

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Jay H. Draheim,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11R 558

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

For the Appellant:

Jay H. Draheim,
Pro Se

For the Appellee:

Malina M. Dobson,
Deputy Douglas County Attorney

The appeal was 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 2,000 square foot home. The legal description of the parcel is found at Exhibit 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 \$675,000 for tax year 2011.¹ Jay H. Draheim (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed valuation of \$627,750.² The Douglas County Board determined that the assessed value for tax year 2011 was \$675,000.³

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. In the Pre-Hearing Conference

¹ E1

² E2:42

³ E1

Report, the parties stipulated to the receipt of exchanged exhibits. The Commission held a hearing on March 21, 2014.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁴ 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."⁵

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.⁶

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.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁹ 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.¹⁰

⁴ 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).

⁵ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ 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).

¹⁰ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

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.”¹¹ 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.”¹²

IV. 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.”¹³ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ The constitutional requirement of uniformity in taxation extends to both rate and valuation.¹⁹ If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation

¹¹ Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

¹³ *Neb. Const.*, Art. VIII, §1.

¹⁴ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

¹⁵ *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).

¹⁶ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

¹⁷ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

¹⁸ *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).

¹⁹ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

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].”²⁰ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”²¹ “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.”²²

B. Summary of the Evidence

The Taxpayer purchased the Subject Property on June 11, 2010, for \$675,000. The Taxpayer submitted a spreadsheet comparing the sales price and assessed value of the Subject Property and other properties located geographically close to the Subject Property.²³ The Taxpayer additionally provided the property record cards for these seven properties.²⁴ The Taxpayer asserted that the sales price for all of these properties, and the Subject Property, equaled actual value. She asserted that because the chart indicated that the seven other properties were assessed lower than their sales prices, that it was unreasonable or arbitrary for the County Board to value the Subject Property at 100% of its sale price. The Taxpayer asserts that because of the foregoing, the Subject Property is not equalized with the alleged comparable properties.

The County Board did not present a case in chief. However, the County Assessor’s Assessment Report is in evidence.²⁵ The Assessment Report indicates that the County Assessor generally values properties using the cost approach and sales comparison approach.²⁶ The Assessment Report contains the cost detail for the Subject Property determining an actual value of improvements of \$617,263 and a land component value based on a sales comparison of \$92,000.²⁷ The derived actual value for the Subject Property using the cost and sales comparison approach is \$709,263.²⁸ The Commission also notes that the County Board did not value the Subject Property using the cost approach, but instead set the value of the Subject Property at its

²⁰ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²¹ *Id.* at 673, 94 N.W.2d at 50.

²² *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

²³ E3:5.

²⁴ See, E5, E6, E7, E8, E9, E10, and E11.

²⁵ See, E2.

²⁶ E2:6-7.

²⁷ E2:11-14.

²⁸ *Id.*

sale price. The Assessment Report contains a “Residential Sales Comparables Inventory and Account Value Summary.”²⁹ The Commission notes that when valued at its sales price the Subject Property is assessed less per square foot than any other included sale.³⁰ Additionally, the Commission notes that the County Assessor’s model arrived at values other than sale prices for all of the Taxpayer’s alleged comparable properties.³¹

C. Analysis

At least two tests are available for determining if a Subject Property is not being assessed at a uniform percentage of actual value: (1) if comparable properties are assessed at materially different levels;³² and (2) if a comparison of the assessed to actual values of the Subject Property and other properties indicates that properties are not valued at a similar percentage of actual value.³³

The Commission has reviewed the properties listed on the Taxpayer’s spreadsheet and concludes that they are not comparable to the Subject Property without meaningful adjustments. The properties range in style, size, amenities, exterior furnishing, and area of basement finish.³⁴ The Commission finds that because the Subject Property and the other properties provided are not truly comparable, a comparison of the square foot assessed values of the properties is inappropriate to determine if the properties are being uniformly valued. The differences in the properties may be the factors controlling the differences in assessed values.

