

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Ray Anderson, Inc.,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case No. 15C 0797

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

Case Nos: 15C 0796, 15C 0798, 15C 0799
& 15C 0800

Decision and Order
Reversing the Decisions of the Douglas
County Board of Equalization

For the Appellant:
Benjamin White,
Law Offices of White & Jorgensen

For the Appellee:
Shakil A. Malik
Deputy Douglas County Attorney

These appeals were heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTIES

The Subject Properties are five commercial parcels located in Douglas County. Each parcel is improved with a retail convenience store and car wash. The legal descriptions and property record cards for the Subject Properties are found at Exhibits 6 through 10.

II. PROCEDURAL HISTORY

The Douglas County Assessor determined that the assessed values of the Subject Properties were as follows for tax year 2015:

Case No.	15C 0796	15C 0797	15C 0798	15C 0799	15C 0800
Location¹	114th Street	Arbor Street	Pacific Street	140th Street	Q Street
Value	\$1,337,000	\$2,341,200	\$1,458,100	\$586,600	\$812,700

¹ For ease of reference, we will refer to these properties by street name for purposes of discussion in the course of this order.

Each of these assessments represents the combined value of the land, the convenience store, and the car wash. Ray Anderson, Inc. (the Taxpayer) protested each of these assessments to the Douglas County Board of Equalization (the County Board). The County Board determined that the taxable value was the same as listed above for each parcel.²

The Taxpayer appealed the determinations of the County Board to the Tax Equalization and Review Commission (the 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 Report, the parties stipulated to the receipt of exchanged Exhibits 1 through 10, 18 through 24, and 27. The Commission held a hearing on March 5, 2018, with Commissioner Hotz presiding. Exhibits 11 through 17 were not received for the reasons described on the record. Exhibits 25 and 26 were exchanged but neither offered nor received in the course of the hearing.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is *de novo*.³ 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.⁴

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.⁵

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.⁶ Proof that the order, decision, determination, or action was unreasonable or arbitrary

² Exhibits 1-5.

³ See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁴ *Brenner* at 283.

⁵ *Id.* (Citations omitted).

⁶ Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

must be made by clear and convincing evidence.⁷ A taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that it is overvalued.⁸ 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.⁹

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.¹⁰ 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.¹¹

IV. VALUATION

A. Law

Under Nebraska law,

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.¹²

Actual value, market value, and fair market value mean exactly the same thing.¹³ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁴ All taxable real

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

⁸ 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).

⁹ *Botdorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

¹⁰ Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

¹¹ Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

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

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁴ See Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁵

B. Summary of the Evidence

Three witnesses testified at the hearing. Raymond Anderson III, President of Ray Anderson, Inc., testified that he was familiar with the Subject Properties. He testified to a variety of negative conditions on the properties, including deterioration of exterior walls, issues with concrete and sidewalk cracking, wear and tear to floors and restrooms due to heavy use, older gas pumps in some locations, and inferior building materials in some locations. He testified about the cost of some repairs and maintenance that had been performed on the buildings since the 2015 tax year. He also testified that the convenience stores associated with the properties were becoming functionally obsolete because of industry changes, such as the need to stock a wider variety of products to meet customer demand. He disputed the County Assessor's characterization of the quality and condition of the buildings based on his opinions regarding their functional lifespan, but he also acknowledged that he has limited knowledge of the methodology used to categorize quality and condition in the formal assessment process. He also testified that the buildings on the 140th Street property were razed in the Fall of 2016 and subsequently rebuilt.

Mr. Anderson testified that as of January 1, 2015, all five properties had drive-thru car wash systems, in which the driver parks the vehicle and the washing equipment "rolls over" the vehicle, as opposed to automatic systems, in which the car is pulled through the car wash on a track.¹⁶ He also testified that the car wash for the Pacific Street property was built in 1998, not 2006 as indicated in the Property Record File relied upon by the County Assessor in determining the value of the Subject Properties.

Monte Bowman, a business consultant in real property taxation, testified as to how the Subject Properties should be classified for quality and condition under his understanding of the Marshall Valuation Service (MVS). Mr. Bowman holds no licensure as a real property appraiser. He also testified about alleged statutory and due process violations in the protest process used by

¹⁵ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁶ "Drive-thru" and "automatic" are the categories utilized by the Marshall Valuation Service.

the County Assessor in the 2015 tax year, particularly the in-person meetings required by Neb. Rev. Stat. §77-1311.¹⁷ Mr. Bowman did not attend such meetings on behalf of the Taxpayer for tax year 2015.

