska Statutes section 77-112 defines actual value as follows:

¹ The 2011 Property Profile's "Income Worksheet" uses \$9 per square foot as the imputed rental rate for the 5,000 square foot dry-cleaning facility and \$2 per square foot for the 2,400 square foot storage warehouse (\$371,600 total valuation).

² 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).

³ *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

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

⁵ *Id.*

⁶ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

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

⁸ 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).

Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. 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. 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.⁹

VALUATION ANALYSIS

17. The Taxpayer asserted that the County Board overvalued the Subject Property with the use of an unreasonable or arbitrary income approach model that increased the imputed rental rate from \$6 per square foot (\$225,000 total valuation, which is reflected on the Property Profile's "Income Worksheet" for tax year 2009) to \$9 per square foot (\$371,600 total valuation, which is reflected on the Property Profile's "Income Worksheet" for tax year 2011).¹⁰ In support of this assertion, the Taxpayer submitted documentation that included analysis of the assessments of seven nearby comparables. In further support of this assertion, the Taxpayer submitted documentation demonstrating that revenues generated by the Subject Property declined from tax years 2009 through 2011, and that he pays \$5 per square foot to rent his dry-cleaning business located at 3305 South 66th Avenue.
18. The 2009 – 2012 Property Profiles submitted by the Taxpayer do not include an income worksheet for the County Board's \$246,300 determination for tax year 2011. Based on the Commission's calculation, however, the imputed rental rate associated with the County Board's \$246,300 determination amounts to \$5.66 per square foot for the 5,000 square foot dry-cleaning facility using the variables contained in the County Assessor's 2011 income worksheet.¹¹
19. The Taxpayer did not submit a fee appraisal of the Subject Property at the hearing before the Commission. The Commission also notes that the Taxpayer submitted screen-shots from the Douglas County Assessor's website regarding the seven comparables referenced above (Property Profiles were not submitted).
20. Based on the Taxpayer's analysis, which included concern regarding the County's significant assessment increase in the aftermath of the economic crisis, the Taxpayer

⁹ Neb. Rev. Stat. § 77-112 (Reissue 2009).

¹⁰ The Commission notes that the Property Profile's "Income Worksheet" for tax year 2010 reflects a \$187,500 total valuation that uses \$5 per square foot imputed rental rate.

¹¹ This \$5.66 imputed rental rate calculation for the 5,000 sq. ft. building that contains the dry-cleaning operation assumes that the 2,400 square foot storage facility valuation remains constant at \$34,100, using a \$2 per square foot imputed rental rate (\$246,300 - \$34,100 = \$212,200). In other words, use of a \$5.66 rent rate in combination with the other variables contained in the 2011 income worksheet produces a \$212,200 valuation for the dry-cleaning improvement component of the Subject Property.

asserted that the actual value of the Subject Property amounted to \$199,500 for tax year 2011, which amounts to a 10% increase over the 2010 assessment (\$187,500, as ordered by the Commission).

