

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

Robert M. & Laurie A. Barber,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 12R 382

Decision and Order Reversing 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 residential parcel located at 6716 N. 56 Street, Omaha, Nebraska, with a legal description of: MEINERSHAGEN ADD LOT 3 BLOCK 0 IRREG LTS 2 & 3.
2. The Douglas County Assessor assessed the Subject Property at \$192,900 for tax year 2012.
3. Robert M. & Laurie A. Barber (herein referred to together and separately as the “Taxpayer”) protested this value to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested a value of \$125,000.
4. The County Board determined that the assessed value of the Subject Property was \$183,500 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 July 29, 2014, at the Tax Equalization and Review Commission Hearing Room, Sixth Floor, Nebraska State Office Bldg., 301 Centennial Mall South, Lincoln, Nebraska, before Commissioner Thomas D. Freimuth.
7. Laurie A. Barber was present at the hearing for the Taxpayer.
8. Larry Thomsen, an appraiser with the Douglas County Assessor’s Office (herein referred to as the “County Appraiser”), was present for the County Board.

**SUMMARY OF HEARING DOCUMENTS & STATEMENTS**

9. The Property Record Card (PRC) for the Subject Property indicates that the County Board’s \$183,500 determination for tax year 2012 includes \$12,700 for land and \$170,800 for the improvement components.
10. The PRC’s sales history indicates that the Taxpayer purchased the Subject Property for \$82,000 in March of 1995.
11. The Taxpayer asserted that as of the date of assessment the actual value of the Subject Property was affected by multiple deferred maintenance issues, inefficient HVAC, deteriorated deck and above ground pool, and sagging roof areas.
12. The Taxpayer offered a Comparative Market Analysis (CMA) performed by a residential real estate broker that asserted that the value of the Subject Property would be \$ 70.76 per spare foot or \$163,450 between December 2011 and June 2012.
13. The Taxpayer offered the PRC’s for three alleged comparable properties used in the CMA.

14. The County Appraiser offered a revised opinion of value for the Subject property of \$172,183 for tax year 2012, rounded to \$172,200. The County Appraiser stated that the Subject Property was inspected in November of 2013. As a result of this inspection the condition rating of the Subject Property was changed from “Good” to “Average.” Additionally the determination square feet of basement finish was changed and the amount of deck area was changed. The County Appraiser additionally asserted that the value of the Subject Property should be reduced by removing the value of the deck component for tax year 2012 due to the deck’s deteriorated condition in 2012 and replacement in 2013.

### STANDARD OF REVIEW

15. 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>
16. 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>
17. 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>
18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</sup>
19. 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>

### GENERAL VALUATION LAW

20. 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>8</sup>

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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).

<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).

21. “Actual value, market value, and fair market value mean exactly the same thing.”<sup>9</sup>
22. 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>10</sup>
23. All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>11</sup>
24. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>12</sup>
25. 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>13</sup>

### VALUATION ANALYSIS

26. The CMA presented by the Taxpayer derived an opinion of value in the amount of \$163,450 for the Subject Property for tax year 2012 based on the average assessed values and sales prices of alleged comparable properties.
27. The CMA’s opinion of value is based on the assessed values and sales prices of alleged comparable properties can best be described as an attempted sales comparison approach. In the sales comparison approach an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property.<sup>14</sup> An opinion of value based on use of the sales comparison approach requires use of a systematic procedure.<sup>15</sup> This process requires an analysis of sales prices, not assessed values.<sup>16</sup> This approach also requires that analyzed properties must be comparable to the Subject Property, and receive adjustments for any differences.<sup>17</sup>
28. A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes.<sup>18</sup> The approaches identified are the sales comparison approach, the income approach, the cost approach and other

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<sup>8</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>9</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>10</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>11</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>12</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

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

<sup>14</sup> *The Appraisal of Real Estate*, Appraisal Institute, at 297 (13th ed. 2008).

<sup>15</sup> *Id.* at 301-302.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

professionally accepted mass appraisal methods.<sup>19</sup> The comparison of assessed values of dissimilar parcels is not recognized as an appropriate approach.

