

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

Harvey Varenhorst,  
Appellant,

v.

Otoe County Board of Equalization,  
Appellee.

Case No: 13R 227

Decision and Order Reversing  
County Board of Equalization

**GENERAL BACKGROUND & PROCEDURAL HISTORY**

1. The Subject Property is a residential parcel located at 415 4th Rue, Nebraska City, Otoe County, Nebraska. The legal description of the Subject Property is contained in the Case File.
2. The Otoe County Assessor assessed the Subject Property at \$5,690 for tax year 2013.
3. Harvey Varenhorst (herein referred to as the “Taxpayer”) protested this value to the Otoe County Board of Equalization (herein referred to as the “County Board”).
4. The County Board determined that the assessed value of the Subject Property was \$5,690 for tax year 2013.
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 June 12, 2014, at the State Office Building, in Lincoln, Nebraska, before Commissioner Thomas D. Freimuth.
7. Harvey Varenhorst and his daughter, Jennifer Varenhorst-Wohlens, were present at the hearing. Bill Thummel of Nebraska City was also present at the hearing on behalf of the Taxpayer.
8. David Partsch, Otoe County Attorney, and John Palmtag, Deputy Otoe County Attorney, were present for the County Board. Therese Gruber, the Otoe County Assessor, and Christina Smallfoot, Deputy Otoe County Assessor, were also present at the hearing.

**SUMMARY OF HEARING DOCUMENTS & STATEMENTS**

9. The County Board submitted Property Record Cards for the Subject Property and alleged comparable properties at the hearing before the Commission.
10. The Property Record Card for the Subject Property indicates that the County Board’s \$5,690 determination for tax year 2013 includes \$2,800 for land and \$2,890 for the improvement components.
11. The Property Record Card’s sales history indicates that the Taxpayer purchased the Subject Property for \$6,250 in December 2009.
12. The Property Record Card’s property valuation history indicates that the County Board’s determinations for tax years 2006 through 2009 amounted to \$22,050 (land: \$2,800; improvements: \$19,250) and decreased to \$5,690 for tax years 2010 through 2013.
13. The Property Record Card indicates that the Otoe County Assessor’s Office performed an inspection of the Subject Property on October 6, 2009. The County Assessor’s statements and documents submitted at the hearing before the Commission indicate that

this inspection generated the decrease in the Subject Property's valuation to the \$5,690 amount adopted by the County Board for tax years 2010 through 2013.

14. The Property Record Card and the statements of the County Assessor indicate that the cost approach is the basis of the County Assessor's \$5,690 opinion of value and the County Board's final determination for tax year 2013. The County Assessor indicated that this cost valuation is derived from the Marshall & Swift valuation service, and that the Subject Property is valued as a storage unit.
15. The Taxpayer asserted that the County Board overvalued the Subject Property with the use of an unreasonable or arbitrary cost approach model because it includes a garage and privacy fence that do not exist. The County stated that the cost approach for storage units does not apply value to a garage, and that a privacy fence is also not included in its cost valuation.
16. In support of his overvaluation assertion, the Taxpayer's documentation analyzes Property Record Cards of properties in Otoe County submitted by the County allegedly similar to the Subject Property. Based on this documentation, the Taxpayer asserted that the actual value of the Subject Property should be lowered to \$3,367 for tax year 2013 (land - \$1,200; improvements - \$2,167).<sup>1</sup>
17. The Commission notes that the Taxpayer's hearing on the Subject Property (415 4<sup>th</sup> Rue) was held contemporaneously with the 2013 tax year hearing on his property located at 417 4<sup>th</sup> Rue (Case No. 13R-226), which is adjacent to the Subject Property.

### STANDARD OF REVIEW

18. The Commission's review of the determination of the County Board of Equalization is de novo.<sup>2</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>3</sup>
19. 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>4</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>5</sup>
20. 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>6</sup>

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<sup>1</sup> See, Taxpayer's one-page letter to the Commission dated June 10, 2014.

<sup>2</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).

<sup>3</sup> *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>4</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>5</sup> *Id.*

<sup>6</sup> Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

21. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>7</sup>

## GENERAL VALUATION LAW

22. 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>
23. “Actual value, market value, and fair market value mean exactly the same thing.”<sup>9</sup>
24. 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>
25. All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>11</sup>
26. 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>
27. 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

28. The Taxpayer asserted that the actual value of the Subject Property amounted to \$3,367 for tax year 2013 (land - \$1,200; improvements - \$2,167).
29. The Taxpayer’s \$3,367 opinion of value is based in part on the use of assessed values of properties in Otoe County. This approach is not a commonly accepted mass appraisal technique for determining the actual value of real property under Nebraska Statutes section 77-112.
30. The valuation approaches identified under Nebraska Statutes section 77-112 include the sales comparison approach, the income approach, the cost approach, and other

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<sup>7</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<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).

professionally accepted mass appraisal methods. The Taxpayer's use of assessed values is not identified as an appropriate approach under Nebraska Statutes section 77-112. Additionally, the Taxpayer did not provide evidence that this approach is a professionally accepted mass appraisal or fee appraisal technique. Therefore, while assessed values can provide the basis for relief in the equalization context as discussed below, the Commission is unable to place significant weight on the Taxpayer's opinion of value to the extent it relies on the use of assessed values in Otoe County.