21. The Taxpayer's opinion of value relies in part on the use of assessed values of comparables in close proximity to the Subject Property. This approach is not a commonly accepted mass appraisal technique for determining the actual value of real property under Nebraska Statutes section 77-112.
22. The valuation approaches identified under Nebraska Statutes section 77-112 include the sales comparison approach, the income approach, the cost approach, and other professionally accepted mass appraisal methods. The Taxpayer's use of assessed values of properties in close proximity to the Subject Property is not identified as an appropriate approach under Nebraska Statutes section 77-112. Additionally, the Taxpayer did not provide evidence that this approach is a professionally accepted mass appraisal or fee appraisal technique. Therefore, while assessed values can provide the basis for relief in the equalization context as discussed below, the Commission is unable to place significant weight on the Taxpayer's opinion of value to the extent it relies on the use of assessed values of nearby properties.
23. The mass appraisal income capitalization model used by the County Assessor to derive its \$371,600 notice valuation for tax year 2011 requires the analysis and use of competitive market information.¹² In this regard, *The Appraisal of Real Estate* published by The Appraisal Institute states: "To derive pertinent income and expense data, an appraiser investigates comparable sales and rentals or competitive income-producing properties of the same type in the same market. ... Appraisers try to obtain all income and expense data from the income-producing properties used as comparables."¹³ "Vacancy and collection loss is commonly expressed as a percentage of potential annual gross income, and it should be based on market research, not the actual rental history of a property."¹⁴ "Published studies are useful, but the appraiser must still develop operating expense ratios from comparable properties in the subject property's market or verify the applicability of the published ratios to this market."¹⁵ Finally, *The Appraisal of Real Estate* states that the income approach "employs capitalization rates and multipliers extracted from market data."¹⁶
24. In addition to market data, the income approach also requires analysis of subject property income and expense information.¹⁷
25. With respect to the proper use of the income approach in the mass appraisal context, "gross income, allowable expenses, net incomes, gross income multipliers, and overall rates can all be estimated in one of two basic ways: by developing typical per-unit values through stratification, often using spreadsheet software, or through statistical models."¹⁸ In order to avoid reflecting differences in management, it is acceptable for an appraiser to use median vacancy, collection loss ratio and income per unit when valuing a property under the income approach.¹⁹ Whether the appraiser uses actual subject property

¹² Fisher and Martin, *Income Property Valuation*, Dearborn Financial Publishing, Inc., 2004, at p. 43.

¹³ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 473.

¹⁴ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at 404.

¹⁵ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 494.

¹⁶ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 499.

¹⁷ *The Appraisal of Real Estate*, 13th Edition, The Appraisal Institute, 2008, at p. 466.

¹⁸ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 132.

¹⁹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

income/expense information or estimated medians is “a matter of appraiser judgment” based upon whether the reported actual figures appear reasonable or typical when compared to the median figure for the model.²⁰

26. *Mass Appraisal of Real Property* states the basic concept that for purposes of ad valorem taxation of real property, only the value of the real property and not that value of the business which is attributable to individual management style or experience is to be valued. The use of estimated figures instead of actual figures for each business is intended to prevent the inappropriate taxation of management.²¹
27. Because of these principles of mass appraisal, it is not enough to rebut the presumption in favor of the County Board for the Taxpayer to present evidence that there is a difference between the Subject Property’s actual figures and the estimates utilized by the County Assessor and adopted by the County Board in its determination. The Taxpayer must show something more in the form of clear and convincing evidence that the County Assessor or County Board inappropriately derived the estimated figures, or inappropriately included the Subject Property in a model comprised of incomparable properties, or any other error or calculation that evidences that the model or process utilized by the County Assessor and/or relied upon by the County Board determined the value of the Subject Property in such a way that the decision was “made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion”²² or evidences that there is “no room for differences of opinion among reasonable minds.”²³
28. The Taxpayer supplied the Commission with documentation that illustrates the decline of the actual gross income of the Subject Property for the years 2009 through 2012. The Taxpayer did not provide actual expense information.
29. While the Taxpayer’s opinion of value relies in part on his statement that he pays \$5 per square foot to rent his dry-cleaning business located at 3305 South 66th Avenue, the Commission finds that the Taxpayer did not present sufficient local market data to demonstrate that the County Board’s decision to reduce the County Assessor’s notice value from \$371,600 to \$246,300 for tax year 2011 was unreasonable or arbitrary (as indicated previously, this \$246,300 determination results in a \$5.66 per square foot imputed rental rate using the 2011 Property Profile’s income worksheet variables.)²⁴
30. The Commission notes that valuation guidance is widely available in the case where a Taxpayer determines that it is not cost effective to obtain a fee appraisal. For example, the Commission is allowed by statute and by its rules and regulations to consider many publications that provide guidance regarding the sales comparison approach and other valuation techniques. These publications, which are listed at the Commission’s “Rules/Regulations” website link (Chapter 5, section 031), can be found at area public libraries and law school libraries. Guidance regarding valuation techniques can also be found at the Commission’s “Decisions” website link.

²⁰ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²¹ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, at p. 158.

