

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

Pinnacle Bancorp, Inc.,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 10C 245, 11C 156 & 11C 157

Decision and Order Affirming the Douglas  
County Board of Equalization

**For the Appellant:**

Alison Johnson,  
Senior Financial Analyst,  
Pinnacle Bancorp, Inc.,

**For the Appellee:**

Matthew J. Boever,  
Deputy Douglas County Attorney

The appeals were heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.  
Commissioner Salmon, affirming; Commissioner Freimuth dissenting.

**I. THE SUBJECT PROPERTY**

The Subject Property consists of two commercial parcels located in Douglas County. The parcel in Case No. 10C 245 was vacant as of January 1, 2010, and the same parcel in Case No. 11C 157 was improved with a 59,998 square foot office building as of January 1, 2011. The legal description of the parcel is found at Exhibit 2, page 3 in 10C 245 and Exhibit 2, page 5 in 11C 157. The property record cards for the parcel in 10C 245 and 11C 157 are found in Exhibit 2 of both appeals. The parcel in 11C 156 is a vacant corner lot. The legal description is found at Exhibit 2 page 4. The property record card is found in Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property in Case No. 10C 245 was \$1,821,200 for tax year 2010.<sup>1</sup> Pinnacle Bancorp, Inc. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and

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<sup>1</sup> E1:1.

requested an assessed valuation of \$830,732.<sup>2</sup> The Douglas County Board determined that the assessed value for tax year 2010 was \$1,821,200.<sup>3</sup>

The Douglas County Assessor determined that the assessed value of the Subject Property in Case No. 11C 157 was \$6,491,400 for tax year 2011.<sup>4</sup> Pinnacle Bancorp, Inc. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$5,612,100.<sup>5</sup> The Douglas County Board determined that the assessed value for tax year 2011 was \$6,491,400.<sup>6</sup>

The Douglas County Assessor determined that the assessed value of the Subject Property in Case No. 11C 156 was \$624,300 for tax year 2011.<sup>7</sup> Pinnacle Bancorp, Inc. (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$450,000.<sup>8</sup> The Douglas County Board determined that the assessed value for tax year 2011 was \$624,300.<sup>9</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on October 17, 2012.

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>10</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>11</sup>

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<sup>2</sup> E4:1.

<sup>3</sup> E1:1.

<sup>4</sup> E1:1.

<sup>5</sup> E4:1.

<sup>6</sup> E1:1.

<sup>7</sup> E1:1.

<sup>8</sup> E4:1.

<sup>9</sup> E1:1.

<sup>10</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>11</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

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>12</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>13</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>14</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>15</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>16</sup>

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>17</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>18</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

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<sup>12</sup> *Id.*

<sup>13</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>14</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>15</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>16</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>17</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>18</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

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>19</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>20</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>21</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>22</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>23</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>24</sup>

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

Allison Johnson, a Senior Financial Analyst for Pinnacle Bank, testified that in June 2011 adjacent properties sold for as little as \$6 per square foot. The Taxpayer did not provide any property record cards or real estate transfer sheets for the alleged comparable properties. Johnson contended that the County Assessor’s comparable properties, contained in the County’s Assessment Report of each parcel found in Exhibit 2 of all appeals, were located in a different area of Omaha, and were not truly comparable. The Taxpayer also contended that the land values should be decreased due to economic recession.

The only evidence in the record regarding economic recession is the testimony of Greg Weisheipl, Senior Commercial Appraisal Manager for the Douglas County Assessor’s Office, that, according to the National Bureau of Economics the recession occurred from December 2007 to June 2009, and that the Subject Property in 11C 157 was purchased in 2010, after the end of the recession.

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<sup>19</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

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

<sup>21</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>22</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>23</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>24</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

The Commission finds that the Taxpayer did not present competent evidence of the actual value of the Subject Property. 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>25</sup> The Commission notes that the Land Sales Comparables provided in the Assessment Reports are only provided to illustrate equalization and valuation and are not all inclusive of the sales used to value the Subject Property.<sup>26</sup> Additionally, the Assessment Reports indicate that the County Assessor used current and reliable data to value the land component of the Subject Property.<sup>27</sup>

## V. EQUALIZATION

### A. Law

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”<sup>28</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>29</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>30</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>31</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>32</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>33</sup> The constitutional requirement of

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<sup>25</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>26</sup> See, E2:12 in appeal 11C-157.