The burden upon the Taxpayer is to show that: (1) the valuation placed on the Subject Property is “grossly excessively”; and (2) that the excess “is the result of systematic will or failure of a plain legal duty.”³⁵ This burden is not satisfied by showing that County Board’s valuation was simply the result of a difference of opinion in those elements of valuation which are open to the subjectivity of the assessing official.³⁶ The appraisal of real estate is not an exact

²⁹ E2:10.

³⁰ E2:10.

³¹ E3:5.

³² See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

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

³⁴ See, E4, E5, E6, E7, E8, E9, E10, and E11.

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

³⁶ *Id.*

science.³⁷ The Taxpayer must show something more than a difference of opinion.³⁸ The Taxpayer has provided the Commission with information which she alleged shows the actual value for the Subject Property and other properties and the assessed values for the same.³⁹ The Taxpayer's assertions rely on the presumption that sale prices equal actual value.⁴⁰

Even if the Commission were to accept that sale price equals actual value for all of the Taxpayer's alleged comparable properties, the Commission notes that the range of the alleged sales to actual ratios are 92% to 100%.⁴¹ Mass appraisal models are capable of performance analysis using a ratio study.⁴² The inherent premises connected with ratio studies expect that mass appraisal models will produce valuations for real property which both exceed and are below sales price.⁴³ A ratio study evaluates the performance of a mass appraisal model by comparing the actual values produced by the model and known recent sales prices for the same properties.⁴⁴ The ratio of sales price to actual value is then reduced to an accepted measurement of the level of valuation.⁴⁵ The measurement is examined to determine whether the mass appraisal model produces values which meet statistical requirements for reliability.⁴⁶

³⁷ See, *Matter of Bock's Estate*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977).

³⁸ See, *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 284, 276 N.W.2d 802, 812 (2008) (quoting *Bumgarner v. County of Valley*, 208 Neb. 361, 366, N.W.2d 307, 310 (1981)).

³⁹ See, E3:5.

⁴⁰ The Nebraska Supreme Court has consistently held that sales price is not synonymous with actual value. *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *Dowd v. Board of Equalization*, 240 Neb. 437, 482 N.W.2d 583 (1992). "The statutory measure of actual value is not what an individual buyer may be willing to pay for property, but, rather, its 'market value in the ordinary course of trade.'" *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). See also, *Cabela's Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted). This interpretation is required by Nebraska Statutes section 77-112. *Id.* Sales price may be taken into consideration, but it is not conclusive of actual value. See, *Novak v. Board of Equalization*, 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945); *Collier v. County of Logan*, 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959); *Josten-Wilbert Vault Co. v. Board of Equalization*. 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965); *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 46, 328 N.W.2d 175, 180 (1982); *US Ecology, INC., v. Boyd County Board of Equalization*, 256 Neb. 7, 18, 588 N.W.2d 575, 583 (1999); *Cabela's Inc. v. Cheyenne County Bd. Of Equalization*, 8 Neb.App. 582, 591, 597 N.W.2d 623, 632 (1999) (citations omitted). It is necessary to know the "character and circumstances" of a sale in order to determine that a sale is competent evidence of actual value. *Josten-Wilbert Vault Co. v. Board of Equalization*. 179 Neb. 415, 417, 138 N.W.2d 641, 643 (1965). Where evidence indicates that a sale was part of an arm's length transaction, the sale price should be given strong consideration. *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 47, 328 N.W.2d 175, 181 (1982).

⁴¹ See, E3:5.

⁴² *Mass Appraisal of Real Property*, International Association of Assessing Officers, at 30-34 (1999).

⁴³ See generally, *IAAO Standard on Ratio Studies*, (01/10).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

If the alleged comparable properties provided by the Taxpayer are representative of all real property in the Subject Property's market area, the percentages presented by the Taxpayer may be examined as a measurement of the level of value.⁴⁷ The Commission notes that both an indicator of the central tendency of assessment of the percentages and each and every ratio for each and every property would fall within an acceptable range of variation.⁴⁸ In other words, even assuming that sales price did equal actual value for all of the alleged comparable properties and the Subject Property, the difference in valuation would fall within a statistically acceptable range of valuation, and is not, therefore, excessive. Indeed instead of excessive, the range would be expected.

