

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

Union Bank & Trust Co., Trust,  
Appellant,

v.

Chase County Board of Equalization,  
Appellee

Case No: 11A 043

Order Reversing the Decision of the  
Chase County Board of Equalization

**For the Appellant:**  
Bill White, Trustee,

**For the Appellee:**  
Arlan G. Wine,  
Chase County Attorney

Heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property is a 20.07 acre parcel located in Chase County, Nebraska, improved with 20 grain bins, 2 hopper bins, a grain pit, a utility building, a truck scale, and an 80 foot elevator leg. The legal description of the subject property is found at Exhibit 2, page 3. The property record card for the subject property is found at Exhibit 2, pages 8-20.

**II. PROCEDURAL HISTORY**

The Chase County Assessor determined that the assessed value of the subject property was \$432,845 for tax year 2011, including \$21,160 for the land and \$411,685 for the improvements. Union Bank & Trust Co., Trust (the Taxpayer) protested this assessment to the Chase County Board of Equalization (the County Board) and requested an assessed valuation of \$215,000, including \$15,000 for the land and \$200,000 for the improvements. The Chase County Board determined that the assessed value for tax year 2011 was \$399,104, including \$21,160 for the land and \$377,944 for the improvements.<sup>1</sup>

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

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<sup>1</sup> Exhibit 1.

Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on June 26, 2012.

### III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.<sup>2</sup> 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."<sup>3</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>4</sup>

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

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>7</sup> 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.<sup>8</sup>

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

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<sup>2</sup> 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). "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).

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

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.).

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

<sup>7</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>8</sup> *Bottofv. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>9</sup> 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.”<sup>10</sup>

#### 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.<sup>11</sup>

"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."<sup>12</sup> The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”<sup>13</sup> 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.<sup>14</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>15</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>16</sup>

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value.<sup>17</sup> Agricultural land and horticultural land means a parcel

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<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2011 Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>12</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>13</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>14</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>15</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009)

<sup>16</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>17</sup> Neb. Rev. Stat. §77-201(2) (Reissue 2009).

of land which is primarily used for agricultural or horticultural purposes...<sup>18</sup> Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture.<sup>19</sup> Commercial production, in the context of agricultural or horticultural purposes, means “agricultural and horticultural products produced for the primary purpose of obtaining a monetary profit.”<sup>20</sup>

“The term tangible personal property [includes] trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased, ...<sup>21</sup> Section 77-105 “clearly controls the issue of classification of fixtures for taxation purposes.”<sup>22</sup>

## **B. Summary of the Evidence**

The County Assessor used a cost approach to determine the assessed value of the subject property.<sup>23</sup> The County Board relied upon that assessment, but made a determination lowering the taxable value of nine of the grain bins by applying an additional 20% of depreciation due to observable damage.<sup>24</sup> This determination was made at the recommendation of the County Assessor, after she inspected the grain bins prior to the Protest proceeding.<sup>25</sup>

Bill White testified on behalf of the Taxpayer. White asserted that the 20 grain bins were overvalued and were not equalized with similar grain bins in Chase County and in other nearby counties. He asserted that the damage to 18 of the grain bins was due to a construction or design defect in the “fifth ring” of the bins, which were constructed of inadequately weighted material. White described the grain bins as being constructed with multiple horizontal rings of heavy corrugated material. He testified that due to the structural weakness of the fifth ring, the bins could not be filled to capacity. White asserted that each bin had nine rings, and that due to the

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<sup>18</sup> Neb. Rev. Stat. §77-1359(1) (Reissue 2009).

<sup>19</sup> Neb. Rev. Stat. §77-1359(2) (Reissue 2009).

<sup>20</sup> Title 350 Neb. Admin. Code, ch. 14 §002.58 (3/09).

<sup>21</sup> Neb. Rev. Stat. §77-105 (Reissue 2009).

<sup>22</sup> *Vandenberg v. Butler County Board of Equalization*, 796 N.W.2d 580, 584, 281 Neb. 437, 442 (2011).

<sup>23</sup> Exhibit 2:8-13, 20.

<sup>24</sup> Exhibit 2:14-19.

<sup>25</sup> Exhibit 1:1.

design and construction defect the bins could only be filled to the top of the eighth ring without risk that the fifth ring would be compromised and the bin would collapse.<sup>26</sup> White testified that the County Board determination partially addressed this problem in relation to nine of the grain bins, but that 18 bins should have received even higher depreciation due to the effect of the defect on the capacity of the bins. However, White did not quantify what effect the defects had on the market value of the grain bins.

Exhibit 4 was offered by the Taxpayer regarding the sales in 2006 and 2010 of two individual grain bins located on the subject property for \$7,200 and \$7,500 respectively. White testified that these sales were each at a 1/20<sup>th</sup> interest of the value of the subject property and asserted that the sales were indicative of the actual value of the subject property for tax year 2011.

It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value.<sup>27</sup>

“Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where ... 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.”<sup>28</sup> Other than the sale price of these two bins, White provided no further information about the circumstances relating to the sales. The Commission finds that these sales are not clear and convincing evidence of the actual value of the subject property for tax year 2011.

