

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

Andrew F. Foray,  
Appellant,

v.

Sarpy County Board of Equalization,  
Appellee.

Case No: 13R 055

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

Procedural Background

1. The Assessor assessed the Subject Property at \$132,669 for tax year 2013.
2. The Taxpayer protested this value to the County Board.
3. The County Board determined that the taxable value of the Subject Property was \$130,669 for tax year 2013.
4. The Taxpayer appealed the determination of the County Board to the Tax Equalization and Review Commission (the Commission).
5. A Single Commissioner hearing was held on June 18, 2014, at the Tax Equalization and Review Commission Hearing Room, Sixth Floor, Nebraska State Office Building, 301 Centennial Mall South, Lincoln, Nebraska, before Commissioner Robert W. Hotz.
6. Dean Jungers, an attorney, was present at the hearing for Andrew F. Foray (the Taxpayer).
7. Larry Houlton, an employee of the Sarpy County Assessor (the Assessor) and Jackie Morehead, Chief Deputy Sarpy County Assessor, were present for the Sarpy County Board of Equalization (the County Board).
8. The Subject Property (Subject Property) is improved with a single family residence consisting of 1,953 square feet of floor area located at 404 Sullivan Drive, Bellevue, Sarpy County, Nebraska, with a legal description of: LOT 7 WALK-A-PONY ADD & VAC 13TH AVE.

Applicable Law

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

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<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).

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>

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>
14. The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>8</sup>

## Analysis

15. Larry Houlton asserted that the Subject Property was originally assessed using a cost approach with depreciation derived from comparable sales.
16. The cost approach includes six steps:
  - (1) Estimate the land (site) value as if vacant and available for development to its highest and best use;
  - (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis;
  - (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence;
  - (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements;
  - (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost

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

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

- new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.<sup>9</sup>
17. An inspection of the Subject Property was completed on April 30, 2014. Based on the inspection, the Assessor developed a revised opinion of value of \$134,872. This new opinion of value was asserted by the County Board at the hearing.
  18. The Commission's Rules and Regulations do not allow the Commission to set taxable value of real property at an amount higher than previously noticed to the Taxpayer by the Assessor or the County Board 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>10</sup> The Commission notes that no notice as required by the Commission's Rules and Regulations was ever perfected for the 2013 tax year. There is no evidence that the Taxpayer was given notice in these proceedings of a value higher than \$132,669 for tax year 2013.<sup>11</sup> The Commission finds that it cannot set the taxable value of the Subject Property at an amount higher than previously noticed to the Taxpayer by the Assessor or by the County Board in these appeals.
  19. The Taxpayer produced a table of six alleged comparable properties, and their assessed values per square foot where the area was calculated by combining the gross living area of the properties and the basement areas of the properties. The Taxpayer asserted that the average assessment per square foot of the alleged comparable properties was \$39.12. The Taxpayer also produced the property record cards for the alleged comparable properties.
  20. The Taxpayer posited that the Subject Property's assessment per square foot was \$54.16. The Taxpayer opined that the Subject Property should be assessed at \$39.12 per square foot instead.
  21. The Commission notes that the Subject Property has several notable and significant differences than the alleged comparable properties including: (1) no basement area; (2) different style; and (3) different amenities.
  22. A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes.<sup>12</sup> The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods.<sup>13</sup> The comparison of assessed values of dissimilar parcels is not recognized as an appropriate approach.

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<sup>9</sup> International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

<sup>10</sup> 442 Neb. Admin. Code, ch 5, §016.02A (06/06/11).

<sup>11</sup> Even though the Assessor's Cost Detail of Building in the Property Record File at Exhibit 4, pages 11-13, indicated a taxable value of \$457,200 (with land added), the Assessor noticed assessed value to the Taxpayer for tax year 2013 at the same taxable value as determined by the County Board for tax year 2012 of \$420,000.

