

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

Mustapha Friha,  
Appellant,

v.

Douglas County Board of Equalization,  
Appellee.

Case No: 11R 533

**Amended**

Decision and Order Reversing the  
Determination of the Douglas County Board  
of Equalization  
**(All Changes in Bold, Amended Dissent  
Language Conforms Page 21 with First  
Section of Dissent)**

**For the Appellant:**

Mustapha Friha,  
Pro Se

**For the Appellee:**

Malina M. Dobson,  
Douglas County Attorney

Heard before Commissioners Nancy J. Salmon and Thomas D. Freimuth.

**I. THE SUBJECT PROPERTY**

The Subject Property is a residential parcel located in Douglas County. The parcel is improved with a 3,212 square foot home. The legal description of the parcel is found at Exhibit 2, page 2. The property record card for the Subject Property is found at Exhibit 2.

**II. PROCEDURAL HISTORY**

The Douglas County Assessor determined that the assessed value of the Subject Property was \$367,300 for tax year 2011. Mustapha Friha (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board). The County Board determined that the assessed value for tax year 2011 was \$367,300.<sup>1</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on April 7, 2014.

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<sup>1</sup> (E1)

### III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.<sup>2</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>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>

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> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</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>7</sup> The County Board need not

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<sup>2</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>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).

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>8</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>9</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>10</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 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>11</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>12</sup> “Actual value, market value, and fair market value mean exactly the same thing.”<sup>13</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>14</sup> All real property in Nebraska subject to taxation shall be assessed as of

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<sup>8</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

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

<sup>13</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>14</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

January 1.<sup>15</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>16</sup>

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

The Taxpayer asserted that he began building the house located on the Subject Property in 2008, but that his contractor went out of business before the house was completed. He testified that he moved into the house in 2010. At that time a majority of the house was completed, but elements of the house were not completed as of the date of assessment including: (1) garage finish; (2) basement finish; (3) exterior paint; (4) fireplace mantle; (5) back splash; (6) shelves in closets; (7) pantry; (8) outside landscaping; and (9) basement waterproofing. The Taxpayer testified that most of the uncompleted portions of the Subject Property could be described as touch up or finish work, and that critical components including plumbing, electricity, and floor coverings were completed prior to occupancy of the residence. The Taxpayer was required to fix some problems soon after occupying the home including fixing loose exterior finishing and repairing some cracks. He asserted that construction of the home was not completed until July 2012.

Additionally, the Taxpayer testified that County Assessor had incorrectly determined the amount of rooms, number of baths, number of fixtures, and total area of the Subject Property. The Taxpayer asserted that a city building permit obtained for the construction of the Subject Property listed the area of the improvement as 2,944 square feet. He asserted that it was unreasonable for the County Assessor to list a greater area for the Subject Property. The Taxpayer never measured the home himself, and refused the opportunity to accompany the County Assessor when the home was measured in 2012.<sup>17</sup> Finally, the Taxpayer asserted that the economic downturn had resulted in decreased housing prices which would require a lower actual value. The Taxpayer asserted that the assessment history for the comparable properties contained in the County Assessor's Assessment Report supported this conclusion.<sup>18</sup> The Taxpayer did not quantify the impact of this economic downturn on the Subject Property.

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<sup>15</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

<sup>16</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>17</sup> See, E2:8.

<sup>18</sup> See, E2:21, 29, and 37.

Larry Thomsen, the Residential Supervisor for the Douglas County Assessor's Office, testified that the County Assessor inspected the Subject Property in July 2012.<sup>19</sup> He testified that as a result of the inspection the number of additional fixtures was changed from 4 to 3. The Account Notes found in the Assessment Report also indicate that the number of rooms was decreased to 11 and the number of baths was decreased to 3. The cost detail of the building indicates that the Taxpayer was assessed for 3.5 baths, and that the County Assessor assigned a 6% physical depreciation (\$21,255) to the Subject Property.<sup>20</sup> Thomsen acknowledged that the changes in quantities and types of physical characteristics would affect the actual value of the Subject Property under the cost approach, but he could not quantify the impact.