White also testified that the elevator leg should not have been assessed as real property, but instead should be regarded as personal property for property tax purposes. The cost approach used by the County Board included the costing of the 80 foot elevator leg as real property.<sup>29</sup> The

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<sup>26</sup> The Commission notes that the capacity to fill the bins to the top of 8 of 9 rings would equate to approximately 89% of overall capacity.

<sup>27</sup> *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637, (1998).

<sup>28</sup> *Potts v. Board of Equalization of Hamilton County*, 213 Neb. 37, 48, 328 N.W.2d 175, 328 (1982).

<sup>29</sup> E2:18. A photograph of the elevator leg is shown at Exhibit 2, page 4.

County Board valued the elevator leg, after applying depreciation, at \$10,338.<sup>30</sup> “The term tangible personal property [includes] trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property...”<sup>31</sup>

In order to determine whether the grain leg is a trade fixture (personal property), and not real property, an analysis of the elements of Section 77-105 must be done. To be a trade fixture the item in question must be (1) either machinery or equipment,<sup>32</sup> and (2) must be used directly in commercial, manufacturing, or processing activities conducted on real property.

We first consider whether the elevator leg is machinery. Machine means “[a]n assemblage of parts that are usu. solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion, and energy on to another in some predetermined manner and to some desired end.”<sup>33</sup> White testified that the purpose and function of the elevator leg was to transport the grain to each of the 20 grain bins. The Commission finds that the elevator leg is machinery under Section 77-105.

Next, we must consider whether the elevator leg was used directly in a commercial activity conducted on real property. White testified that the subject property was purchased by a group of agricultural landowners who formed a trust for the purpose of storing grain. The 20 bins on the subject property were separately owned by numerous agricultural landowners. The elevator leg was owned in trust for the benefit of each of the owners of the individual grain bins. White testified that the elevator leg serviced all 20 grain bins by transporting grain to each bin. And each landowner produced the grain for the purpose of obtaining a monetary profit. The Commission finds that such use of the elevator leg was for commercial production, as contemplated in Section 77-1359(2). Therefore, the Commission finds, the elevator leg was used directly in a commercial activity conducted on real property. It follows that the elevator leg was a trade fixture, not real property, and should not have been included with the real property that was valued using the cost approach.

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<sup>30</sup> E2:18.

<sup>31</sup> Neb. Rev. Stat. § 77-105 (Reissue 2009).

<sup>32</sup> We interpret the conjunctive “machinery and equipment” to mean that in order to be a trade fixture the item must be either machinery or equipment. We would not read Section 77-105 to require that the item be both machinery and equipment.

<sup>33</sup> Webster’s Third New International Dictionary, Merriam-Webster, Inc., (2002) p. 1353.

There is clear and convincing evidence that the County Board's determination to assess the elevator leg as real property was arbitrary or unreasonable. The Commission finds that the taxable value of the subject property should be reduced by \$10,338.<sup>34</sup>

## 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."<sup>35</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>36</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>37</sup> 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>38</sup> 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>39</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>40</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>41</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

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<sup>34</sup> E2:18.

<sup>35</sup> *Neb. Const.*, Art. VIII, §1 (commonly known as the Uniformity Clause).

<sup>36</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>37</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>38</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>39</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>40</sup> *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).

<sup>41</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

judgment. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.<sup>42</sup>

### **B. Summary of the Evidence**

White asserted the grain bins were not equalized with similar grain bins in Chase County and in other nearby counties. The Taxpayer offered Exhibit 3, a portion of a property record card for a property in Seward County. Exhibit 3 appears to indicate that two storage bins in Seward County were assessed at a lower value than the subject property grain bins. Exhibit 3 indicates the two bins had dimensions of 36 x 20, with the third dimension not shown. The dimensions of the grain bins on the subject property were 36 x 36 x 27. The comparability of these bins to the subject property is not evident. The Taxpayer also offered Exhibit 8, a portion of a property record card for a parcel in Hitchcock County. Exhibit 8 appears to indicate the assessment of a parcel with ten different bins of various sizes in Hitchcock County. The taxable value of these individual bins ranged from \$2,120 to \$77,550. The comparability of any of the bins on this parcel to the grain bins on the subject property is unknown.

The Commission therefore finds that there is no clear and convincing evidence of a violation of the Uniformity Clause of the Nebraska Constitution.

## **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 determination of the County Board is reversed.

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<sup>42</sup> *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

**VII. ORDER**

IT IS ORDERED THAT:

1. The decision of the Chase County Board of Equalization determining the value of the subject property for tax year 2011 is vacated and reversed.
2. The assessed value of the subject property for tax year 2011 is:

Land	\$ 21,160
Improvements	\$ <u>367,606</u>
Total	\$ 388,766

3. This decision and order, if no appeal is timely filed, shall be certified to the Chase County Treasurer and the Chase 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 decision shall only be applicable to tax year 2011.
7. This order is effective for purposes of appeal on July 23, 2012.

Signed and Sealed: July 23, 2012

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

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