29. An examination of the three alleged comparable properties whose PRCs were presented to the Commission indicates that the properties have several differences in terms of characteristics in comparison to the Subject Property, including quality, condition, age, size, style, amenities and number of improvements. The Commission is unable to make this same inquiry into the properties listed in the CMA whose PRC's were not presented. Additionally, the CMA did not use sales prices exclusively, but instead relied in part upon an examination of assessed values. The CMA's approach for determining the actual value of the Subject Property's improvement component does not meet the requirements of the sales comparison approach.<sup>20</sup>
30. The CMA's opinion of value relies, at least in part, on averaging the per square foot assessed value attributable to the improvements of several alleged comparable properties. This approach is not identified in the Nebraska Statutes as an accepted method for determining the actual value of the Subject Property as defined by statute.<sup>21</sup> Because the method used by the CMA is not identified in statute, proof of its professional acceptance as an accepted fee or mass appraisal would have to be produced. No evidence has been presented to the Commission that the CMA's approach is a professionally accepted mass or fee appraisal approach.
31. The weight of authority is that assessed value is not in and of itself direct evidence of actual value.<sup>22</sup> Additionally, "[s]implify averaging the results of the adjustment process to develop an averaged value fails to recognize the relative comparability of the individual transactions as indicated by the size of the total adjustments and the reliability of the data and methods used to support the adjustments."<sup>23</sup>
32. A comparable sale provides weight towards the actual value of the Subject Property when it possesses the same physical, functional, and locational characteristics.<sup>24</sup> If an alleged comparable property has different physical, functional, and locational characteristics, then the adjustments must be made to account for these differences.<sup>25</sup>
33. The documents and statements of the County's Appraiser indicate that the County Board's determination of value for tax year 2012 was based on incorrect information about the Subject Property's condition, square footage and amenities.
34. The County Appraiser asserted that his revised opinion of value based on the revised condition rating, correction of basement square footage and removal of the value of the deck component was \$172,183 for tax year 2012, rounded to \$172,200.
35. The Commission finds that it was unreasonable or arbitrary for the County Board to adopt an opinion of value that assigned an incorrect condition rating to the Subject Property and attributed incorrect square foot determinations and amenities to the Subject Property for tax year 2012.

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<sup>19</sup> *Id.*

<sup>20</sup> See, *The Appraisal of Real Estate*, Appraisal Institute, at 301-302 (13th ed. 2008).

<sup>21</sup> See, Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>22</sup> See, *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974).

<sup>23</sup> *The Appraisal of Real Estate*, Appraisal Institute, at 308 (13<sup>th</sup> ed. 2008).

<sup>24</sup> See generally, Neb. Rev. Stat. 77-1371 (Reissue 2009) (defining comparable sale). See generally also, International Association of Assessing Officers, *Property Assessment Valuation*, at 169-79 (3rd ed. 2010).

<sup>25</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 297 (13th ed. 2008) (requiring adjustments for comparable sales to account for differences with the Subject Property).

36. The Commission finds that the actual value of the Subject Property for tax year 2012 should be \$172,200.

### GENERAL EQUALIZATION LAW

37. “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>26</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>27</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>28</sup>
38. 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>29</sup>
39. 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>30</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>31</sup>
40. The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>32</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>33</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>34</sup>
41. “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>35</sup>

### EQUALIZATION ANALYSIS

42. As indicated above, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;<sup>36</sup> or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property

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<sup>26</sup> *Neb. Const.*, Art. VIII, §1.

<sup>27</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>28</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>29</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>30</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>31</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>32</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>33</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>34</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>35</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>36</sup> See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

**regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.<sup>37</sup>

43. For equalization analysis purposes, the Taxpayer submitted PRC's for three parcels.
44. A review of the PRC's submitted by the Taxpayer indicates that the properties submitted for consideration are not truly comparable with the Subject Property. The size of the improvements, land components, and physical characteristics vary significantly. A review of the per square foot assessed value is only applicable where properties are substantially similar.
45. The Commission finds that the Taxpayer's alleged comparable properties are not substantially similar to the Subject Property for purposes of equalization review.
46. 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 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 by the Taxpayer.

### **CONCLUSION**

47. The Taxpayer has 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 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 vacated and reversed.

### **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 Vacated and Reversed.
2. The taxable value of the Subject Property for tax year 2012 is:

Land	\$ 12,700
<u>Improvements</u>	<u>\$159,500</u>
Total	\$172,200

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.

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<sup>37</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

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 October 29, 2014.

Signed and Sealed: October 29, 2014.

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Thomas D. Freimuth, Commissioner