Thomsen testified that it was not uncommon for the County Assessor to arrive at a different area for improvements than were listed on the building permits. He posited that this could be caused by the city measuring the interior square feet of the Subject Property, while the County Assessor measures the exterior.<sup>21</sup> He testified that the County Assessor's Office received summaries of building permits which generally include the area of new improvements. These summaries are provided to the County Assessor's Office from the city planning office, and do not include the actual blue prints or actual building permits.

Concerning the economic crisis, Thomsen testified that he was aware that general economic conditions had impacted several markets within the Douglas County. He testified that there was a greater impact on high end property, over \$600,000, than on lower value properties in tax year 2011. However, Thomsen stated that the sales used to set values for the Subject Property would have already included any economic impact that may have been affecting the Subject Property. The Commission notes that the Subject Property was assigned a .95 neighborhood adjustment.<sup>22</sup>

### **C. Analysis**

While the Taxpayer asserted that because components of the home were not completed as of the date of assessment, the assessed value was excessive. The Taxpayer did not quantify the impact of these deficiencies would have on the actual value of the Subject Property. The County

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<sup>19</sup> See also, E2:8.

<sup>20</sup> E2:11.

<sup>21</sup> See, E2:8 (indicating the area was determined by measuring the exterior of the Subject Property).

<sup>22</sup> E2:11.

Assessor assigned a 6% physical depreciation (\$21,255) to the Subject Property.<sup>23</sup> The Commission finds that there is not clear and convincing evidence that the County Assessor did not make an appropriate adjustment for the Taxpayer's asserted deficiencies.

Similarly, the Taxpayer asserted that the economic downturn affected the actual value of the Subject Property. This assertion was not disputed by the County Board. However, the County Assessor's method of valuation considers the impact of any economic environment. Additionally, the Assessment Report indicates that the County Assessor analyzed each neighborhood independently to determine the differences in economic impact in each neighborhood.<sup>24</sup> Further, an examination of the County Assessor's comparable properties indicates two properties that sold for less than assessed value and one property that sold for more than assessed value.<sup>25</sup> This is the expected result from a mass appraisal method that appropriately values properties at actual value and not sale price.

Mass appraisal models should produce similar values to sales prices as measured through an acceptable method of performance analysis, such as a ratio study, but it is expected that the model produced values will differ to some degree from the sales price.<sup>26</sup> Any two individuals, whether assessors, appraisers, or private purchasers, may have reasonable but different opinions of the actual value for a parcel of real property.<sup>27</sup> The mere fact that some properties sold for less than their assessed values does not indicate that the County Assessor failed to examine the current market conditions and make appropriate adjustments.

Finally, Thomsen acknowledged that the Taxpayer's assertion that characteristics assigned to the Subject Property were incorrect in the cost approach utilized by the County Assessor to value the Subject Property and relied upon by the County Board in its' determination is correct. The Assessment Report indicates that the Subject Property should only be assessed for 3 baths and 3 additional fixtures. While Thomsen indicated that these errors would affect the actual value of

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<sup>23</sup> E2:11.

<sup>24</sup> E2:11 (County Assessor assigned an individual neighborhood factor of .95).

<sup>25</sup> See, E2:13.

<sup>26</sup> See generally, IAAO *Standard on Ratio Studies*, (01/10).

<sup>27</sup> See generally, *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999) (citing Neb. Rev. Stat. §77-112).

the Subject Property, was unable to quantify the impact at the hearing. The Taxpayer did not provide any quantification of his assertions.

The Commission finds that it was unreasonable and arbitrary for the County Board to accept the County Assessor's value which relied upon incorrect characteristics for the improvements located on the Subject Property. The Cost Detail for the Subject Property indicates that the Subject Property was assessed \$10,204 for 4 additional fixtures or \$2,251 per fixture.<sup>28</sup> The uncontroverted testimony indicates that the Subject Property only had three additional fixtures as of the date of assessment. The Commission finds that \$2,251 should be removed from the replacement cost new (RCN) of the Subject Property for a total RCN of \$349,125, and a total new RCN less depreciation of \$314,060. While the Property Record Card also indicates an incorrect number of bathrooms and rooms for the Subject Property, the difference in the actual number of bathrooms and rooms would not affect the actual value of the Subject Property under the cost approach.<sup>29</sup>