<sup>27</sup> See, E2:5 in appeal 10C-245 (stating that sales through July 1, 2009 were used to value the Subject Property’s land component); E2:11 in appeal 11C-157 (indicating that the County Assessor maintains an “ongoing sales confirmation and validation program for property transactions used in developing value”); and E2:6 (indicating that the County Assessor used sales from July 1, 2007 through January 1, 2011 to determine the value of the Subject Property).

<sup>28</sup> *Neb. Const.*, Art. VIII, §1.

<sup>29</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>30</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>31</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>32</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>33</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).

uniformity in taxation extends to both rate and valuation.<sup>34</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>35</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>36</sup>

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

The Taxpayer contended that other parcels in the Subject Property’s SID were assessed at different levels of value per square foot, with the average value per square foot being \$6.50. The Taxpayer did not provide any property record cards to indicate the assessed values of any alleged comparable properties.

Weisheipl testified that any variation in land value within the SID was attributable to difference in the size of parcels, and application of a developer’s discount to those properties still owned by the developer.

The use of a developer’s discount to determine the actual value of real property for ad valorem tax purposes has not been addressed by Nebraska Courts. However, the issue has been addressed by several courts in other jurisdictions.<sup>37</sup> Additionally, the Commission has previously held that the use of a discounted cash flow analysis, or application of a developer’s discount, to determine the assessed value of real property violated the principles and

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<sup>34</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>35</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>36</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>37</sup> See, *Tramburelli Properties Association v. Borough of Creskill*, 308 N.J. Super. 326, 705 A.2d 1270 (N.J. Super.Add.Div. 1998) (holding that the use of an absorption discount did not violate New Jersey ad valorem real property tax scheme in the limited instances where the property was assessed at a highest and best use of residential but was currently used for another use, and where the parcel had yet to be legally subdivided into individual lots); *Board of Equalization of Salt Lake County v. Utah State Tax Commissioner ex re. Benchmark, Inc.*, 864 P.2d 882 (1993) (holding that use of an absorption discount violated both Utah Constitutional provisions for uniformity and the statutory scheme for the application of ad valorem taxes); *Mathais v. Department of Revenue of the State of Oregon*, 312 Or. 50, 817 P.2d 272 (1991) (holding that a statutory scheme which can best be described as permitting the use of a discounted cash flow analysis to value certain undeveloped properties for ad valorem tax purposes violated the Oregon Constitutional provisions for uniformity); *Edward Rose Builing Company v. Independence Township*, 436 Mich. 620, 462 N.W.2d 325 (1990) (holding a wholesale discount would violate the states constitutional requirement for uniformity); *Hixon v. Lario Enterprises, Inc.*, 257 Kan. 377, 892 P.2d 507 (1995) (holding use of a developer’s discount would violate the statutory scheme for valuing property for ad valorem tax purposes); *St. Leonard Shores v. Supervisor of Assessments of Calvet County*, 307 Md. 441, 514 A2d 1215 (1985) (rejecting the use of a developer’s discount to value property for ad valorem tax purposes).

requirements of Nebraska Statute.<sup>38</sup> The Commission recognizes that the holdings and reasoning from other jurisdictions are persuasive only, and not controlling. However, the Commission finds these holdings and reasoning instructive.

Nebraska Statutes require that real property subject to taxation be valued at its actual value unless the real property meets the definition of agricultural or horticultural land, or historically significant real property.<sup>39</sup> Nebraska Statutes section 77-112 defines “actual 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 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 consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.

Nebraska Statutes further defines taxable value, “[t]axable value shall be as described in section 77-201 and shall have the same meaning as assessed value.”<sup>40</sup>

Nebraska Statute requires the Subject Properties to be assessed at actual value. Weisheipl testified that the County Assessor instead valued other properties in the county at an amount less than actual value.