Michaela Larson, a licensed real property appraiser employed by the County Assessor, testified that she personally inspected and measured the public areas of the Subject Properties in 2013. She testified that she remained confident about the quality and condition ratings of the properties relied upon by the County Assessor, and subsequently, the County Board. She explained that, under the MVS formula used to determine the replacement cost of buildings, the quality rating of a building is determined based on the materials used to construct the building and is used to determine lifespan. The condition rating relates to the maintenance and wear-and-tear on the building. She testified that nothing in Mr. Anderson's testimony changed her opinion of the quality or condition of the buildings. She acknowledged that the assessments of the 114th Street, Pacific Street, 140th Street, and Q Street properties relied on the belief that the car washes on those properties were automatic rather than drive-thru, and she testified that she had determined the car washes were drive-thru during a 2017 inspection. She also acknowledged that, if the car wash for the Pacific Street property was built in 1998 rather than 2006, the depreciation on the property should have been approximately 35% rather than the 14% used in the assessment.

C. Analysis

The Taxpayer offered evidence and made argument regarding alleged errors and irregularities in the referee and protest process used by the County Assessor and County Board in tax year 2015. Specifically, the Taxpayer alleged that the individual who conducted the in-person meeting required by Neb. Rev. Stat. §77-1311 failed to provide information required by statute, rule, or court order. The Taxpayer asserts that this failure constituted a deprivation of due process, and as a result, the "Assessment is void. Because the Assessment is void, no presumption should operate in favor of the Assessor's valuation and the Appellant's taxes should

¹⁷ Neb. Rev. Stat. §77-1311(6) requires that, "[d]uring such meetings, the county assessor or the county assessor's designated representative shall provide a basis for the property valuation contained in the notice of preliminary valuation sent pursuant to section 77-1301 and accept any information the property owner provides relevant to the property value."

be reduced to the extent that the Appellant can demonstrate that a lower valuation is appropriate.”¹⁸

The Commission finds no merit in this due process argument since the Taxpayer subsequently had the opportunity for a protest hearing before the County Board and a de novo review of the valuation and equalization of the Subject Properties before the Commission.¹⁹ However, we need not rule on the legal merit of the argument because Mr. Bowman testified unambiguously that he did not attend in-person meetings pursuant to Neb. Rev. Stat. §77-1311 on behalf of the Taxpayer for tax year 2015. Having failed to request or attend such meetings, the Taxpayer cannot complain that it has been prejudiced by events that might have occurred had the meetings taken place. The Taxpayer’s argument has no factual or legal basis in the present case, and we reject it without further discussion.

The issue under consideration in this appeal is the actual value of the Subject Property. 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 Neb. Rev. Stat. §77-1371, (2) income approach, and (3) cost approach.²⁰ The County Assessor used the cost approach to value each of the Subject Properties in this case. The cost approach operates by calculating the replacement cost new less depreciation. The building costs and depreciation percentages are determined based on MVS. The County Assessor and County Board also utilized a “neighborhood adjustment” to raise or lower valuations based on location. Neither the land value nor the neighborhood adjustment was challenged by the Taxpayer in this case.

The Taxpayer asserted that the County Board’s determination was incorrect because the quality and condition of the buildings was worse than assessed, the car washes on most of the Subject Properties were incorrectly classified, and the age of one of the car washes was listed incorrectly. The evidence supporting the assertion regarding quality and condition consisted of the testimony of Mr. Anderson and Mr. Bowman. Mr. Anderson was clearly well-informed about

¹⁸ Appellant’s Brief at 10.

¹⁹ As noted above, the appellate review conducted by the Commission is a de novo review. See Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.). “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).

²⁰ Neb. Rev. Stat. §77-112 (Reissue 2009).

the property owned by his company; however, as he acknowledged in his testimony, he has limited familiarity with the methodology used to categorize quality and condition in the formal assessment process. Mr. Bowman testified that his estimates of the quality and condition of the property were based on Marshall & Swift categories, but MVS is a technical manual designed to be applied and interpreted by licensed appraisers. Despite his experience consulting with businesses on property tax matters, Mr. Bowman is not a licensed appraiser, and the Commission was not persuaded that he applied professionally approved methods of mass appraisal to arrive at his conclusions. For these reasons, the Commission gave the testimony of Mr. Anderson and Mr. Bowman little weight as to the appropriate classification of the buildings for quality and condition.