The Subject Property's Property Record Card includes an assessment history that indicates that the Subject Property was assessed for \$336,200 for tax year 2012.<sup>30</sup> There is no basis contained in evidence that this value should be applied to tax year 2011, no evidence concerning why the County Assessor's opinion of value changed, and no evidence that the condition of the Subject Property and market conditions were similar on January 1, 2011, and January 1, 2012. The assessed value for real property may be different from year to year, dependent upon the circumstances.<sup>31</sup> Markets may change and the condition of the Subject Property may change from year to year. For these reasons, the Commission finds that the subsequent year's assessment is not relevant to the prior year's valuation. There is no evidence that any change in assessed value from tax year 2011 to tax year 2012 was based on any of the arguments presented to the Commission.

The dissent asserts that the use of the assessed value for tax year 2012 for tax year 2011 is supported by the opinion of a County Board referee. The referee's opinion of value is contained in a single paragraph and relies upon two of the County Board's three comparable sales that sold

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<sup>28</sup> See, E2:11.

<sup>29</sup> See, Marshall & Swift/Boeckh LLC, *Residential Cost Handbook*,(6/2014) at Good-23.

<sup>30</sup> E2:13.

<sup>31</sup> See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

for less than their assessed values.<sup>32</sup> The referee took the assessed value of these two sales, split the difference, and applied the assessed value per square foot to the Subject Property.<sup>33</sup> This is not a commonly accepted appraisal practice. The third comparable property sold for more than its assessed value, was assessed at the greatest per square foot value, and was completely ignored by the referee.<sup>34</sup> The referee was not present at the hearing to be questioned concerning his opinion. Additionally, the referee coordinator involved disagreed with the referee's recommendation. The Commission finds that the referee's opinion based on limited facts, and not derived from a commonly accepted mass appraisal technique is no more credible or reasonable than the County Board's determination.

The Commission is not convinced that there is clear and convincing evidence that the County Assessor's measurement of the Subject Property was unreasonable or arbitrary. Many factors may explain the discrepancy between the County Assessor's area and the area listed on the city's building permit. Several methods are available for determining the area a residential property.<sup>35</sup> The method of determining the area of a residential property can vary between local markets.<sup>36</sup> The method utilized by the County Assessor, measuring the exterior walls of a property,<sup>37</sup> is an accept method for determining the gross living area of an improvement.<sup>38</sup> It is a recommended practice for County Assessor's to take their own measurements of an improvement, because measurements taken from plans may not be accurate due to alterations, additions, or changes to the structure made after the plans are produced.<sup>39</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

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<sup>32</sup> See, E2:41.

<sup>33</sup> *Id.*

<sup>34</sup> See, *Id.*

<sup>35</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 224-25 (14th ed. 2011).

<sup>36</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 225 (14th ed. 2011).

<sup>37</sup> See, E2:8.

<sup>38</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 225 (14th ed. 2011) (stating that gross living are is "calculated by measuring the outside perimeter of the structure").

<sup>39</sup> See, Appraisal Institute, *The Appraisal of Real Estate*, at 225 (14th ed. 2011).



Constitution.”<sup>40</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>41</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>42</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>43</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>44</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>45</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>46</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>47</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>48</sup> “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>49</sup>

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

The Taxpayer asserted that the Subject Property was not equalized with improvements on other parcels in the neighborhood. The Taxpayer asserted that he had examined other parcels in the neighborhood and determined that they had a lower assessed value per square foot than the Subject Property. The Taxpayer referred to the comparable properties provided in the County

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<sup>40</sup> *Neb. Const.*, Art. VIII, §1.