While it is true that a developer’s discount is a generally accepted appraisal technique, the applicability of this technique is also limited. “The [subdivision development analysis] technique is most useful for reporting the market value for a group of subdivision lots, whether

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<sup>38</sup> See, *CAE Enterprises LLC v Sarpy*, 08C-002 (July 14, 2009); *Palisades Development LLC v Sarpy*, 08R-863-68 (August 11, 2010); *Savanna Shores Development LLC v Sarpy*, 08R-276-87 (August 11, 2010). (Available on the Commission’s website at [terc.ne.gov](http://terc.ne.gov)).

<sup>39</sup> Neb. Rev. Stat. § 77-201 (Reissue 2009).

<sup>40</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

existing or proposed. The method uses what is known as a *bulk sales* scenario to develop the value of all lots to one purchaser.”<sup>41</sup> In other words, the discounted cash flow analysis, or developers’ discount does not value a parcel individually, but instead determines the aggregate value of a group of parcels to a developer or investor.

Nebraska Law requires an assessor to prepare an assessment roll each year.<sup>42</sup> Nebraska Statute requires that the assessment roll list the number of lots comprising the parcel and the value of the parcel.<sup>43</sup> Nebraska Statutes define a “parcel”:

Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel.<sup>44</sup>

The Commission finds that because the valuation of a single lot as a parcel is required by Nebraska Statute, that is was not permissible for the County Assessor to value undeveloped parcels at less than 100% of actual value, and that it was statutorily impermissible for the County Assessor to value several parcels as part of one holding.

Additionally, when discussing the strength of a value indication derived from a discounted cash flow analysis, the literature states that, “[t]he value indication is most persuasive when the sales comparison method provides additional support.”<sup>45</sup> In other words, a discounted cash flow analysis should be supported by the sales comparison approach.

While the Commission acknowledges that there may be some justifiable policy reasons for desiring a lower tax rate on undeveloped lots, this policy would not trump the requirement that all real property, other than agricultural and horticultural real property, in Nebraska be assessed at one hundred percent of actual or fair market value. Additionally, this Commissioner would find that the Commission has no authority or power in hearing and deciding a valuation appeal to implement this policy.

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<sup>41</sup> Appraisal Institute, *The Appraisal of Real Estate*, at 370 (13th edition 2008).

<sup>42</sup> Neb. Rev. Stat. §77-1303 (2012 Cum. Supp.).

<sup>43</sup> *Id.*

<sup>44</sup> Neb. Rev. Stat. §77-132 (Reissue 2009).

<sup>45</sup> Appraisal Institute, *The Appraisal of Real Estate*, at 370 (13th edition 2008).

The Commission finds that evidence that the County Assessor valued other properties in the SID at less than actual value due to the application of a developer's discount is clear and convincing evidence that the valuations placed on the Subject Property when compared with valuations placed on similar property are grossly excessive and are the result of systematic will or failure of a plain legal duty. However, the Taxpayer did not provide evidence establishing the percentage of the developer's discount, or the assessed value per square foot of similarly situated properties receiving a developer's discount.

The Commission notes that Taxpayer asserted in its 2010 protest to the County Board that the Subject Property was valued at \$14.24 per square foot, while adjacent properties were valued at \$7.00 per square foot and \$6.50 per square foot.<sup>46</sup> Additionally, the Commission notes that the Taxpayer asserted in its 2011 protest to the County Board that the Subject Property was valued at \$13.79 per square foot, while adjacent properties were valued at \$7.80 per square foot, \$8.58 per square foot, and \$8.97 per square foot.<sup>47</sup> The Taxpayer also alleged comparable sales of \$6.00 per square foot.<sup>48</sup> The Taxpayer did not provide property record cards for any of the adjacent properties for either tax year.<sup>49</sup> The Taxpayer also did not provide any evidence from a source with personal knowledge or official records documenting the alleged sale prices. Without further information the Commission is unable to determine the reduction in per square foot assessment attributable to an applied developer's discount or differences in size of the parcels. The Commission does not have the evidence necessary to evaluate the Taxpayer's assertions or exhibits prepared and presented by Johnson.

