

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Peter J. Fink,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 10C-243 & 11C-440

Order Reversing the Determinations of the
Douglas County Board of Equalization

For the Appellant:

Peter J. Fink,
Pro Se

For the Appellee:

Sandra K. Connolly,
Deputy Douglas County Attorney

Appeals heard before Commissioners Robert W. Hotz and Thomas D. Freimuth.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located at 11005 Emmet Street, in Omaha, Douglas County, Nebraska. The parcel is improved with a transmission repair shop. The legal description and the property record card for the Subject Property are found at Exhibit 3 and Exhibit 5.

II. PROCEDURAL HISTORY

The Douglas County Assessor (Assessor) determined that the assessed value of the Subject Property was \$537,000¹ for tax year 2010 and \$415,400² for tax year 2011. Peter J. Fink (the Taxpayer) protested these assessments to the Douglas County Board of Equalization (the County Board) and requested assessed valuations of \$382,300³ for tax year 2010 and \$202,504⁴ for tax year 2011. The County Board determined that the assessed value for both tax years 2010 and 2011 was \$415,400.⁵

¹ The 2010 assessment included \$141,500 for the land component, and \$395,500 for the improvement. E1:1.

² The 2011 assessment included \$141,500 for the land component, and \$273,900 for the improvement. E2:1.

³ The Taxpayer's 2010 requested value included \$141,500 for land and \$240,800 for the improvement. E7:1.

⁴ The Taxpayer's 2011 requested value included \$96,220 for land and \$106,284 for the improvement. E8:2.

⁵ E1:1, E2:1. The determination of value by the County Board for both tax years 2010 and 2011 included \$141,500 for the land component, and \$273,900 for the improvement.

The Taxpayer appealed the decisions of the County Board to the Tax Equalization and Review Commission (Commission). The Commission held a hearing on October 11, 2012.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁶ 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."⁷

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.⁸

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.⁹ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.¹⁰

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.¹¹ 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.¹²

⁶ See, Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008).

⁷ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted). "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).

⁸ *Id.*

⁹ Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

¹⁰ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹¹ 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).

¹² *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.”¹³ 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.”¹⁴

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.¹⁵

“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.”¹⁶ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁷ 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.¹⁸ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁹ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.²⁰

¹³ Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

¹⁴ Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

¹⁵ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁶ *Id.*

¹⁷ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁸ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁹ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

²⁰ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

Peter J. Fink, the owner of the Subject Property, offered his own testimony, but provided no other evidence. Fink testified that for tax year 2010 the Subject Property had an 80% increase in its assessment as compared to the prior year.²¹ The assessed value for real property may be different from year to year, dependent upon the circumstances.²² The prior year's assessment is not relevant to the subsequent year's valuation.²³

Fink testified that the improvement had been built in 1991 as a car wash, and that he subsequently converted it to a transmission repair shop. He testified that the ceiling height was approximately 14 feet at the center of the building and probably as low as 12 feet at each end of the building. Fink testified that he did not measure the ceiling height, but instead his assertion was made by estimating the ceiling height based upon his knowledge of car and truck heights and the average height extensions of vehicle lifts. He asserted that pickups could not be raised to full height in the end bays where the ceiling was lower.²⁴ He also asserted that he needed to have his shorter mechanics work in the bays where the ceiling was lower. Fink also testified that comparable properties had 14 foot ceiling heights without similar limitations. He testified that these limitations had negative effects on productivity and reduced the value of the Subject Property, but he did not offer evidence to quantify these effects.

Fink's testimony is best characterized as an assertion that the Subject Property suffers from incurable functional obsolescence – deficiency.²⁵ The Assessor valued the Subject Property for tax year 2010 using the cost approach, and the County Board's valuation is the result of a recommendation made by the Assessor at the time of the 2010 protest proceeding.²⁶ The Assessor's cost detail for the Subject Property provided by the County Board indicates no functional obsolescence was attributed to the Subject Property.²⁷ However, Fink failed to provide evidence to quantify the impact of the alleged incurable functional obsolescence –

²¹ According to the property record card, the Subject Property was assessed at \$297,800 each tax year beginning in 2002 until the notice of increased assessment for tax year 2010. E3:17. The County Board's determination of value of \$415,400 was a 39% increase over the course of eight tax years ($\$415,400 - \$297,800 = \$117,600$. $\$117,600 / \$297,800 = 39\%$).

²² See, *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

²³ *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop. v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 613, 428 N.W.2d 201, 206 (1988).

²⁴ A photograph taken by the Assessor, at E5:4, may illustrate the ceiling height issue. See also E5:7.

²⁵ See, *Property Assessment Valuation*, 3rd Ed., International Association of Assessing Officers, 2010 at 283.

²⁶ E3:7, E4:2-3.

²⁷ E3:9.

deficiency on the actual value of the Subject Property. The Commission finds that Fink did not produce clear and convincing evidence that the County Board was arbitrary or unreasonable for tax year 2010.

The Assessor valued the Subject Property for tax year 2011 using the same value that the Assessor recommended for the 2010 taxable value of the subject property, supporting this value with both the income approach and the cost approach.²⁸ As previously discussed, this method did not subtract obsolescence from the calculated value. However, the Commission finds that Fink also presented no evidence quantifying the obsolescence for tax year 2011.