31. The Property Record Card indicates that the County Board relied upon the County Assessor's opinion of the actual value of the Subject Property as determined by a cost approach. Additionally, the County Assessor's representative indicated that this cost valuation is derived from the Marshall & Swift valuation service, a national publication that contains updated cost information adjusted on a region-by-region basis.
32. The cost approach includes six steps:
  - (1) Estimate the land (site) value as if vacant and available for development to its highest and best use;
  - (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis;
  - (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence;
  - (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements;
  - (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements;
  - (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.<sup>14</sup>
33. The Commission finds that the County's valuation of the Subject Property for tax year 2013, which relies on the Marshall & Swift costing service to value the improvement components at \$2,890, is based on a statutorily permissible assessment method. The Commission further finds that the Taxpayer's \$3,367 opinion of value (land - \$1,200; improvements - \$2,167) for the Subject Property's does not constitute clear and convincing evidence that the County Board's determination for tax year 2013 was unreasonable or arbitrary.
34. Guidance for purposes of applying the sales comparison approach and other valuation methods is available in the case where a Taxpayer determines that it is not cost effective to obtain a fee appraisal. For example, the Commission is allowed by statute and by its rules and regulations to consider many publications that provide guidance regarding the sales comparison approach and other valuation techniques. These publications, which are listed at the Commission's "Rules/Regulations" website link (Chapter 5, section 031), can be found at area public libraries and law school libraries. Guidance regarding valuation techniques can also be found at the Commission's "Decisions" website link.

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<sup>14</sup> International Association of Assessing Officers, *Property Assessment Valuation*, at 230 (3rd ed. 2010).

## GENERAL EQUALIZATION LAW

35. “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>15</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>16</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>17</sup>
36. 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>18</sup>
37. 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>19</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>20</sup>
38. The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>21</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>22</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>23</sup>
39. “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>24</sup>

## EQUALIZATION ANALYSIS

40. The Taxpayer asserted that the Subject Property was overvalued in comparison to the assessed valuations of other properties located in Otoe County, including the parcel located at 417 4<sup>th</sup> Rue.
41. As indicated previously, an order for equalization requires evidence that either: (1) similar properties were assessed at materially different values;<sup>25</sup> or (2) a comparison of the ratio of assessed value to market value for the Subject Property and other real

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<sup>15</sup> *Neb. Const.*, Art. VIII, §1.

<sup>16</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>17</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>18</sup> *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>19</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>20</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Otoe County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>21</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

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

<sup>23</sup> *Id.* at 673, 94 N.W.2d at 50.

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

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

property **regardless of similarity** indicates that the Subject Property was not assessed at a uniform percentage of market value.<sup>26</sup>

42. Based on a review of statements by the parties at the hearing and a review of the respective Property Record Cards, the Commission finds that the improvement components of the properties submitted for equalization analysis are not substantially similar due to differences regarding one or more of the following characteristics: size, amenities, effective age and location. Based on this finding, the Commission finds that there is not clear and convincing evidence that these properties are substantially similar for improvement value equalization relief purposes.
43. Based on a review of statements by the parties at the hearing and a review of the Property Record Cards for the Subject Property and the adjacent property located at 417 4<sup>th</sup> Rue, however, the Commission finds that the land component of the latter parcel assessed at \$.16 per square foot (\$2,240/14,000 sq. ft.= \$.16 psf) for tax year 2013 is comparable to the Subject Property's land component assessed at \$.40 per square foot for the same year (\$2,800/7,000 sq. ft. = \$.40 psf). Thus, the Commission finds there is clear and convincing evidence that the assessed value of the land component of the Subject Property is grossly excessive as compared to the land component of the comparable parcel located at 417 4<sup>th</sup> Rue. The Commission further finds that the equalized value of the Subject Property's land component is \$1,120 rounded (7,000 sq. ft. x \$.16 per sq. ft. = \$1,120).
44. 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 2013. 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**

45. 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.
46. 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 Otoe County Board of Equalization determining the value of the Subject Property for tax year 2013 is vacated and reversed.

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<sup>26</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

2. That the taxable value of the Subject Property for tax year 2013 is:

Land	\$ 1,120
Improvements	<u>\$ 2,890</u>
Total	\$ 4,010

3. This decision and order, if no further action is taken, shall be certified to the Otoe County Treasurer and the Otoe 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 order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2013.
7. This order is effective on September 12, 2014.

Signed and Sealed: September 12, 2014.

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Thomas D. Freimuth, Commissioner