The value of properties may be different based upon the characteristics of the property. Comparable properties share similar use (residential, commercial industrial, or agricultural), physical characteristics (size, shape, and topography), and location.<sup>50</sup> The Taxpayer did not provide evidence of the size, shape, or topography of any of the alleged comparable properties.

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<sup>46</sup> See, E4:1 appeal 10C-245.

<sup>47</sup> See, E4:1 appeal 11C-156 and E4:1 appeal 11C-157.

<sup>48</sup> *Id.*

<sup>49</sup> The Commission's Order for Hearing and Notice dated August 14, 2012, and found in each case file for the above captioned cases, in paragraph 10, requires the production of property records cards for any properties which the parties will assert are comparable to the Subject Property. The Commission notes that these property record cards often have the most reliable information about pertinent characteristics of a subject property and any alleged comparable properties.

<sup>50</sup> See generally, International Association of Assessing Officers, *Property Assessment Valuation*, at 169-79 (3rd ed. 2010).

The Commission notes that the Assessments Reports indicate that differences in valuation between the Subject Property and adjacent lots may be the result of physical differences between the properties.<sup>51</sup> The dissent relies in part on comments made by a referee during the protest of appeal 11C-157 when determining that the land value of the Subject Property was not equalized with other properties.<sup>52</sup> However, none of the referees testified at the hearing. The Commission is also unaware of what evidence the referee used when reaching his opinion. Finally, the Commission notes that the other referees in all three appeals rejected the Taxpayer's assertions.<sup>53</sup>

The Commission finds that without further evidence the Commission cannot quantify the amount of relief to apply to Subject Property, and, therefore, affirms the decisions of the County Board of Equalization.

## 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 there is not clear and convincing evidence that the valuations placed on the Subject Property when compared with valuations placed on similar property are grossly excessive and are the result of systematic will or failure of a plain legal duty.

For all of the reasons set forth above, the appeal of the Taxpayer is denied.

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<sup>51</sup> E2:5 in appeal 10C-245; E2:16 in appeal 11C-157; and E2:8 in appeal 11C-156.

<sup>52</sup> See, E3:3 in appeal 11C-157.

<sup>53</sup> See, E3:2-3 in appeal 10C-245; E3:3 in appeal 11C-157; and E3:3-4 in appeal 11C-156.

## 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 affirmed.<sup>54</sup>
2. The assessed value of the Subject Property is:

10C 245

<u>Land</u>	\$1,821,200
Total	\$1,821,200

11C 157

Land	\$1,763,700
<u>Improvements</u>	\$4,727,700
Total	\$6,491,400

11C 156

<u>Land</u>	\$624,300
Total	\$624,300

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 years 2010 and 2011.

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<sup>54</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.

7. This Decision and Order is effective for purposes of appeal on March 28, 2014.

Signed and Sealed: March 28, 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. I concur with Commissioner Salmon that the County Board's determinations in Case Nos. 10C-245, 11C-156 and 11C-157 were arbitrary or unreasonable due to the County's application of a developer's discount to properties near the Subject Properties.
2. In the case where it is determined that the County Board's determination was unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.<sup>55</sup> I would find that the best evidence of value of the land component in each case is the Taxpayer's protest calculation submitted to the County Board in tax years 2010 and 2011.<sup>56</sup>
3. The Taxpayer expressed 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.<sup>57</sup> For example, *Property Assessment Valuation* states that assessment officials are required to review factors such as vacancy factors and distressed sale rates as a part of developing and maintaining market area databases.<sup>58</sup> Additionally, in addressing mass appraisal techniques such as the land 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

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<sup>55</sup> See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

<sup>56</sup> These protest calculations are found at Exhibit 4 for each case.

