

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

H K Scholz,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 12C 744

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

**GENERAL BACKGROUND AND PROCEDURAL HISTORY**

1. The real property subject to appeal (herein referred to as the “Subject Property”) is a commercial parcel located at 7800 Serum Avenue, Ralston, NE, with a legal description of: LANDS SEC-TWN-RGE 11-14-12 –EX S 25 FT – IRREG E 501.80 FT S OF MPRR TX LT 4 S 1/2 NW 1/4 1.04 AC.
2. The Douglas County Assessor assessed the Subject Property at \$695,800 for tax year 2012.
3. H K Scholz (herein referred to as the “Taxpayer”), a manufacturing company, protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed value of \$419,007.
4. The County Board determined that the assessed value of the Subject Property was \$695,800 for tax year 2012.
5. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”).
6. A Single Commissioner hearing was held on August 27, 2013, at the Omaha State Office Bldg., 1313 Farnam, Rm. 227, Omaha, NE, before Commissioner Thomas D. Freimuth.
7. Ann Hough, a corporate officer and owner of the Taxpayer, was present at the hearing.
8. Linda Rowe, an assessor with the Douglas County Assessor’s Office, was present for the County Board.

**STANDARD OF REVIEW**

9. The Commission’s review of the determination of the County Board of Equalization is de novo.<sup>1</sup> “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.”<sup>2</sup>

<sup>1</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).

<sup>2</sup> *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

10. 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.”<sup>3</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>4</sup>
11. 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>5</sup>
12. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</sup>
13. 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>7</sup>

#### **SUMMARY OF HEARING DOCUMENTS & STATEMENTS**

14. The document contained in the County’s Assessment Report submitted at the hearing that outlines the Subject Property’s valuation history (“PVAL”) indicates that the parcel was assessed at \$420,000 from tax year 2004 through tax year 2010. The PVAL also indicates that the County Assessor reappraised the Subject Property in the amount of \$695,800 on March 13, 2011, and that the County Board adopted this recommendation for tax years 2011 and 2012.<sup>8</sup>
15. The Taxpayer asserted that the substantial assessed value increase in tax year 2012 in comparison to tax years 2004 through 2010 was not justified, and that the assessment should revert to \$420,000.
16. The Taxpayer also asserted that the County Board’s determination which relied upon the County Assessor income approach was based upon an arbitrarily determined capitalization rate.<sup>9</sup>
17. The Taxpayer contended that the Subject Property is subject to easements and the frequent flooding.<sup>10</sup> The Taxpayer provided a map of the flood fringe and the Subject

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

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>6</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>7</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>8</sup> The PVAL indicates that the Taxpayer appealed the County Board’s 2011 determination to the Commission, and that the parties agreed to settle the appeal by reducing the \$695,800 reappraisal value to \$688,615. The basis of this reduction is not clear.

<sup>9</sup> See, Assessment Report and Hearing Notes.

Property's neighborhood that labels the Taxpayer's alleged comparable properties. The Taxpayer also provided photographs of flooding in 1993 and 2000 in close proximity to the Subject Property. The Taxpayer asserted that the Subject Property should receive a deduction for these easement and flooding factors.

18. The Taxpayer also asserted that the Subject Property was not equalized with alleged comparable properties.
19. The Taxpayer provided a chart detailing perceived relevant factors of the Subject Property and the alleged comparable properties. The Taxpayer also provided the property record cards for the alleged comparable properties.
20. The alleged comparable properties were referred to as: (1) the Platinum Real Estate Property; (2) the Sadler Property; and (3) the Reeder Property.<sup>11</sup> The assessed value for the alleged comparable properties varied from \$12 per square foot to \$25 per square.<sup>12</sup> The assessed value per square foot of the Subject Property is \$36 per square foot.<sup>13</sup>
21. The County Assessor provided an Assessment Report for the Subject Property which includes the Subject Property's property record card, the income approach worksheet for the Subject Property, a list of alleged equalization comparable properties, a comparison table of the Subject Property and the alleged comparable properties, the property record cards for the alleged comparable properties, and the income worksheets for the alleged comparable properties.
22. The County Assessor asserted that the capitalization rate for the Subject Property was appropriately determined using acceptable mass appraisal techniques.<sup>14</sup>
23. The Assessment Report indicates that the capitalization rate was derived by a study of the Subject Property's market area, and that the County Assessor's Office continually updates its information to ensure that the derived capitalization rates remain applicable.<sup>15</sup> The Assessment Report indicates that the County Assessor considered the impact of the potential flooding on the Subject Property, but concluded that the Subject Property was not located in flood fringe.<sup>16</sup>
24. The County Assessor asserted that the Taxpayer's alleged comparable properties are not truly comparable. The County Assessor indicated that all of the alleged comparable properties were assessed as storage warehouses, whereas the Subject Property is assessed as light industrial manufacturing.<sup>17</sup>

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<sup>10</sup> See, Taxpayer's County Board Submission; See also, Assessment Report, Account Notes; See also, Hearing Notes.

<sup>11</sup> See, Taxpayer Comparable Property Chart.

<sup>12</sup> See, *Id.*; See also, alleged comparable properties' property record cards.