<sup>41</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>42</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>43</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>44</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>45</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>46</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

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

<sup>48</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>49</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

Assessor's Assessment Report to provide evidence of his argument. The Taxpayer testified that Comp 1 is located directly across the street from the Subject Property.<sup>50</sup> The Taxpayer testified that Comp 2 was the second house on the left.<sup>51</sup> The Taxpayer indicated that Comp 3 is located in the same neighborhood but that it is larger than the Subject Property, and has different characteristics including a walk out basement, one and half story construction, located on a golf course, brick veneer, finished basement area, and completed landscaping.<sup>52</sup> For tax year 2011, the Subject Property had an assessed value per square foot of \$114.35, Comp 1 had an assessed value per square foot of \$103.26, Comp 2 had an assessed value per square foot of \$113.81, Comp 3 had an assessed value per square foot of \$124.84.<sup>53</sup>

### C. Analysis

At least two tests exist for determining if property with 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>54</sup> and (2) are substantial similar properties valued at materially different levels of value.<sup>55</sup>

The Subject Property and the comparable properties are located in the same neighborhood but the Commission finds that they are not substantially similar. The area, number of baths, numbers of fixtures, numbers of rooms, and area of basement finish varies between the properties.<sup>56</sup> The variance in the assessed value of these properties is directly attributable to these differences in characteristics as evidenced in the cost detail of each property located in the Assessment reports.<sup>57</sup>

The Taxpayer did not provide any ratios of the assessed to actual values for the Subject Property or any of the comparable properties.

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<sup>50</sup> See, E2:14-21 (Property Record Card for Comp 1).

<sup>51</sup> E2:22-29 (Property Record Card for Comp 2).

<sup>52</sup> E2:303-37 (Property Record Card for Comp 3).

<sup>53</sup> E2:10.

<sup>54</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>55</sup> *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>56</sup> E2:10.

<sup>57</sup> See, E2:11-12 (cost detail of the Subject Property; E2:19-20 (cost detail of Comp 1); E2:27-28 (cost detail of Comp 2); and E2:35-36 (cost detail of Comp 3).

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.

## **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 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.

## **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 reversed.<sup>58</sup>
2. The assessed value of the Subject Property for tax year 2011 is \$365,060.
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 year 2011.

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<sup>58</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 **September 22, 2014**.

Signed and Sealed: **September 22, 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,

## I. OVERVIEW

I concur with Commissioner Salmon that the County Board's \$367,300 determination for tax year 2011 is arbitrary or unreasonable due to reliance on the County Assessor's cost approach that contains incorrect characteristics. 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>59</sup> In the aftermath of the 2008 economic crisis, I would find that the best evidence of Subject Property value is the \$333,807 determination rendered by the County Board's private-sector Referee for tax year 2011.<sup>60</sup> This Referee determination for tax year 2011 is supported by the County Board's \$333,200 determination for tax year 2012.<sup>61</sup>

## II. SUMMARY OF THE EVIDENCE

The Property Record Card indicates that the Subject Property is improved with a residence built in 2010, although Taxpayer testified that construction began in 2008 by a contractor that

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<sup>59</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>60</sup> E2:41.

<sup>61</sup> E2:13.

ceased business operations shortly thereafter.<sup>62</sup> In addition to incorrect characteristics contained on the Property Record Card, the Taxpayer's testimony and exhibit evidence assert that the actual market value of the Subject Property for tax year 2011 purposes is \$300,000 for the following reasons: (1) the 2008 economic crisis and its aftermath is not sufficiently addressed by County; (2) sales of properties in the Subject Property's market area are significantly less than assessed value for tax year 2011 purposes; and (3) a recent fee appraisal of the Subject Property indicated a value lower than the County Board's \$367,300 determination for tax year 2011 (this bank appraisal is not in evidence).<sup>63</sup>

The Property Record Card contains the following assessment history regarding the Subject Property:<sup>64</sup>

<b>YEAR EFFECTIVE</b>	<b>DATE OF CHANGE</b>	<b>LAND VALUE</b>	<b>IMPROVE VALUE</b>	<b>TOTAL VALUE</b>	<b>REASON</b>
2012	8/7/2012	\$39,000	\$297,200	\$336,200	Board of Equalization
2012	3/9/2012	\$39,000	\$297,200	\$336,200	Assessor Reappraisal
2011	8/9/2011	\$51,000	\$316,300	\$367,300	Board of Equalization
2011	3/13/2011	\$51,000	\$316,300	\$367,300	Assessor Inspection Review
2010	3/6/2010	\$51,000	\$214,300	\$265,300	Building Permit
2007	3/13/2007	\$33,200	\$0	\$33,200	Assessor Reappraisal
2004	3/18/2004	\$30,000	\$0	\$30,000	Assessor Land Review
2003	3/14/2003	\$18,800	\$0	\$18,800	Assessor Land Review
2001	11/1/2001	\$6,200	\$0	\$6,200	S/C