The best evidence of the quality and condition of the properties under the applicable professional standards was the opinion of Ms. Larson. Ms. Larson is a licensed appraiser. She personally inspected the properties in 2013 and 2017, and she testified that the ratings used by the County Assessor and the County Board were correct for each Subject Property. The Commission finds that the assessment data underlying the County Board's determination was correct in each case as to the quality and condition of the Subject Properties.

However, the evidence produced at the hearing established that the car washes located on the 114th Street, Pacific Street, 140th Street, and Q Street properties should have been categorized as drive-thru rather than automatic. The evidence also established that the car wash on the Pacific Street property was built in 1998 rather than 2006. The Commission finds that the determinations of the County Board were made in reliance on erroneous information and are incorrect as to the 114th Street, Pacific Street, 140th Street, and Q Street properties. The Commission further finds that these errors constitute clear and convincing evidence that the determinations of the County Board were arbitrary or unreasonable as to the 114th Street, Pacific Street, 140th Street, and Q Street properties. The Commission finds that the determination of the County Board was correct as to the Arbor Street property.

Typically, a taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that it is overvalued. In this case, the Taxpayer produced clear and convincing evidence that the County Board's determinations were arbitrary and

unreasonable, but provided the Commission little assistance in determining the correct values. As noted above, the Commission may consider all questions necessary to determine taxable value of property as it hears an appeal; it may consider and utilize published treatises, periodicals, and reference works pertaining to the valuation or assessment of real property; and it may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented. Because the record contains clear and convincing evidence that the County Board's determinations were arbitrary or unreasonable, and the evidence produced provides sufficient basis for further analysis, the Commission elects to make use of its specialized knowledge and the quarterly editions of MVS to determine the actual values of the four Subject Properties correcting for the type of car wash and age, as discussed above.

In order to calculate the value of a building using the cost approach through MVS, the per-square-foot building cost is determined from MVS tables based on the class, quality, and function of the building. That cost is then multiplied by the square footage, and the outcome is multiplied by a current cost multiplier and a local cost multiplier, both taken from MVS. The result is the replacement cost new. Depreciation is determined using MVS tables based on the age, class, quality, and function of the building, and is deducted from the replacement cost new. The result is the replacement cost new less depreciation. The neighborhood adjustment used by the County Assessor and by the County Board is then applied to arrive at the value of the building. To reach the final value of each parcel in this case, the recalculated cost of the car wash must be added to the value of the land and of the convenience store. Wherever data is taken from MVS, the most recent update of MVS prior to the assessment date (January 1, 2015) is used.²¹

²¹ Data in the tables that follow is drawn from the exhibits, the witnesses' testimony, and MVS §§ 64 (Mar. 2014), 97 (Nov. 2014), and 99 (Oct. 2014).

114th Street Property²²

Land Value	\$373,600	Store Value	\$693,667
Car Wash Sq. Ft.	2210	Construction Type	C
Neighborhood Adj.	2.2	Quality	Average
Year Built	1999	Cost per square foot	\$90.19
Current Cost Mult.	0.99	Local Multiplier	0.94
Life Expectancy	25 Years	Depreciation	48%

\$90.19 per square foot × 2210 square feet × 0.99 current cost multiplier × 0.94 local multiplier = \$185,487 replacement cost new. Depreciation for a building of this age, type, and life expectancy is 48%. $52\% \times \$185,487 = \$96,454$ replacement cost new less depreciation. 2.2 neighborhood adjustment × \$96,454 = \$212,199. \$212,199 car wash value + \$693,667 convenience store value + \$373,600 land value = **\$1,279,466 total parcel value.**

Pacific Street Property²³

Land Value	\$416,500	Store Value	\$745,166
Car Wash Sq. Ft.	1260	Construction Type	C
Neighborhood Adj.	2.2	Quality	Good
Year Built	1998 ²⁴	Cost per square foot	\$108.54
Current Cost Mult.	0.99	Local Multiplier	0.94
Life Expectancy	30 Years	Depreciation	39%

\$108.54 per square foot × 1260 square feet × 0.99 current cost multiplier × 0.94 local multiplier = \$127,269 replacement cost new. Depreciation for a building of this age, type, and life expectancy is 39%. $61\% \times \$127,269 = \$77,634$ replacement cost new less depreciation. 2.2 neighborhood adjustment × \$77,634 = \$170,795. \$170,795 car wash value + \$745,166 convenience store value + \$416,500 land value = **\$1,332,461 total parcel value.**

²² See Exhibits 6:3, 6:5, 6:10, and 6:11.

