

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Millard Lumber Inc.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No: 11C 447

Decision and Order Reversing Douglas
County Board of Equalization

For the Appellant:

Jordan W. Adam,
Fraser Stryker PC LLO.

For the Appellee:

Jimmie L. Pinkham III,
Deputy Douglas County Attorney.

This appeal was heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Omaha, Douglas County, Nebraska. The parcel is improved with a 598,737 sq. ft. distribution facility and retail store. The legal description and Property Record File for the Subject Property are found at Exhibit 2.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed value of the Subject Property was \$9,459,400 for tax year 2011. Millard Lumber Inc. (herein referred to as the “Taxpayer”) protested this assessment to the Douglas County Board of Equalization (herein referred to as the “County Board”) and requested an assessed valuation of \$7,000,000. The Douglas County Board determined that the assessed value for tax year 2011 was \$7,094,200.¹

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on December 30, 2014.

¹ E1.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.² 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.”³

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.⁴

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.⁵ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁶

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁷ 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.⁸

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.”⁹ The commission may also “take notice of judicially cognizable facts and in

² See, Neb. Rev. Stat. §77-5016(8) (2014 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).

³ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁴ *Id.*

⁵ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

⁶ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁷ 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).

⁸ *Botdorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

⁹ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

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.”¹⁰ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹¹

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.¹²

“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.”¹³ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁴ 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.¹⁵ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁶ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁷

B. Valuation Analysis

The Taxpayer did not dispute the County Board’s \$7,094,000 determination of the actual value of the Subject Property for tax year 2011.

¹⁰ Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

¹² Neb. Rev. Stat. §77-112 (Reissue 2009).

¹³ *Id.*

¹⁴ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁵ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁶ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁷ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

V. EQUALIZATION

A. Law

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”¹⁸ Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.¹⁹ 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.²⁰

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.²¹ 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.²²

The constitutional requirement of uniformity in taxation extends to both rate and valuation.²³ 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].”²⁴ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”²⁵

“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.”²⁶

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.²⁷

¹⁸ *Neb. Const.*, Art. VIII, §1.

¹⁹ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

²⁰ *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).

²¹ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

²² *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).

²³ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

²⁴ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

²⁵ *Id.* at 673, 94 N.W.2d at 50.

²⁶ *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

“Misclassifying property may result, ... in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief.”²⁸

B. Summary of Equalization Evidence

The Taxpayer submitted Exhibits 3 through 38 in support of its assertion that the Subject Property should be equalized with an adjacent parcel for tax year 2011, which were received in evidence by the Commission. Brent Reeder, the President of Sigma Corp. Inc., a general contractor familiar with the Subject Property and the alleged comparable parcel, also testified on behalf of the Taxpayer. The Taxpayer did not submit a fee appraisal of the Subject Property or other parcels at the hearing.

The County Board submitted an Assessment Report for the Subject Property for tax year 2011 prepared by Mark Jenkins, a commercial appraiser employed by the Douglas County Assessor’s Office, which the Commission received in evidence at Exhibit 2. The County Board did not submit witness testimony at the hearing before the Commission.

The Property Record File (“PRF”) for the Subject Property indicates that the Taxpayer purchased the 35.526-acre (1,547,513 sq. ft.) parcel from the entity known as Connectivity Solutions Manufacturing for \$7,094,233 in October 2006.²⁹ The PRF indicates that the Subject Property is improved with a 598,737 sq. ft. facility constructed in 1958 for “Industrial Light Manufacturing” purposes, which is categorized by the County Assessor under Abstract Code 1250 “Commercial” and Occupancy Code 334 “Industrial Light Manufacturing” for tax year 2011.³⁰ The PRF also indicates that the Subject Property is improved with a 1,368 sq. ft. facility constructed in 1958 for “Storage Warehouse” purposes, which is categorized by the County Assessor under Abstract Code 1250 “Commercial” and Occupancy Code 334 “Industrial Light Manufacturing” for tax year 2011.³¹ The PRF attributes all of the Subject Property’s \$3,844,400

²⁷ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

²⁸ *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

²⁹ E2:5.