A County Board's Referee's recommendation amounted to \$333,807 for tax year 2011, stating as follows in pertinent part: "Based on recent sales provided by assessor 12418 Read Street sold for \$103.26 psf built in 2005 and 11829 Whitmore sold for \$104.59 psf built in 2003. Subject at \$103.93 times 3212 = \$333,807."<sup>65</sup> This recommendation, however, was overridden by the County Board's Referee Coordinator, and as noted in the chart above, the County Board accepted the County Assessor's \$367,300 reappraisal recommendation for tax year 2011.<sup>66</sup>

<sup>62</sup> E2:4.

<sup>63</sup> See, E2:39 (Protest filed with County Board dated 6/30/11); Case File.

<sup>64</sup> E2:13.

<sup>65</sup> E2:41.

<sup>66</sup> E2:41; See, E2:13.

The County Board relied on the County Assessor's cost approach model for purposes of its \$367,300 determination for tax year 2011.<sup>67</sup> This cost valuation does not adjust for economic obsolescence.<sup>68</sup>

### III. VALUATION ANALYSIS

#### A. CURRENT MARKET CONDITIONS REQUIREMENT

1. General guidance regarding consideration of the economic crisis by the County in the mass appraisal context is contained in *Property Assessment Valuation*, which is published by the International Association of Assessing Officers.<sup>69</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>70</sup> Additionally, in addressing mass appraisal techniques such as the model used by the County to value the Subject Property, *Property Assessment Valuation* states as follows:

Although the structure of a mass appraisal model may be valid for many years, **the model is usually recalibrated or updated every year.** To update for short periods, trending factors may suffice. Over longer periods, as the relationships among the variables in market value change, complete market analyses are required. **The goal is for mass appraisal equations and schedules to reflect current market conditions.**<sup>71</sup>

2. 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 2011 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

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<sup>67</sup> E2:11.

<sup>68</sup> E2:11 (while the County's cost valuation does include a "Neighborhood Adjustment" by applying a .95 multiplier to the replacement cost new, I am not at all persuaded that this adjustment is sufficient in the aftermath of the economic crisis, and the County's own comparables reflect this insufficiency as discussed further below).

<sup>69</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 73 - 83.

<sup>70</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at pgs. 77 - 83.

<sup>71</sup> *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010, at p. 417-18 (emphasis added).

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>72</sup>

3. The Illinois Court of Appeal stated as follows regarding consideration of “current market conditions” in a 2012 opinion affirming a lower court’s approval of a \$300,000 judicial foreclosure sale of commercial real estate secured by a note with a principal balance in the amount of \$824,540:

Our courts today face a similar situation as that faced by the court in [1937] *Levy* during the Great Depression, in that many properties were purchased during a time when real estate values greatly increased (referred to as “the real estate bubble”) **and those same properties plummeted in value after 2006 [and] continuing to the present.** Consequently, many property owners owe much more to the lenders than what the property is worth. While this fact is unquestionably tragic, the value of a given piece of property must be determined by considering all of the pertinent factors 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>73</sup>

4. 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.*

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<sup>72</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).

<sup>73</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).