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.⁴⁹ 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.⁵⁰ The Commission finds that mere evidence that the County Assessor's model indicates valuations similar to, but less than, contracted prices for the sales of alleged comparable properties is not clear and convincing evidence that the valuation of the Subject Property at sales price is excessive; especially where, as in this case, the amount of variation falls within an acceptable range of valuation, the sales price and assessed value are below the actual value as determined by a properly conducted mass appraisal model, and, assuming all necessary facts, the indicator of central tendency falls within the acceptable range.⁵¹

The Commission finds that the sales price of the Subject Property and the alleged comparable properties are no better indicators of the actual value of the properties than the assessed values determined by the County Assessor's model.

⁴⁷ The Commission notes there is no evidence that the alleged comparable properties are actually representative of the market area. Additionally, there was no evidence presented to indicate whether there were other properties in the Subject Property's market area which were assessed at or above a recent sales price. However, for the sake of argument and a determination of the merits of Taxpayer's assertions, assuming the alternative, the Commission proceeds in a hypothetical manner.

⁴⁸ See, Neb. Rev. Stat. §77-5023 (Reissue 2009).

⁴⁹ See generally, IAAO *Standard on Ratio Studies*, (01/10).

⁵⁰ 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).

⁵¹ "Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *State v. Payne-McCoy*, 284 Neb. 302, 308, 818 N.W.2d 608 (2012) (citing *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009)).

The Taxpayer has not shown that that valuation placed on the Taxpayer's 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.

V. CONCLUSION

The Commission finds that there is not 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 not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

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

VI. 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.⁵²
2. The assessed value of the Subject Property for tax year 2011 is \$675,000.
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.

⁵² 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 order is effective for purposes of appeal on September 4, 2014.

Signed and Sealed: September 4, 2014

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, dissenting,

I. OVERVIEW

The Taxpayer purchased the Subject Property in June 2010 for \$675,000, and the County Board determined that its assessed value equaled this sale price for tax year 2011. The Taxpayer submitted seven properties for equalization analysis in close proximity to the Subject Property that sold near the assessment date at issue in this case of January 1, 2011.⁵³ The County Board determined that the assessed value of these seven properties averaged 93.5% of the sale price for tax year 2011.⁵⁴ The County Board's determination regarding the Subject Property's assessed value amounted to \$652,000 for tax year 2012 and \$636,300 for tax year 2013 – the latter value is 94% of the Taxpayer's \$675,000 purchase price in 2010.⁵⁵

I would find that the Taxpayer adduced sufficient evidence that the valuation of the Subject Property was sufficiently excessive in comparison to assessments of the seven nearby properties submitted for equalization analysis for tax year 2011. Therefore, I would find that the County Board's determination of the assessed value of the Subject Property was arbitrary or unreasonable for tax year 2011. I would further find that the best evidence of value for the Subject Property amounts to \$636,300 for tax year 2011.

⁵³ E3:5.

⁵⁴ E3:5. These assessed to sales ratios for the seven properties were as follows: 92.2%; 93%; 95.9%; 93.5%; 92.9%; 92.8%; 94.1%.

⁵⁵ E2:14.

II. EQUALIZATION 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.”⁵⁶ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.⁵⁷ 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.⁵⁸

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.⁵⁹

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.⁶⁰ 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.⁶¹

The constitutional requirement of uniformity in taxation extends to both rate and valuation.⁶² 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].”⁶³ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”⁶⁴

III. EQUALIZATION ANALYSIS

The Property Record Card contains the following assessment history regarding the Subject Property:⁶⁵

⁵⁶ *Neb. Const.*, Art. VIII, §1.

⁵⁷ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

⁵⁸ *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).

⁵⁹ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

⁶⁰ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

⁶¹ *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).

⁶² *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

⁶³ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

⁶⁴ *Id.* at 673, 94 N.W.2d at 50.

⁶⁵ E2:14.