³⁰ E2:2, E2:5, E2:6 (the Commission notes that while these Exhibits indicate that the 598,737 sq. ft. facility is categorized by the County Assessor under Occupancy Code 334 “Industrial Light Manufacturing” for tax year 2011, E2:6 also includes the term “Distribution Warehouse” next to the word “Occupancy”).

³¹ E2:2, E2:5 (the Commission notes that while these Exhibits indicate that the 1,368 sq. ft. facility is categorized by the County Assessor under Occupancy Code 334 “Industrial Light Manufacturing” for tax year 2011, E2:7 includes the term “Distribution Warehouse” next to the word “Occupancy”).

improvement value to the 598,737 sq. ft. facility and no value to the 1,368 sq. ft. facility for tax year 2011 (\$3,844,400/598,737 sq. ft. = \$6.42 per sq. ft.).³²

Reeder testified that he is a native Omahan who received a finance degree from Iowa State University in 1991. His testimony indicates that he formed Sigma Corp. Inc., which engages in the general contractor business in the Omaha area, in the early 1990s. Reeder testified that his company assisted the Taxpayer with the renovation of the Subject Property's improvement components to meet the needs of Millard Lumber's business, which involves retailing/wholesaling lumber and building materials. His testimony also indicates that the Taxpayer purchased the Subject Property to move its separate corporate offices and operating businesses from "old downtown" Millard for consolidation purposes, and that this process was complete by the assessment date of January 1, 2011.

Reeder's testimony indicates that the business of Connectivity Solutions evolved from the companies known as Western Electric and Lucent, which were engaged in the manufacturing business for the telephone industry in the Omaha area since the 1950s. Reeder testified that these telephone companies used the 598,737 sq. ft. facility for manufacturing purposes.

The PRF for the alleged comparable property (herein sometimes referred to as "Parcel 0208," which is shorthand for Parcel 1919870208) indicates that Omaha Business Park LLC purchased the 35.212-acre (1,533,834.72 sq. ft.) parcel from Connectivity Solutions Manufacturing in November 2011. The Form 521 Real Estate Transfer Statement received in evidence at Exhibit 15 indicates that Omaha Business Park purchased the Parcel 0208 together with 12 surrounding parcels for a total of \$7,000,000.

Reeder's testimony and documentary evidence in the form of aerial maps indicate that Parcel 0208 is adjacent to the Subject Property, and that the main improvement components on each of these parcels are connected.³³ Reeder's testimony and documentary evidence also indicate that Omaha Business Park's \$7,000,000 purchase in November 2011 included approximately 94 total acres, including the 35.212-acre Parcel 0208.³⁴

Parcel 0208's PRF provides that it is improved with a 1,034,028 sq. ft. facility constructed in 1958 for "Industrial Heavy Manufacturing" purposes, which is categorized by the County

³² E2:5.

³³ E34, E35.

³⁴ E15 (Real Estate Transfer Statement – Form 521); E34 (Aerial map of 13 purchase parcels, including Parcel 0208); E16 – E26 (PRFs for 11 of the 13 parcels referenced on the Real Estate Transfer Statement – Mr. Reeder provided testimony regarding the remaining two parcels).

Assessor under Abstract Code 1250 “Commercial” and Occupancy Code 333 “Industrial Heavy Manufacturing” for tax year 2011.³⁵ The PRF also indicates that Parcel 0208 is improved with four separate buildings that comprise approximately 17,000 sq. ft. in terms of total area.³⁶ The PRF attributes all of Parcel 0208’s \$1,692,500 improvement value to the 1,034,028 sq. ft. facility and no value to the four separate buildings for tax year 2011 (1,692,500/1,034,028 = \$1.64 per sq. ft.).³⁷

Reeder testified that he is familiar with Parcel 0208. He testified that the above-referenced telephone companies used the 1,034,028 sq. ft. facility for manufacturing purposes, and that Omaha Business Park now leases portions of the improvement component for commercial office purposes similar in part to the use as of January 1, 2011. He also stated that the Subject Property’s 598,737 sq. ft. improvement is similar to Parcel 0208’s substantially larger improvement component.