<sup>12</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>13</sup> *Id.*

23. The Taxpayer's approach in combining the basement area with the gross living area to determine square footage value is not identified in the Nebraska Statutes as an accepted approach for determining the actual value of the Subject Property for purposes of mass appraisal. Because the method is not identified in statute, proof of its professional acceptance as an accepted appraisal approach would have to be produced. No evidence has been presented to the Commission that this approach is a professionally accepted mass or fee appraisal approach.
24. Additionally, the Taxpayer's approach to valuation is similar to the sales comparison approach in that it seeks to compare assigned values of alleged comparable properties to the Subject Property to determine the actual value of the Subject Property; the most notable difference being that the sales comparison approach relies upon arm's length transactions of comparable properties instead of assessed values of other properties to determine the actual value of the Subject Property.
25. Even if comparing assessed values of alleged comparable properties to determine actual value was an appropriate method for determining actual value in Nebraska, the approach would have little, if any value, if the alleged comparable properties are not actually comparable.<sup>14</sup> This inherent weakness is also found in the sales comparison approach.<sup>15</sup>
26. Comparable properties used in a sales comparison approach must possess similar characteristics as the Subject Property.<sup>16</sup> Where characteristics are different, adjustments must be made to account for the effect on actual value attributable to the differences.<sup>17</sup>
27. These requirements for comparable properties used in a sales comparison approach enable the construction of a reasonable opinion of value for real property. In addition to not being professionally accepted as an appraisal technique, the Taxpayer's method suffers from the same inherent weakness as the sales comparison approach, and at a minimum should have accounted for differences between the Subject Property and the alleged comparable properties by appropriate adjustments.
28. The Taxpayer's opinion of value did not make any adjustments for characteristics that affect the actual value of the Subject Property and the alleged comparable properties.
29. The Commission gives the Taxpayer's opinion of value little probative weight.
30. A comparison of assessed values may be used to determine if properties in the same taxing district are equalized.
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.<sup>18</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

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<sup>14</sup> "Comparing assessed values of other properties with the subject property to determine actual value has the same inherent weakness as comparing sales of other properties with the subject property. The properties must be truly comparable." *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998).

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

<sup>16</sup> See generally, International Association of Assessing Officers, *Property Assessment Valuation*, at 169-79 (3rd ed. 2010).

<sup>17</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 297 (13th ed. 2008) (procedures for a sales comparison approach).

<sup>18</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

a disproportionate part of the tax.<sup>19</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>20</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>21</sup>

32. 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>22</sup>
33. At least two tests exist for determining if property within a taxing district is equalized: (1) does a comparison of the ratio of assessed to actual value indicate that properties are assessed at different levels of value;<sup>23</sup> and (2) are substantial similar properties valued at materially different levels of value.<sup>24</sup>
34. To determine if substantially similar properties are valued at materially different levels of value the Commission may review the assessed value per square foot of gross living area of the Subject Property and comparable properties.<sup>25</sup> However, the Commission notes that the Taxpayer’s calculations are not based upon the gross living area of the Subject Property or the alleged comparable properties.
35. Gross living area does not include any basement or attic area, whether finished or not.<sup>26</sup> Basement finish and finished above-grade living space do not cost the same to construct, and contribute differently to the actual value of real property. Generally, basement finish is less expensive to install and contributes less to the actual value of real property.<sup>27</sup>
36. Additionally, the Subject Property and the alleged comparable properties are not comparable. A comparison of the levels of value for equalization purposes is therefore given little probative weight.
37. Finally, the Taxpayer did not provide any ratios of the assessed values to the actual values for the Subject Property or any of the comparable properties.
38. The Commission finds that there is not clear and convincing evidence that the valuation placed on the Subject 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.

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<sup>19</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>20</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>21</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>22</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>23</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>24</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

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

<sup>26</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 225 (14th ed. 2013).

<sup>27</sup> See, Property Record Cards for the Subject Property and all comparable properties indicating that as recorded in *Marshall and Swift* basement finish is less expensive to install and contributes less to the actual value of real property.

39. 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.
40. The Taxpayer has not adduced clear and convincing evidence that the determination of the County Board is unreasonable or arbitrary.
41. The decision of the County Board should be affirmed.

## ORDER

### IT IS ORDERED THAT:

1. The Decision of the Sarpy County Board of Equalization determining the taxable value of the Subject Property for tax year 2013 is affirmed.
2. The taxable value of the Subject Property for tax year 2013 is \$130,669.
3. This Decision and Order, if no further action is taken, shall be certified to the Sarpy County Treasurer and the Sarpy 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 2013.
7. This Decision and Order is effective on June 27, 2014.

Signed and Sealed: June 27, 2014

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Robert W. Hotz, Commissioner