<sup>13</sup> See, Taxpayer Comparable Property Chart; See also, Assessment Report, Commercial Sales Comparables Inventory and Account Value Summary.

<sup>14</sup> See, Assessment Report, Overall Capitalization Rate.

<sup>15</sup> *Id.*

<sup>16</sup> See, Assessment Report, Account Notes.

<sup>17</sup> See, property record cards for the Subject Property and the Taxpayer's alleged comparable properties.

## GENERAL VALUATION LAW

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.<sup>18</sup>
26. “Actual value, market value, and fair market value mean exactly the same thing.”<sup>19</sup>
27. Taxable value is the percentage of actual value subject to taxation as directed by Nebraska Statutes section 77-201 and has the same meaning as assessed value.<sup>20</sup>
28. All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>21</sup>
29. 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>
30. Nebraska Statutes section 77-112 defines actual value as follows:

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.<sup>23</sup>

## VALUATION ANALYSIS

31. The evidence indicates that the County Board adopted the County Assessor’s opinion of value which was based upon an income approach.<sup>24</sup>
32. The income approach is a statutorily permissible mass appraisal method for determining the actual value of real property in Nebraska.<sup>25</sup>
33. The Taxpayer specifically asserted that the derived capitalization rate for the Subject Property was arbitrary. “A decision is arbitrary when it is made in disregard of the facts

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<sup>18</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>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).

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

<sup>24</sup> See, Assessment Report.

<sup>25</sup> See, Neb. Rev. Stat. §77-112 (Reissue 2009).

or circumstances and without some basis which would lead a reasonable person to the same conclusion.”<sup>26</sup>

34. The Assessment Report indicates that the capitalization rate was derived through a professionally accepted mass appraisal method, and that the County Assessor regularly reviewed market data to ensure that the capitalization rate was still applicable.<sup>27</sup> The Taxpayer did not provide a quantification of an alternative capitalization rate.
35. While the Taxpayer asserted that the Subject Property should receive deductions for flooding and easement factors, quantification of such deductions were not received by the Commission. The Commission notes that the photographs submitted by the Taxpayer depict isolated water retention in a location that appears to be constructed for the specific purpose of controlling the impact of flooding on the Subject Property.<sup>28</sup> Additionally, the map submitted by the Taxpayer and the County’s Assessment Report indicate that while the Subject Property is located close to the flood fringe, it is not actually in the flood fringe.<sup>29</sup>

### **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.”<sup>30</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>31</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>32</sup>
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.<sup>33</sup>
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.<sup>34</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>35</sup>

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<sup>26</sup> *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000) (citations omitted).

<sup>27</sup> See, Assessment Report, Overall Capitalization Rate.

<sup>28</sup> See, Taxpayer’s pictures of flooding.

<sup>29</sup> See, Assessment Report, Account Notes.

<sup>30</sup> *Neb. Const.*, Art. VIII, §1.

<sup>31</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>32</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>33</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>34</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>35</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).

39. The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>36</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>37</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>38</sup>
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.”<sup>39</sup>

### EQUALIZATION ANALYSIS

41. As indicated previously, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;<sup>40</sup> 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.<sup>41</sup>
42. The Taxpayer’s alleged comparable properties are not truly comparable to the Subject Property. The Subject Property is valued as a light industrial manufacturing and the alleged comparable properties are all valued as storage warehouses.<sup>42</sup> The income worksheets for the Taxpayer’s alleged comparable properties indicate that storage warehouses are subject to a higher capitalization rate and different rental rate factors.<sup>43</sup>
43. The Taxpayer did not provide any evidence to indicate that these factors should be the same for storage warehouses and light industrial manufacturing buildings. While the Taxpayer generally asserted that she had heard manufacturing type noises emanating from the Platinum Real Estate Property, there was no additional evidence that the Platinum Real Estate Property is used for light manufacturing or that light manufacturing is a legally permissible use for the Platinum Real Estate Property.
44. The Assessment Report contains alleged comparable properties as well. The property record cards for these alleged comparable properties indicate that they are also light industrial manufacturing and that they are assessed at a similar per square foot value as the Subject Property. The income worksheets for these alleged comparable properties indicates that any differences in valuation of the alleged comparable properties is directly

<sup>36</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>37</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>38</sup> *Id.* at 673, 94 N.W.2d at 50.

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

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

<sup>41</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999); See generally, *Krings v. Garfield County Board of Equalization*, 286 Neb. 352, 835 N.E.2d 750 (2013).

<sup>42</sup> See, property records cards for the Subject Property and the Taxpayer’s alleged comparable properties.

<sup>43</sup> See, Taxpayer’s alleged comparable properties’ property record cards.

attributable to differences between the Subject Property and the alleged comparable properties including size, age, and condition.

45. 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 years 2012. 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.

### **CONCLUSION**

46. The Taxpayer has not produced clear and convincing evidence that the assessed value of the Subject Property is grossly excessive.
47. 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.
48. 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.

### **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 2012 is Affirmed.
2. The taxable value of the Subject Property for tax year 2012 is \$695,800.
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 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 on July 2, 2014.

Signed and Sealed: July 2, 2014.

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Thomas D. Freimuth, Commissioner