(*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>74</sup> I note that the Court's holding in this case is based in part on testimony that "indicated that auctioning the property was a reasonable alternative to listing with a real estate agent."<sup>75</sup> This testimony included reference to the "slow real estate market" after the decedent's death on July 17, 2008, so I disagree with any assertion that the Court's holding did not rely in part on this factor.<sup>76</sup>

5. As indicated above, the Taxpayer asserted that the actual value of the Subject Property amounted to \$300,000 for tax year 2011.<sup>77</sup> In support of this assertion, the Taxpayer indicated that the County did not give sufficient consideration to the adverse impact of the 2008 economic crisis on the local market as evidenced by the sale of market area properties for prices significantly less than assessed values.
6. The County's Assessment Report found at Exhibit 2 contains the sale/assessment history of two homes located near the Subject Property (12418 Read and 11829 Whitmore) that support the Taxpayer's assertion that the actual value of the Subject Property was \$300,000 for tax year 2011. As indicated in the sale/assessment history charts below, these parcels referenced as comparables by the County sold for significantly less than the year-of-sale assessed value, which creates concern whether the County's mass appraisal model accurately determines actual value in the Subject Property's market area.
7. The Property Record Card for the County's comparable located at 12418 Read Street, which is directly across the street from the Subject Property, contains the following sale/assessment history:<sup>78</sup>

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<sup>74</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>75</sup> *Id.* at 129, 411.

<sup>76</sup> *Id.* at 124, 408.

<sup>77</sup> E2:39.

<sup>78</sup> E2:14, E2:21.



Sale Date	Sale Price	Deed Type	Book	Page #	Grantor
9/1/2010	\$298,000	Warranty Deed	2010	80542	SALL CRAIG M ETAL
8/22/2008	\$262,000	Warranty Deed	2008	84483	HSBC MORTGAGE SERVICES
3/27/2008	\$0	Trust Deed	2008	29410	SWANSON STEFFI A TRUSTEE
3/13/2006	\$440,000	Warranty Deed	2006	28794	LANDMARK ENTERPRISES INC
2/7/2005	\$2,180,000	Warranty Deed M	2005	15472	IRISHSTONE LLC

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	3/9/2012	\$34,500	\$256,000	\$290,500	Assessor Reappraisal
2011	8/9/2011	\$60,000	\$238,000	\$298,000	County Board
2010	3/6/2010	\$60,000	\$271,200	\$331,200	Assessor Reappraisal
2009	8/12/2009	\$60,000	\$240,000	\$300,000	County Board
2009	3/9/2009	\$60,000	\$291,900	\$351,900	Assessor Reappraisal
2007	3/13/2007	\$60,000	\$355,200	\$415,200	Building Permit
2006	3/14/2006	\$75,000	\$255,500	\$330,500	Assessor Inspection Review
2004	3/18/2004	\$30,000	\$0	\$30,000	Assessor Land Review
2003	3/14/2003	\$18,800	\$0	\$18,800	Assessor Land Review
2001	11/1/2001	\$6,200	\$0	\$6,200	S/C (Acronym Unknown)

8. The Property Record Card for the County's comparable located at 11829 Whitmore Street, which the Taxpayer testified is a neighbor in close proximity to the Subject Property, contains the following sale/assessment history:<sup>79</sup>

Sale Date	Sale Price	Deed Type	Book	Page #	Grantor
4/19/2010	\$312,000	Warranty Deed	2010	33693	DELLBARCA CASEY ETAL
8/14/2009	\$329,000	Warranty Deed	2009	93414	ANDRICKS MARK ETAL
12/19/2003	\$407,000	Warranty Deed	2003	246370	LANDMARK DEVELOPMENT
5/1/2001	\$50,000	Warranty Deed	2179	579	

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	3/9/2012	\$39,000	\$263,900	\$302,900	Assessor Reappraisal
2010	3/6/2010	\$60,000	\$279,500	\$339,500	Assessor Reappraisal
2009	3/9/2009	\$60,000	\$267,000	\$327,000	Assessor Reappraisal
2007	3/13/2007	\$60,000	\$324,300	\$384,300	Assessor Reappraisal
2004	3/18/2004	\$67,500	\$324,300	\$391,800	Building Permit
2003	3/14/2003	\$67,500	\$270,300	\$337,800	Building Permit
2002	3/24/2002	\$71,000	\$145,200	\$216,200	Building Permit
2001	3/16/2001	\$21,000	\$0	\$21,000	Assessor Land Review
2000	3/12/2000	\$7,000	\$0	\$7,000	Assessor Land Review
1999	11/4/1999	\$1,900	\$0	\$1,900	S/C (Acronym Unknown)

<sup>79</sup> E2:22, E2:29.