²² *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted) (defining “arbitrary”).

²³ See, *Pitman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 401-02, 603 N.W.2d 447, 455-56 (1999) (defining “unreasonable”).

²⁴ The Taxpayer did not provide a Property Profile or income/expense documentation for his dry-cleaning business located at 3305 South 66th Avenue where he pays \$5 per square foot rent. Thus, the Commission is unable to adequately analyze whether the actual income and expense information for this property constitutes reliable market data to support a reduction of the County Board’s \$246,300 actual value determination.

31. The Commission also notes that section 8 of the Order for Single Commissioner Hearing issued to the parties in this matter at least 30 days prior to the hearing provides as follows:

***NOTE:** Copies of the County’s Property Record File for any parcel you will present as a comparable parcel should be provided so that your claim can be properly analyzed. The information provided on the County’s web page is **not** a property record file. A property Record File is only maintained in the office of the County Assessor and should be obtained from that office prior to the hearing.*

32. Further, with respect to the Taxpayer’s concern regarding insufficient consideration of the economic crisis by the County, 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.²⁵ For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as foreclosure rates and vacancy rates as a part of developing and maintaining market area databases.²⁶ 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.**²⁷

33. 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

²⁵ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

²⁶ *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

²⁷ *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.²⁸

34. 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.²⁹
35. This Commissioner is mindful that the events surrounding the economic crisis adversely affected business and real estate values throughout the United States. The Commission finds, however, that the Taxpayer did not provide sufficient clear and convincing evidence to quantify the impact of the economic crisis on the actual value of the Subject Property.³⁰

GENERAL EQUALIZATION LAW

36. “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.”³¹ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.³² 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.³³
37. 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.³⁴
38. 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.³⁵ 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.³⁶
39. The constitutional requirement of uniformity in taxation extends to both rate and valuation.³⁷ 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

²⁸ *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).

²⁹ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

³⁰ The Commission notes that one purpose of the County’s use of market data -- assuming it is reliable and sufficient -- in its income approach model is to account for any adverse local consequences related to the worldwide economy.

³¹ *Neb. Const.*, Art. VIII, §1.

³² *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³³ *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).

³⁴ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

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

³⁶ *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).

³⁷ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”³⁸ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”³⁹

40. “To set the 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.”⁴⁰

EQUALIZATION ANALYSIS

41. The Taxpayer asserted that the Subject Property was overvalued in comparison to the assessed valuations of seven comparables located near the Subject Property. In support of this assertion, the Taxpayer submitted screen-shots from the Douglas County Assessor’s website for these properties.
42. As indicated previously, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;⁴¹ or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property **regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.⁴²
43. The Commission finds that the properties submitted by the Taxpayer are not similarly situated or comparable for equalization analysis purposes in substantial part because none of the operations situated on these parcels engage in the dry-cleaning business.
44. The Commission further finds that the Taxpayer did not produce sufficient evidence of the market value of the properties submitted for comparison, in order to determine whether the ratio of one or more assessed to market values was less than 100% for tax year 2011. Thus, the Commission is unable to determine whether the Subject Property was assessed at an excessive percentage of market value in comparison to the properties presented for consideration by the Taxpayer.

CONCLUSION

45. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its duties and to act on sufficient competent evidence to justify its actions.
46. The Taxpayer has not adduced sufficient, clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.
47. The Commission is mindful that the County Board was not represented at the hearing. The County Board, however, 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.⁴³

³⁸ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

³⁹ *Id.* at 673, 94 N.W.2d at 50.

⁴⁰ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴¹ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴² See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

⁴³ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998). See, *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 621 N.W.2d 518, 261 Neb. 130 (Neb. 2001).

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 Affirmed.
2. That the taxable value of the Subject Property for tax year 2011 is:

Land	\$ 66,800
Improvements	\$179,500
Total	\$246,300

3. This decision and order, if no further action is taken, 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 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 2011.
7. This order is effective on January 14, 2014.

Signed and Sealed: January 14, 2014.

Thomas D. Freimuth, Commissioner