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2013	3/9/2013	\$92,000	\$544,300	\$636,300	Assessor Reappraisal
2012	8/7/2012	\$92,000	\$560,000	\$652,000	Board of Equalization
2012	3/9/2012	\$92,000	\$560,000	\$652,000	Building Permit
2011	8/9/2011	\$92,000	\$583,000	\$675,000	Board of Equalization
2010	1/9/2012	\$92,000	\$583,000	\$675,000	TERC
2010	8/11/2010	\$92,000	\$583,000	\$675,000	Board of Equalization
2009	3/9/2009	\$92,000	\$617,300	\$709,300	Building Permit
2008	9/24/2008	\$92,000	\$217,700	\$309,700	S/C (Acronymn Unknown)

The Taxpayer submitted seven properties in close proximity to the Subject Property that sold near the assessment date at issue in this case of January 1, 2011. The assessed to sales ratios for these seven properties were as follows for tax year 2011: 92.2%; 93%; 95.9%; 93.5%; 92.9%; 92.8%; and 94.1%.⁶⁶ These assessed to sales ratios average 93.5%.

The Taxpayer asserts that the taxation of the seven properties submitted for consideration reflects a pattern indicating the County Board assessed properties that sold near the 2011 assessment at approximately 94% of sale price, and that the Subject Property should be equalized with the treatment of these properties for tax year 2011.

As indicated above, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;⁶⁷ or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real property regardless of similarity indicates that the Subject Property was not assessed at a uniform percentage of market value.⁶⁸

I concur with the majority opinion that sufficient evidence does not exist to apply the “similar properties” equalization test referenced above. With respect to the second test, however, the majority opinion asserts that the Taxpayer’s equalization assertion fails because the sale

⁶⁶ E3:5.

⁶⁷ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁶⁸ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999); See also, *Krings v. Garfield County Bd. Of Equalization*, 286 Neb. ___, ___ N.W.2d ___ (Case. No. S-12-623 Filed July 26, 2013).

prices of the seven properties submitted for consideration do not reflect actual market value. In this case where these sales occurred in the aftermath of the 2008 economic crisis, I disagree.

I am mindful that the Nebraska Court of Appeals has stated that “[s]ale price is not synonymous with actual value or fair market value.”⁶⁹ I also note, however, that the Nebraska Supreme Court stated as follows in *Potts v. Board of Equalization of Hamilton County*: “where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.”⁷⁰

In the aftermath of the 2008 economic crisis, I would find that the sale price of property is a powerful indicator of actual market value. As a backdrop for the market conditions that existed in the timeframe when the sales at issue in this case occurred, 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 2012 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):

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

⁶⁹ *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

⁷⁰ *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

long-term recalibration of the economy, was hardening among the public and participants in the financial markets as of the second valuation date.⁷¹

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.⁷²

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.⁷³ 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.”⁷⁴ 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.⁷⁵

In light of the 2008 economic crisis and its aftermath, and based on the Nebraska Supreme Court’s holdings in *Potts* and *In re Estate of Craven*, I would find that the sale prices of the Subject Property and the seven properties submitted for consideration by the Taxpayer for

⁷¹ *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).

⁷² *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).

⁷³ *County of Lancaster v. Union Bank & Trust Co. (In re Estate of Craven)*, 281 Neb. 122, 794 N.W.2d 406 (Neb. 2011).

⁷⁴ *Id.* at 129, 411.

⁷⁵ *Id.* at 124, 408.

equalization analysis were the best indicators of actual market value on the assessment date of January 1, 2011. I note that while the case law discussed above from jurisdictions outside of Nebraska is not controlling, it is instructive for purposes of this finding. Thus, because the County Board assessed the seven properties submitted for equalization analysis in the approximate amount of 94% of sale price, I would further find that the County Board's failure to treat the Subject Property similarly was arbitrary or unreasonable for tax year 2011.

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.⁷⁶ I would find that the Subject Property's \$636,300 assessed value for tax year 2013, which amounts to 94% of the Taxpayer's \$675,000 purchase price in 2010, is the best evidence of equalization value for tax year 2011.⁷⁷

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 best evidence of value for the Subject Property for tax year 2011 is \$636,300. Therefore, I would find that the equalization value of the Subject Property for tax year 2011 is \$636,300, and that the decision of the County Board should be vacated and reversed.

Thomas D. Freimuth, Commissioner

⁷⁶ 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).

⁷⁷ Assessed value, as determined by the County Board for tax year 2011, 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 at the 2011 protest proceeding.