The Subject Property’s valuation history in comparison to Parcel 0208’s valuation history is set forth below:³⁸

SUBJECT PROPERTY VALUATION HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2011	8/9/2011	\$3,249,800	\$3,844,400	\$7,094,200	County Board
2011	3/13/2011	\$3,249,800	\$6,209,600	\$9,459,400	Reappraisal by County Assessor
2007	7/30/2007	\$4,642,500	\$2,451,700	\$7,094,200	County Board
2007	3/13/2007	\$4,642,500	\$4,125,300	\$8,767,800	Inspection by County Assessor
2006	11/2/2006	\$847,800	\$7,920,000	\$8,767,800	S/C**

PARCEL 0208 VALUATION HISTORY

YEAR EFFECTIVE	DATE OF CHANGE	LAND VALUE	IMPROVE VALUE	TOTAL VALUE	REASON
2012	3/9/2012	\$766,900	\$1,692,500	\$2,459,400	Inspection by County Assessor
2011	5/11/2012	\$766,900	\$1,692,500	\$2,459,400	Settlement of TERC Appeal
2011	8/9/2011	\$3,221,100	\$5,742,400	\$8,963,500	County Board
2011	3/13/2011	\$3,221,100	\$15,298,500	\$18,519,600	Reappraisal by County Assessor
2007	3/13/2007	\$4,601,500	\$9,000,000	\$13,601,500	Inspection by County Assessor
2006	11/2/2006	\$840,300	\$10,067,000	\$10,907,300	S/C**

³⁵ E19:3.

³⁶ E19:2, E19:4 – E19:7.

³⁷ E2:5.

³⁸ E2:16 (Subject Property valuation history); E19:21 (Parcel 0208’s valuation history). **It is possible that the acronym “S/C” that appears in the PRF valuation charts for both the Subject Property and Parcel 0208 is a reference to the sale of the Subject Property to the Taxpayer for \$7,094,000 in October 2006. It is also possible that “S/C” is shorthand for “Sales Contract.”

The County's Assessment Report includes a table listing three properties it deemed comparable to the Subject Property found at page 14 of Exhibit 2. The County's Assessment Report also includes the PRFs for these three alleged comparable properties.³⁹

C. Equalization Analysis

As indicated above, an order for equalization generally requires evidence that either: (1) similar properties were assessed at materially different values;⁴⁰ 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;⁴¹ or (3) similar properties were assessed at materially different values due to misclassification of components of the Subject Property or similar components of other properties.⁴²

The Commission finds that the improvement components of the properties submitted for consideration were not substantially similar for tax year 2011 purposes due in part to differences regarding size and use noted above. Based on these differences and a review of the respective PRFs, the Commission finds that there is not clear and convincing evidence that these properties are substantially similar for improvement value equalization relief purposes.

The Commission is persuaded, however, that the land component of Parcel 0208 assessed at \$.50 per square foot ($\$766,900/1,533,835$ sq. ft. = \$.50 per square foot) for tax year 2011 is comparable to the Subject Property's land component assessed at \$2.10 per square foot for the same year ($\$3,249,800/1,547,513$ sq. ft. = \$2.10 per square foot). 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 0208's land component. The Commission further finds that the equalized value of the Subject Property's land component is \$773,800 rounded ($1,547,513$ sq. ft. x \$.50 per sq. ft. = \$773,800(rounded)).

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

³⁹ E2:17 – E2:38.

⁴⁰ See, *Scribante v. Douglas County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

⁴¹ See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, 635 (1999).

⁴² See, *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

of one or more assessed to market values was less than 100% for tax year 2011. 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.

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.

For all of the reasons set forth above, the decision of the County Board is vacated and reversed.

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 vacated and reversed.⁴³
2. The assessed value of the Subject Property for tax year 2011 is:

Land:	\$ 773,800
<u>Improvements:</u>	<u>\$3,249,800</u>
Total:	\$4,023,600
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 (2014 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 2011.

⁴³ 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 January 30, 2015.

Signed and Sealed: January 30, 2015.

Thomas D. Freimuth, Commissioner

SEAL

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.