²³ See Exhibits 8:3, 8:5, 8:9, and 8:10.

²⁴ See un rebutted testimony of Mr. Anderson.

140th Street Property²⁵

Land Value	\$405,100	Store Value	\$105,450
Car Wash Sq. Ft.	855	Construction Type	C
Neighborhood Adj.	2.2	Quality	Fair ²⁶
Year Built	1989	Cost per square foot	\$76.58
Current Cost Mult.	0.99	Local Multiplier	0.94
Life Expectancy	20 Years	Depreciation	80%

$\$76.58$ per square foot \times 855 square feet \times 0.99 current cost multiplier \times 0.94 local multiplier = \$60,932 replacement cost new. Depreciation for a building of this age, type, and life expectancy is 80%. $20\% \times \$60,932 = \$12,187$ replacement cost new less depreciation. 2.2 neighborhood adjustment \times \$12,187 = \$26,811. \$26,811 car wash value + \$105,450 convenience store value + \$405,100 land value = **\$537,361 total parcel value.**

Q Street Property²⁷

Land Value	\$191,100	Store Value	\$495,114
Car Wash Sq. Ft.	1140	Construction Type	C
Neighborhood Adj.	2.2	Quality	Average
Year Built	1992	Cost per square foot	\$90.19
Current Cost Mult.	0.99	Local Multiplier	0.94
Life Expectancy	25 Years	Depreciation	73%

$\$90.19$ per square foot \times 1140 square feet \times 0.99 current cost multiplier \times 0.94 local multiplier = \$95,681 replacement cost new. Depreciation for a building of this age, type, and life expectancy is 73%. $27\% \times \$95,681 = \$25,834$ replacement cost new less depreciation. 2.2 neighborhood adjustment \times \$25,834 = \$56,835. \$56,835 car wash value + \$495,114 convenience store value + \$191,100 land value = **\$743,049 total parcel value.**

²⁵ See Exhibits 9:3, 9:5, 9:9, and 9:10.

²⁶ "Fair" quality equates to "low cost" under MVS.

²⁷ See Exhibits 10:3, 10:5, 10:8, and 10:9.

Summary

Location	County Board	Commission	Difference
114th Street	\$1,337,000	\$1,279,466	\$57,534
Arbor Street	\$2,341,200	Affirmed	\$0
Pacific Street	\$1,458,100	\$1,332,461	\$135,639
140th Street	\$586,600	\$537,361	\$49,239
Q Street	\$812,700	\$743,049	\$69,651

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 in Case No. 15C 0797.

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 in Case Nos. 15C 0796, 15C 0798, 15C 0799, and 15C 0800. The Commission also finds that there is clear and convincing evidence that the County Board's decision were arbitrary or unreasonable in those cases.

For all of the reasons set forth above, the appeal of the Taxpayer is denied in Case No. 15C 0797. The decisions of the County Board are vacated and reversed in Case Nos. 15C 0796, 15C 0798, 15C 0799, and 15C 0800.²⁸

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 2015 in Case No. 15C 0797 is affirmed.

²⁸ Taxable 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.

2. The taxable value of the Subject Property for tax year 2015 in Case No 15C 0797 is \$2,341,200.
3. The decisions of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2015 in Case Nos. 15C 0796, 15C 0798, 15C 0799, and 15C 0800 are vacated and reversed.
4. The taxable value of the Subject Property for tax year 2015 in Case No 15C 0796 is \$1,279,466.
5. The taxable value of the Subject Property for tax year 2015 in Case No 15C 0798 is \$1,332,461.
6. The taxable value of the Subject Property for tax year 2015 in Case No 15C 0799 is \$537,361.
7. The taxable value of the Subject Property for tax year 2015 in Case No 15C 0800 is \$743,049.
8. 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 (2016 Cum. Supp.).
9. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
10. Each party is to bear its own costs in this proceeding.
11. This Decision and Order shall only be applicable to tax year 2015.
12. This Decision and Order is effective for purposes of appeal on March 27, 2018.²⁹

Signed and Sealed: March 27, 2018

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

²⁹ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.