9. The testimony of the Taxpayer and Mr. Thomsen of the County Assessor's Office, together with the County's own documentation charted above, indicate that the real estate market in the Omaha metropolitan area where the Subject Property is located experienced distress in the aftermath of the 2008 economic crisis.<sup>80</sup> Notwithstanding this distress, the County Assessor's cost valuation of the Subject Property relied upon by the County Board for tax year 2011 does not adjust for economic obsolescence.<sup>81</sup>
10. The majority asserts that the County's cost valuation for tax year 2011 sufficiently addresses valuation distress in the aftermath of the economic crisis by applying a .95 "Neighborhood Adjustment" multiplier to the Subject Property's replacement cost new value. I am not at all persuaded that this adjustment is sufficient in the aftermath of the economic crisis, and the sales/assessment history of the County's own comparables charted above reflects this insufficiency.<sup>82</sup>
11. In this regard, the 12418 Read St. comparable sold for \$298,000 in September 2010 after the County Assessor's \$331,200 reappraisal value for that tax year (see charts above). The County Assessor applied a .95 "Neighborhood Adjustment" multiplier to the Subject Property's replacement cost new value in 2010 for purposes of deriving its \$331,200 reappraisal value for tax year 2010.<sup>83</sup> The \$298,000 sale of the 12418 Read St. comparable in September 2010 shows that this .95 multiplier was insufficient.
12. Similarly, the 11829 Whitmore Street comparable sold for \$312,000 in April 2010 after the County Assessor assigned a \$339,500 reappraisal value for that tax year in March 2010 (see charts above). The County Assessor applied a .95 "Neighborhood Adjustment" multiplier to the Subject Property's replacement cost new value in 2010 for purposes of deriving its \$339,500 reappraisal value for tax year 2010.<sup>84</sup> The \$312,000 sale of the 11829 Whitmore Street comparable in April 2010 shows that this .95 multiplier was insufficient.
13. I note that the County Board lowered the valuation of the 12418 Read Street comparable to \$298,000 in tax year 2011, and the County Assessor's reappraisal value for tax year

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<sup>80</sup> See, E2:21 & E2:29.

<sup>81</sup> E2:11 (while the County's cost valuation does include a "Neighborhood Adjustment" by applying a .95 multiplier to the replacement cost new, I am not at all persuaded that this adjustment is sufficient in the aftermath of the economic crisis, and the County's own comparables reflect this insufficiency).

<sup>82</sup> E2:11 (Subject Property); E2:19 (12418 Read St. County comparable); E2:19 (11829 Whitmore St. County comparable).

<sup>83</sup> E2:19

<sup>84</sup> E2:27.

2012 adopted by the County Board further lowered the assessed value to \$290,500 (see charts above). This 2012 reappraisal value amounts to 97% of the 12418 Read Street comparable's \$298,000 sale price in September 2010.

14. Similarly, I note that the County Board lowered the valuation of the 11829 Whitmore Street comparable to \$302,900 in tax year 2012, thereby adopting the County Assessor's lower reappraisal value derived in March of that year (see charts above). This 2012 reappraisal value amounts to 97% of the 11829 Whitmore Street comparable's \$312,000 sale price in April 2010.

15. Based on the testimony of the Taxpayer and Mr. Thomsen of the County Assessor's Office, together with a review of documentary evidence that indicates in part that the County failed to apply an economic obsolescence adjustment as a part of its cost valuation that its own comparable sales illustrate was required, I would find that the County did not sufficiently consider the impact of the national economic crisis on the local market for tax year 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 Subject Property for tax year 2011.