Fink also testified that the Assessor's income approach calculation used an incorrect net operating income value. He testified that the net operating income of the Subject Property for 2011, based on his knowledge of a profit and loss statement that was not offered or received in evidence, was \$30,771. Using the Assessor's income worksheet, Fink's asserted net operating income of \$30,771, rather than \$39,599 would result in an actual value of \$323,905.²⁹ However, Fink was unable to explain the type or source of the expense figures used to arrive at his asserted net operating income of \$30,771. The use of actual expenses to determine the net operating income may have the adverse effect of valuing the management of the property instead of the market value of the subject property.³⁰ Additionally, information obtained from the market must meet commonly accepted mass appraisal standards to ensure reliability.³¹ The Commission gives greater weight to the Assessor's income approach valuation and net operating income value for the preceding reasons. The Commission finds that Fink has not adduced by clear and convincing evidence that the County Board acted arbitrarily or unreasonably in its determination of the Subject Property's 2011 determination of value.

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

²⁸ E5:2.

²⁹ E5:16 ($\$30,771 / .095 = \$323,905$).

³⁰ *Mass Appraisal of Real Property*, International Association of Assessing Officers, 1999, 156-58.

³¹ *Id.*

Constitution.”³² Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.³³ 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.³⁴ 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.³⁵ 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.³⁶ 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.³⁷ The constitutional requirement of uniformity in taxation extends to both rate and valuation.³⁸ 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].”³⁹ “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”⁴⁰

B. Summary of the Evidence

The Assessment Reports provided by the County Board for the Subject Property for tax years 2010 and 2011 indicate that the valuation for each year was based upon a recommendation by the Assessor.⁴¹ The County Board determined value was \$273,900 for improvements and \$141,500

³² *Neb. Const.*, Art. VIII, §1.

³³ *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

³⁴ *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).

³⁵ *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

³⁶ *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

³⁷ *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).

³⁸ *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

³⁹ *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

⁴⁰ *Id.* at 673, 94 N.W.2d at 50.

⁴¹ E4:2-3 (stating that the \$415,400 value adopted by the County Board for tax year 2010 is the result of a recommendation by the Assessor); E5:18 (indicating that the 2011 assessed value was set at the previous year's County Board determination of value, which E4:2-3 indicates is the result of a recommendation by the Assessor).

for the land component, totaling \$415,400 actual value.⁴² No equalization evidence was offered to dispute that portion of actual value derived from the value of the improvements.

The County Board provided property record cards for the Subject Property and comparable properties for tax years 2010 and 2011. The Subject Property's property record cards indicate that the land component of the Subject Property was valued at \$4.75 per square foot for each tax year 2010 and 2011 ($\$141,500/29,787$ square feet = \$4.75 per square foot).⁴³ A comparable property provided by the County Board for both tax years indicates that the assessed value for the land component of the comparable property was \$52,600 for 26,148 square feet, or a per square foot value of \$2.01 ($\$52,600/26,148$ square feet = \$2.01 per square foot).⁴⁴ Both the Subject Property and this comparable were classified by the Assessor using the same Occupancy Code, 325 Service Garage.⁴⁵ Fink testified that this comparable property was a more desirable commercial property than the Subject Property because it was located on a major thoroughfare with four lanes of traffic and great exposure.

There is not a significant enough difference in the size of the land between the Subject Property (29,787 square feet) and the comparable property (26,148 square feet) to explain the difference of per square foot value by applying an economics of scale principle. The Subject Property and the comparable property located at Exhibit 3, page 34 and Exhibit 5, page 36 are comparable. The assessment of the Subject Property's land component at \$4.75 per square foot and the assessment of the comparable property at \$2.01 per square foot, without an appropriate reason for the difference, is a failure of a plain legal duty and results in a taxable value that is grossly excessive. The Subject Property is entitled to an equalized value. The Commission finds that the Subject Property's land component is not equalized with the comparable property and should be valued at the same per square foot value as the comparable property; a total land component value of \$59,872 ($\$2.01 \times 29,787$ square feet = \$59,872).

⁴² E1:1; E2:1.

⁴³ E3:5; E5:6.

⁴⁴ E3:37; E5:39.

⁴⁵ E5:20, E5:36.

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 appeal of 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 years 2010 and 2011 is vacated and reversed.⁴⁶
2. The assessed value of the Subject Property for both tax years 2010 and 2011 is:

Land	\$59,872
<u>Improvements</u>	<u>\$273,900</u>
Total	\$333,772

3. This 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 (2011 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 Order shall only be applicable to tax years 2010 and 2011.

⁴⁶ 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 at the protest proceeding.

7. This Order is effective for purposes of appeal on December 11, 2012.

Signed and Sealed: December 11, 2012

Robert W. Hotz, Commissioner

SEAL

Appeals from any Order of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (2011 Supp.) and other provisions of Nebraska Statutes and Court Rules.

Commissioner Freimuth, Concurring in the result:

I concur only in the result that the value of the Subject Property is \$333,772 for tax years 2010 and 2011.

Thomas D. Freimuth, Commissioner