<sup>57</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

<sup>58</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**<sup>59</sup>

4. The New Jersey Tax Court stated as follows regarding consideration of “current market conditions” in a 2013 opinion that reduced the assessed value of the Borgata casino from \$2.26 billion to \$880 million in tax year 2009 and to \$870 million in tax year 2010 due to the adverse impact of the national economic crisis and increased gaming competition (the \$2.26 billion assessment stemmed from a reappraisal for tax year 2008, similar to the experience of the Taxpayer herein):

The national economy began to soften in late 2007, primarily due to the subprime housing crisis. By October 1, 2008, the economy suffered a significant downturn triggered by the collapse of the mortgage markets and the failure of Bear Stearns and Lehman Brothers. The government-sanctioned bailout of Bear Stearns as a banking institution “too big to fail” set off alarms concerning the stability of the American banking system. The mid-September 2008 collapse of Lehman Brothers led to a sharp drop-off in the stock market and the beginning of the worst recession since the Great Depression. . . .

By October 1, 2009, the national economic condition had further deteriorated. According to one expert who testified at trial “as of October 1, 2009, the macro economy had entered into what many commentators termed a ‘New Normal,’ meaning that the developed nations would enter into a prolonged period of low growth, high unemployment and a need for de-leveraging. This would add to the uncertainty surrounding the gaming industry in general and in Atlantic City specifically, as of the valuation date.” Unemployment rates started to increase significantly in 2008 and were still rising as of September 2009. This fact is significant because low unemployment rates are indicative of increased consumer spending on such discretionary items as gaming and entertainment. The perception that the nation’s economic trouble was not a transitory downturn, but a long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.<sup>60</sup>

5. 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

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<sup>59</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

<sup>60</sup> *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at pgs. 1 – 2, 8 – 9 (New Jersey Tax Court 2013).

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 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>61</sup>

6. 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>62</sup>
7. The County Board submitted Assessment Reports for tax years 2010 and 2011 for the improved parcel (Case Nos. 10C-245 and 11C-157). The Taxpayer purchased this parcel in February 2008, which preceded the time much later in 2008 when the general public became aware of the severity of the economic crisis as indicated in the timeline noted above in the Borgata case. Additionally, in support of the Taxpayer’s assertion that current market conditions changed significantly after the February 2008 purchase, the Taxpayer’s witness testified that construction of the Subject Property’s improvement component was delayed until 2010 in light of the economic crisis.
8. Similarly, the County’s Assessment Reports for Case Nos. 10C-245 and 11C-157 include the same three alleged comparables to support the County Board’s land valuation determinations for tax years 2010 and 2011. These alleged comparable sales occurred in February 2007, January 2008 and February 2008, each of which preceded the time when the general public became aware of the severity of the economic crisis. Thus, the County Board’s land value determinations for the improved parcel for tax years 2010 and 2011 were derived from 2007 and 2008 data that preceded the onset of the economic crisis.
9. Based on the testimony of the Taxpayer and Mr. Weisheipl, an employee of the County Assessor’s Office, together with a review of documentary evidence, I would find that the County did not sufficiently consider the impact of the national economic crisis on the local market for tax years 2010 and 2011. Thus, based on this finding and the above authorities, I would also find that the County Board did not sufficiently consider “current market conditions” for purposes of valuing the land component of the Subject Property for tax years 2010 and 2011.
10. I also note that the County Board’s Referee in 2011 for the improved parcel that is the subject of appeal in Case Nos. 10C-245 and 11C-157 wrote as follows: "Equalization argument by property owner appears reasonable with subject commercial subdivision data supplied."<sup>63</sup>

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<sup>61</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>62</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>63</sup> E3:3, Case No. 11C-157.

11. With respect to the unimproved parcel that is the subject of appeal in Case No. 11C-156, I base my best evidence decision on Mr. Weisheipl's testimony concerning the application of a developer's discount to parcels near the Subject Property.
12. In summary, I would find that Taxpayer's protest calculations submitted to the County Board in tax years 2010 and 2011, which are derived from the assessed values of land near the Subject Property, are the best evidence of value of the land component in each case under appeal herein. Thus, I would find that the land values in the cases under appeal herein are as follows:
  - Case No. 10C-245, Exhibit 4: \$830,732
  - Case No. 11C-157, Exhibit 4: \$884,400
  - Case No. 11C-156, Exhibit 4: \$450,000

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Thomas D. Freimuth, Commissioner