## **B. THE COUNTY'S COST APPROACH VALUATION**

1. The County Board submitted its Assessment Report received in evidence at Exhibit 2, which indicates that its valuation for tax year 2011 is based on the County Assessor's cost approach.<sup>85</sup> This cost valuation does not adjust for economic obsolescence.<sup>86</sup>
2. The reliability of the cost approach is limited in the case of residential properties such as the Subject Property.<sup>87</sup> In this regard, the New Jersey Tax Court stated as follows in the Borgata casino case referenced above regarding the limitations of the cost approach in the aftermath of the economic crisis due to difficulty estimating economic depreciation:

[T]he cost approach necessarily requires the difficult task of accurately measuring economic obsolescence. Given that so much of the value of a casino-hotel's real property is tied to the earning potential of gaming operations, a credible analysis of economic conditions and the translation of those conditions into an appropriate measure of economic

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<sup>85</sup> E2:11.

<sup>86</sup> E2:11.

<sup>87</sup> *Appraising Residential Properties*, 4th Edition, Appraisal Institute, 2007, at p. 260.

obsolescence are essential to reaching a reliable value under the cost approach. This is particularly true here, where the subject property underwent an expensive expansion approved shortly prior to drastic negative changes in the national economy and an expansion in regional competition. The court is not satisfied that, in light of the timing of construction and the changes in the economy and competitive environment, the cost approach would provide a more credible value determination than would the income approach. The court does not hold that the cost approach is inapplicable to the valuation of casino-hotels in New Jersey. It will suffice to hold that based on the record adduced at trial, the income approach is the most reliable method through which to determine the true market value of the subject property on the relevant valuation dates.<sup>88</sup>

3. In light of the limited reliability of the cost approach in the aftermath of the economic crisis, together with my concern that the County failed to sufficiently account for current market conditions by failing to apply an economic obsolescence adjustment for tax year 2011, I would find that reliance on the County Assessor's cost approach valuation relied upon by the County Board is not the best evidence of value for tax year 2011.

## C. VALUATION ANALYSIS CONCLUSION

1. I concur with the majority that the County Board's \$367,300 determination for tax year 2011 is arbitrary or unreasonable due to reliance on the County Assessor's cost approach that contains incorrect characteristics.
2. In the case where it is determined that the County Board's determination is unreasonable or arbitrary, the Commission must review the evidence and adopt the most reasonable estimate of actual value presented.<sup>89</sup>
3. The Commission's review of the determination of the County Board of Equalization is de novo.<sup>90</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>88</sup> *Marina District Development Co., LLC v. City of Atlantic City*, DOCKET NOS. 008116-2009, 008117-2009, 003188-2010, 003194-2010, at p. 55 (New Jersey Tax Court 2013).

<sup>89</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>90</sup> See, Neb. Rev. Stat. §77-5016(8) (2013 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>91</sup>

4. **In light of the County Board’s reduction of the County Assessor’s \$331,200 reappraisal of the 12418 Read Street comparable to match its 2010 sale price of \$298,000 for tax year 2011, together with the County Assessor’s 2012 reappraisal of the 12418 Read Street and 11829 Whitmore Street comparables that both sold in 2010, I would find that the \$333,807 opinion of value for the Subject Property rendered by the private-sector Referee hired by the County Board for tax year 2011 is a reasonable valuation that sufficiently addresses current market conditions and is the best evidence of value for tax year 2011.**<sup>92</sup>
5. **I note that the Referee’s \$333,807 opinion of value for tax year 2011 is supported by the County Board’s adoption of the County Assessor’s \$333,200 reappraisal of the Subject Property for tax year 2012.**<sup>93</sup>

#### IV. CONCLUSION

**Based on the above analysis, I would find that the Taxpayer has rebutted the presumption that the County Board faithfully performed its duties with sufficient and competent evidence on which to base its decision for tax year 2011, and that the Taxpayer has shown by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable. I would further find that the \$333,807 opinion of value rendered by the County Board’s Referee for tax year 2011, which is supported by the County Board’s adoption of the County Assessor’s \$333,200 reappraisal of the Subject Property for tax year 2012, constitutes the best evidence of value for the Subject Property for tax year 2011. Therefore, I would find that the actual value of the Subject Property for tax year 2011 is \$333,807, and that the decision of the County Board should be vacated and reversed.**

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Thomas D. Freimuth, Commissioner

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<sup>91</sup> *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>92</sup> See, E2:13, E2:14, E2:21, E2:22, E2:29, E2:41.

<sup>93</sup> See, E2:13.